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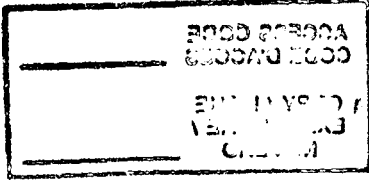
War Criminals

Report

Part I: Public

**Honourable Jules Deschênes
Commissioner**

Ottawa, Canada, 30 December 1986



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Commission d'enquête
sur les criminels de guerre



Commission of Inquiry
on War Criminals

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To Her Excellency the
Governor General in Council
Ottawa, Canada.

May it please Your Excellency:

By Order-in-Council PC-1985-348 of 7 February 1985, I have been appointed Commissioner to inquire into the matter of alleged war criminals in Canada. I now beg to submit the following Report.

In view of the nature of this inquiry, my Report is divided into two Parts: Part I, which is designed for publication; Part II, which is destined to remain confidential.

Respectfully submitted.

A large, stylized handwritten signature in black ink, which appears to read "Jules Deschênes".

Commissioner

30 December 1986

NOTE

The Report of the Commission of Inquiry on War Criminals as submitted to the Governor in Council on December 30, 1986 included 822 opinions on individual cases set out in Sections (d), (e) and (f) of Chapter I-8 and in Chapter I-9. All of these opinions have been retained in this published version, but the specific wording of some of them has been made more general in order to reduce the possibility of identification of individuals. No other changes have been made to any other part of the Report. Such changes as were made are of no significance in the context of the Report as a whole and the Commissioner agrees that they do not in any way impair the integrity or detract from the substance of the Report and of its findings and recommendations.

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Chapter I-1

FINDINGS AND RECOMMENDATIONS

Chapter I-1

FINDINGS AND RECOMMENDATIONS

Definition

For purposes of this report, the Commission defines "war criminals" as follows:

All persons, whatever their past and present nationality, currently resident in Canada and allegedly responsible for crimes against peace, war crimes or crimes against humanity related to the activities of Nazi Germany and committed between 1 September 1939 and 9 May 1945, both dates inclusive.

Findings and Recommendations

The Commission's **FINDINGS and RECOMMENDATIONS** are so closely intertwined that the Commission has not felt it desirable to separate them into two categories. **Recommendations bearing on amendments to the law are however stated in bold characters.** Each number in brackets at the end of a paragraph shows the corresponding page in the body of the report.

- 1- Shortly after World War II, trials were held in Europe for crimes committed against members of the Canadian Armed Forces: four trials involving seven accused were held by the Canadian Forces; at least six other trials involving 28 accused were held by the British Forces on behalf of Canada. (p. 33)
- 2- In 1948 a stop was put to war crimes trials as a result of a secret suggestion made by the United Kingdom to seven "Dominions", to which Canada responded that it had "no comment to make". (p. 33)
- 3- The matter of war crimes officially lay dormant in Canada for a third of a century when it was reactivated mainly at the initiative of then Solicitor General, Honourable Robert P. Kaplan, P.C. (p. 33)
- 4- Canadian policy on war crimes during that long period was not worse than that of several Western countries which displayed an equal lack of interest. (p. 33)

- 5- In order not to thwart lawful investigations by commissions of inquiry or the RCMP or investigative bodies specified in the regulations pursuant to ss. 8(2)(e) of the *Privacy Act* (1980-81-82-83, S.C. c. 111, Schedule II):
- a) the mention of s. 19 of the *Old Age Security Act* (1970 R.S.C., c. 0-6) should be deleted from Schedule II to the *Access to Information Act* (1980-81-82-83 S.C. c. 111, Schedule I);
 - b) s. 19 of the *Old Age Security Act* should be amended by adding to the exceptions listed in ss. 19(2)(a): commissions of inquiry, the RCMP and the above-mentioned investigative bodies;
 - c) ss. 19(2) of the *Old Age Security Act* should be further amended in order to make compulsory, rather than discretionary, the disclosure of information requested in the discharge of their duties by the bodies enumerated in this recommendation. (p. 55)
- 6- On the basis of the weight of the available evidence, it is established beyond a reasonable doubt that Dr. Joseph (Josef) Mengele has never entered Canada. (p. 76)
- 7- Apart from being an alias for Dr. Joseph (Josef) Mengele, the name of Josef Menke was also that of an actual SS Major, who, however, never came to Canada. (p. 77)
- 8- Dr. Joseph (Josef) Mengele did not apply in Buenos Aires in 1962 for a visa to enter Canada, either under his own name or under any of his several known aliases. (p. 82)
- Caveat:* recommendations 9 through 16, dealing with extradition, must be read against the backdrop of the statutory discretion of the Minister of Justice, which the Commission shall not discuss.
- 9- Extradition of a war criminal to the Federal Republic of Germany should, if requested, be favourably considered, once prima facie evidence has been brought of the suspect's commission of the alleged crime. (p. 91)
- 10- Under the 1967 *Extradition Agreement* between Canada and Israel as it now stands, no request for extradition based on Nazi war crimes can be entertained. (p. 92)
- 11- The 1967 extradition agreement between Canada and Israel should however be amended:
- a) To abrogate the restriction, introduced into art. 21 in 1969, as to the date of the offence or the conviction for which extradition is sought; and
 - b) To allow for executive discretion by the requested state, following the model in art. III of the 1962 U.S.A.—Israel

Extradition treaty, when extraterritorial jurisdiction is asserted by the requesting state. (p. 96)

- 12- Requests for extradition of war criminals by other countries having a treaty with Canada should be favourably considered, when the usual conditions provided by law are met. (p. 97)
- 13- Requests for extradition of war criminals by countries having no treaty with Canada cannot be entertained either under the 1942 *St. James's Declaration*, the 1943 *Moscow Declaration*, the 1945 *London Agreement*, the 1946 and 1947 relevant *Resolutions* of the United Nations General Assembly or the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. (p. 102)
- 14- Even in the absence of a bilateral treaty, requests for extradition of war criminals from Canada may be entertained under the 1949 *Geneva Conventions* relative to the treatment of prisoners of war and relative to the protection of civilian persons in time of war, provided the requesting state be a party to the relevant convention (as are Poland and the USSR) and the charge constitute both one of the "grave breaches" described in such convention and a war crime. (p. 105)
- 15- **Section 36 of the *Extradition Act* (1970 R.S.C. c. E-21) should be amended in order to apply to crimes — limited to war crimes — committed before the Proclamation of Part II of the Act (this principle is already enshrined in s. 12 of Part I of the Act).** (p. 108)
- 16- War crimes do not partake of the nature of "offences of a political character" and are not, as such, placed out of the reach of the extradition process. (p. 111)
- 17-, 18- and 19-
No prosecution for Nazi war crimes can be successfully launched under the *Criminal Code* or under the *War Crimes Act* (1946, 10 George VI, c. 73) or under the *Geneva Conventions Act* (1970 R.S.C., c. C-3) as the Code and each Act now stand. (pp. 116, 123 and 126)
- 20- Neither conventional international law nor customary international law *stricto sensu* can support the prosecution of war criminals in Canada. (p. 132)
- 21- Prosecution of war criminals can however be launched on the basis of customary international law *lato sensu* inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which art. 11 (g) of the *Canadian Charter of Rights and Freedoms* has enshrined in the Constitution of Canada. (p. 132)

- 22- By virtue of art. 11 (g) of the *Canadian Charter of Rights and Freedoms*, Parliament can pass enabling legislation, even of a retroactive character, to permit the prosecution and punishment of war criminals. (p. 148)
- 23- Should prosecutions be launched against war criminals, a delay of some 45 years will have elapsed between the alleged crimes and the laying of the charges. It shall belong to the executive and, eventually, to the judiciary to examine the effect, if any, of this delay on the prosecutions. (p. 150)
- 24- Bill C-215: *an Act respecting war criminals in Canada*, introduced in 1978 by the Honourable Robert P. Kaplan, would not have achieved the result desired by its mover, especially because of the lack of retroactivity of the *Geneva Conventions*. (p. 156)
- 25- In view of its essential features, the *War Crimes Act* cannot be conveniently amended in order to deal with war criminals in Canada. (p. 157)
- 26- The contention that the *Geneva Conventions Act* could be amended in order to deal with war criminals in Canada is not tenable. (p. 157)
- 27- The *Criminal Code* should be used as the vehicle for the prosecution of war criminals in Canada. (p. 163).
- 28- Section 6 of the *Criminal Code* should be amended by adding thereto the following subsections:
- “(1.9) For the purposes of this section, ‘war crime’ and ‘crime against humanity’ mean respectively:
- a) War crime: a violation, committed during any past or future war, of the laws or customs of war as illustrated in paragraph 6 (b) of the *Charter of the International Military Tribunal* which sat in Nürnberg, and irrespective of the participation or not of Canada in that war;
 - b) Crime against humanity: an offence committed in time either of peace or of a past or future war, namely murder, extermination, enslavement, deportation or other inhumane act committed against any civilian population or persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated, as illustrated, but without limitation in time or space, in paragraph 6 (c) of the *Charter of the International Military Tribunal* which sat in Nürnberg.
- (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.

(1.11) No proceedings shall be instituted under s.s. 1.9 or 1.10 except by the Attorney General of Canada or counsel instructed by him for the purpose. (p. 167)

29- Without eliminating the final role of the Governor-in-Council, the procedures leading to revocation of citizenship (denaturalization) and to deportation—at least in cases of suspected Nazi war criminals—should be streamlined and consolidated; (p. 173)

30- The deportation hearing should be elevated to the level of the judicial process, as in denaturalization; the two hearings should then be joined before the same authority, with two provisoes:

- a) that the denaturalization phase should proceed first and be decided before the deportation phase is dealt with;
b) that the findings of facts in the first phase should be held as conclusive with respect to the second phase. (p. 173)

31- Judicial appeals should be denied or, at most, a single appeal should be provided for against denaturalization and deportation orders together. (p. 174)

32- In the matter of denaturalization, the substance of the rights of the Crown and the rights and liabilities of the citizen should be governed by the Act under which they accrued, even if the Act was repealed in the meantime; the procedure should be governed by the Act in force when the legal proceedings are commenced. (p. 177)

33- The grounds for revocation of citizenship are, in most cases, those enumerated in the 1946 *Canadian Citizenship Act*: false representations, fraud or concealment of material circumstances. (p. 184)

- 34- Those grounds should be applied both to the citizenship process and to the earlier immigration process. (p. 184)
- 35- Those grounds should be tested against the relevant statutes, Orders-in-Council, Cabinet Directives, Immigration, Security and Police regulations. (p. 185)
- 36- Proceedings in denaturalization are civil in nature; the burden of proof lies on the government. (p. 188)
- 37- In their assessment of the evidence, the courts should not be satisfied with less, but should not look for more than a probability of a high degree. (p. 188)
- 38- With respect to both immigration and citizenship, the applicant is under no other duty than to answer truthfully the questions put to him by the statutory authority; in so doing, however, the applicant ought to acknowledge a duty of candour implied in his obligation not to conceal circumstances material to his application, even absent any relevant questions. (p. 196)
- 39- Applications for citizenship are available from the earliest times; they are not likely, however, to yield useful results for the purpose of unveiling war criminals and leading to the revocation of their citizenship. (p. 199)
- 40- Applications for immigration and connected documents have been destroyed in large numbers over the years, consistently with retention and removal policies in force within Canadian government departments and agencies, more particularly Immigration, External Affairs, RCMP and CSIS, so that evidence for possible revocation of citizenship or deportation has become largely unavailable. (p. 207)
- 41- Recourse to ships' manifests, which have been microfilmed up to 1953, would be of little use, if any, in view of the absence thereon of questions relevant to the issue. (p. 208)
- 42- The destruction of a substantial number of immigration files in 1982-1983 should not be considered as a culpable act or as a blunder, but has occurred in the normal course of the application of a routine policy duly authorized within the federal administration. In any event, if a blunder there was, it arose out of the failure of the higher authorities properly to instruct of an appropriate exception the employees entrusted with the duty of carrying out the retention and disposal policy in their department. (p. 214)
- 43- The existence of a presumption of fact that a former immigrant, if a war criminal, must have lied for purposes either of immigration or of citizenship, cannot be taken generally for granted, in light of the

conflicting evidence before the Commission. It must be left to the courts to decide whether, in any given case, such a presumption has been established with a probability of a high degree. (p. 224)

44- In order to prevent the granting of citizenship to war criminals or, as the case may be, to ease the revocation of citizenship of war criminals, the *Citizenship Act* (23-24-25 El. II, c. 108) should be amended

a) by adding to ss. 5.(1) the following paragraph (f):

“(f) has not committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6.(1.9) of the *Criminal Code*.”;

b) by adding after the word “person”, in the 7th line of ss. 5.(4) the following:

“except a person barred under paragraph 5.(1)(f)”;

c) by adding after the word “circumstances”, in the 8th line of ss. 9.(1), the following:

“or in spite of having committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*,”;

d) by striking, at the end of paragraph 10.(1)(b), the word “and”;

e) by adding, in ss. 10.(1), the following paragraph (c):

“(c) has not committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*; and”;

f) by renumbering “(d)” paragraph 10.(1)(c);

g) by adding, at the end of paragraph 17.(1)(b), the following:

“or in spite of having committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*.” (p. 226)

45- The immigration screening process and interview procedure should be tightened, so that:

- a) a minimum and standard set of questions to be put to the applicant be established by regulation;**
- b) such questions bear explicitly on the applicant’s past military, para-military, political and civilian activities;**
- c) all further questions to the applicant and all answers by the applicant be reduced to writing and signed by the applicant;**

- d) the applicant be required to sign a statement providing, in substance, that he has supplied all information which is material to his application for admission to Canada and that an eventual decision to admit him will be predicated upon the truth and completeness of his statements in his application. (p. 227)
- 46- Where the application is granted, immigration application forms should be kept until either it is established or it can be safely assumed that the applicant is no longer alive. (p. 227)
- 47- There exist no legal or contractual obstacles, either domestically or internationally, for Canada to strip a war criminal of his acquired Canadian citizenship, even at the risk of rendering him stateless. (p. 230)
- 48- In order to reflect in Canadian legislation the exclusion of war criminals contained in the *Convention relating to the Status of Refugees*, the *Immigration Act, 1976* (25-26 El. II, c. 52) should be amended
- a) by adding, in s. 2.(1), after the word "person" at the end of the first line of the definition of the words "Convention Refugee", the following:
- “(except a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*”;
- b) by adding, at the end of s. 4.(2)(b), the following:
- “or a person coming within the exception to the definition of ‘Convention Refugee’ in s. 2.(1)”;
- c) by adding, at the end of s. 19.(1), the following paragraph (j):
- “(j) persons who have committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*”;
- d) by replacing, in the fourth line of paragraph 27.(1)(a), “or (g)” by “,(g) or (j)”;
- e) by replacing, in the second and third lines of paragraph 55.(a), “or (g)” by “,(g) or (j).” (p. 232)
- 49- The notion of the valid acquisition of a Canadian domicile is dissolved, once fraud on entry is established against a suspect. (p. 234)
- 50- Even assuming that fraud on entry did not preclude the acquisition thereafter of a “fraudulently valid” Canadian domicile, such a

domicile cannot constitute an obstacle to deportation of a war criminal. (p. 237)

51- To dispel doubts surrounding the construction of certain statutory provisions:

- a) s. 9 of the *Citizenship Act*, 23-24-25 El. II, c. 108, should be amended by adding a provision making it declaratory, so as to render it explicitly applicable to situations arising under former laws on citizenship and immigration.
- b) s. 127 of the *Immigration Act*, 1976, 25-26 El. II, c. 52 should be amended by adding a second paragraph, as follows:

“This section does not apply to a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*”. (p. 237)

52- In order to assure the effectiveness of the deportation process in the case of war criminals, s. 54 of the *Immigration Act*, 1976 should be amended by adding a paragraph (4), as follows:

“(4) Notwithstanding s.s.(1), (2) and (3), when a removal order has been made against a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*, the Minister shall have full and sole discretion to select the country to which that person shall be removed.” (p. 238)

53- Should Parliament decide that an amendment to the *Criminal Code*, as proposed in recommendation 28 or otherwise, should encompass crimes against peace, recommendations 44, 48, 51 and 52 should then be understood also to cover crimes against peace. (p. 239)

54- Between 1971 and 1986, public statements by outside interveners concerning alleged war criminals residing in Canada have spread increasingly large and grossly exaggerated figures as to their estimated number. (p. 249)

55- Even leaving aside the figure of 6,000 ventured in 1986 by Mr. Simon Wiesenthal, and before a detailed examination of each of the cases appearing on the Commission's Master List, this List already shows no less than a 400 per cent over-estimate by the proponents of those figures. (p. 249)

56- The Galicia Division (14. Waffengrenadierdivision der SS [gal. Nr. 1]) should not be indicted as a group. (p. 261)

- 57- The members of the Galicia Division were individually screened for security purposes before admission to Canada. (p. 261)
- 58- Charges of war crimes against members of the Galicia Division have never been substantiated, neither in 1950 when they were first preferred, nor in 1984 when they were renewed, nor before this Commission. (p. 261)
- 59- Further, in the absence of evidence of participation in or knowledge of specific war crimes, mere membership in the Galicia Division is insufficient to justify prosecution. (p. 261)
- 60- No case can be made against members of the Galicia Division for revocation of citizenship or deportation since the Canadian authorities were fully aware of the relevant facts in 1950 and admission to Canada was not granted them because of any false representation, or fraud, or concealment of material circumstances. (p. 261)
- 61- In any event, of the 217 officers of the Galicia Division denounced by Mr. Simon Wiesenthal to the Canadian government, 187 (i.e., 86 per cent of the list) never set foot in Canada, 11 have died in Canada, 2 have left for another country, no *prima facie* case has been established against 16 and the last one could not be located. (p. 261)
- 62- The Commission has drawn up three lists of suspects: a Master List of 774 names (Appendix II-E); an Addendum of 38 names (Appendix II-F) and a list of 71 German scientists and technicians (Appendix II-G). (p. 262)
- 63- Where the evidence at hand raises a serious suspicion of war crimes against an individual residing in Canada, the Government of Canada should obtain, where available, the evidence of witnesses living in a foreign country provided such country agrees, as the U.S.S.R. has done, to all the conditions stipulated by the Commission in its decision "On Foreign Evidence" of 14 November 1985 (Appendix I-M). (p. 268)
- 64- The files of the 341 suspects who never landed and are not residing in Canada should be closed. (p. 269)
- 65- The files of the 21 suspects who have landed in Canada, but left for another country (at least five of whom are deceased) should be closed. (p. 269)
- 66- The files of the 86 suspects who have died in Canada since landing in this country should be closed. (p. 270)

- 67- The files of the 154 suspects against whom the Commission could find no *prima facie* evidence of war crimes should be closed. (p. 270)
- 68- The files of the 4 suspects whom the Commission has been unable to find in Canada should be closed. (p. 270)
- 69- The last five figures form a total of 606 files which should therefore be closed immediately. (p. 270)
- 70- The Canadian Government should decide, as a matter of policy, whether to request the cooperation of those foreign governments which have not already denounced, on their own initiative, the 97 suspects, residing in Canada, against whom there may exist incriminating evidence abroad, namely: France, Czechoslovakia, Hungary, Israel, Poland, Romania, U.S.A., U.S.S.R., West Germany, Yugoslavia. (p. 272)
- 71- The appropriate Canadian authorities should interrogate 13 of those suspects, as well as 5 others in whose connection no further investigation abroad is indicated. (p. 272)
- 72- The 3 miscellaneous cases should be pursued according to the Commission's recommendations. (p. 272)
- 73- In 34 cases which remain outstanding, a decision should be taken as soon as answers from foreign agencies or other missing information are received. (p. 272)
- 74- Work should be pursued by the appropriate authorities concerning the 38 suspects appearing on the late *Addendum* list, in agreement with the relevant recommendations of the Commission. (p. 273)
- 75- Among the 71 files on German scientists and technicians (Appendix II-G) the following cases should be closed: (p. 274)
- 9 who entered Canada and have died in this country;
 - 4 who entered Canada and left for another country;
 - 2 who never entered Canada;
 - 1 where there is no *prima facie* case.
- 76- In the 55 remaining files of this particular group, the Government of Canada should carry out the additional inquiries indicated in each individual opinion (see section f) of Chapter I-8) and then make a decision accordingly. (p. 274)
- 77- In the 9 cases where the Commission recommends, in Part II of its Report, that no prosecution be initiated and the file be closed, the Government of Canada, where it agrees with the recommendation, should so advise the individual suspect and his or her counsel. (p. 827)

- 78- In the 20 other cases where the Commission recommends, in Part II of its Report, that steps be taken toward either revocation of citizenship and deportation or criminal prosecution, urgent attention should be given to implementing those recommendations and, if necessary for that purpose, to bringing the necessary amendments to the law as well as actively seeking the co-operation of the interested foreign governments. (p. 827)
- 79- In all cases which still appear as outstanding in both Parts of the Commission's Report, the Government of Canada should take the necessary steps in order to pursue the interrogatories and inquiries, in Canada and abroad, which the Commission has indicated, and to bring each case to a close. (p. 830)
- 80- It should not be necessary nor indeed commendable to create for that purpose an organization similar to the Office of Special Investigations in Washington, D.C. (p. 830)
- 81- The Government of Canada might consider one or the other of the following options:
- i) to give to the Department of Justice and to the RCMP a specific mandate bolstered by the following commitments:
 - a) one official of the department to be given full authority;
 - b) a full-time team of several lawyers, historians and police officers to be set up;
 - c) ample financial resources to be supplied, in view of the considerable tasks to be performed across Canada and abroad;
 - d) the responsible official to advise the Attorney General of Canada, through his Deputy, in matters of war crimes; or
 - ii) to renew the mandate of this Commission which possesses the power, among others, to summon the suspects and other witnesses for interrogation. (p. 830)
- 82- Should none of those options be retained, there would appear to be no other alternative but to close the whole matter of war criminals altogether. (p. 830)
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Chapter I-2

THE COMMISSION

Chapter I-2

THE COMMISSION

This Commission, long in its task but short in its delays, was set up by Order No. 1985-348 of the Privy Council for Canada, approved by her Excellency the Governor General on 7 February 1985.¹ The minute reads as follows:

WHEREAS concern has been expressed about the possibility that Joseph Mengele, an alleged Nazi war criminal, may have entered or attempted to enter Canada;

WHEREAS there is also concern that other persons responsible for war crimes related to the activities of Nazi Germany during World War II (hereinafter referred to as war criminals) are currently resident in Canada;

AND WHEREAS the Government of Canada wishes to adopt all appropriate measures necessary to ensure that any such war criminals currently resident in Canada, or hereafter found in Canada, are brought to justice.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, advises that, pursuant to the Inquiries Act, a Commission do issue under the Great Seal of Canada, appointing the Honourable Mr. Justice Jules Deschênes, of the Superior Court of Quebec, to be Commissioner under Part I of the Inquiries Act 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

¹ The French version of this Order-in-Council was revoked and replaced by an amended version on 28 February 1985: P.C. 1985-635; see the French text of this Report.

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 Committee of the Privy Council further advised that:

- (a) the Commissioner be authorized to adopt such procedures and methods as he may from time to time deem expedient for the proper conduct of the inquiry and to sit at such times and at such places within or outside of Canada as he may decide from time to time;
- (b) the Commissioner be authorized to have complete access to personnel and all relevant papers, documents, vouchers, records and books of any kind in the possession of departments and agencies of the Government of Canada and be provided with adequate working accommodation and clerical assistance;
- (c) the Commissioner be authorized to engage the services of such staff and counsel as he deems necessary or advisable at such rates of remuneration and reimbursement as may be approved by the Treasury Board;
- (d) the Commissioner be authorized to rent office space and facilities for the Commission's purposes in accordance with Treasury Board policy;
- (e) the Commissioner be required to submit a report to the Governor in Council embodying his findings and recommendations and advice on or prior to December 31, 1985 and file with the Clerk of the Privy Council his papers and records as soon as reasonably may be after the conclusion of the inquiry;
- (f) the Commissioner be directed that the proceedings of the inquiry be held in camera in all matters where the Commissioner deems it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined;
- (g) the Commissioner be directed to follow established security procedures with regard to his staff and technical advisers and the handling of classified information at all stages of the inquiry;
- (h) the Commissioner be directed, in making his report, to consider and take all steps necessary to preserve
 - (a) the secrecy of sources of security information within Canada; and
 - (b) the security of information provided to Canada in confidence by other nations;
- (i) the inquiry be known as the Commission of Inquiry on War Criminals;

- (j) the Commissioner be authorized to engage the services of such experts and other persons as are referred to in section 11 of the Inquiries Act who shall receive such remuneration and reimbursement as may be approved by the Treasury Board; and
- (k) pursuant to section 37 of the Judges Act, the Honourable Mr. Justice Jules Deschênes be authorized to act as Commissioner in the said inquiry.

By Minutes of 12 December 1985,² 5 June 1986³ and 30 September 1986,⁴ the reporting date of the Commission was gradually extended to 30 June, 30 September and 30 November 1986.

In view of the nature of this inquiry, the Commission must divide its *Report* into two parts: *Part I*, which is designed for publication; *Part II*, which is destined to remain confidential. This is *Part I: The Public Report*.

The Commission established its headquarters in Ottawa. The Commission appointed as chief counsel Mr. L. Yves Fortier, O.C., Q.C. of Montreal and Mr. Michael A. Meighen, Q.C. of Toronto. It appointed as secretary Ms. Karen D. Logan, D.Phil. (Oxon) of Ottawa. The Commission is deeply indebted to them for their faithful and competent collaboration.

On 10 April 1985 the Commission published its "Rules of Practice and Procedure". They are reproduced in Appendix I-C.

The Commission received fourteen applications for standing, which are listed in Appendix I-D. Standing was granted to:

Brotherhood of Veterans of the 1st Division of the Ukrainian National Army in Canada

Canadian Jewish Congress

League for Human Rights of B'nai Brith Canada

Ukrainian Canadian Committee.

Counsel for the applicants, together with counsel for the Government of Canada and for various other parties, are listed in Appendix I-E. The Commission is indebted to all counsel for their courtesy and professional help during the whole course of this inquiry.

The Commission has held 28 days of public hearings in Montreal, Hull, Ottawa, Toronto and Winnipeg between 10 April 1985 and 6 May 1986.

² P.C. 1985-3642; see Appendix I-A.

³ P.C. 1986-1333; see Appendix I-B.

⁴ P.C. 1986-2255; see Appendix I-T.

During those hearings the Commission heard 27 witnesses and received 18 submissions from interested groups or individuals. Public hearings, witnesses and submissions are listed respectively in Appendices I-F, I-G and I-H.

Between 25 April 1985 and 10 November 1986 the Commission has also held 38 days of *in-camera* hearings in Montreal, Hull, Ottawa, Toronto, Windsor, Winnipeg, Calgary and Vancouver during which it heard 58 witnesses and received five submissions from interested groups or individuals. Particulars appear in Part II of this Report.

By far, however, the larger part of the work of the Commission was carried out away from the hearing room; either in the office or in the library or in the field. For those purposes the Commission sought professional help in various fields of endeavour: law, social history, police investigation. The names of the Commission's advisers and consultants in those fields appear at the beginning of this report.

In the fields of law and social history, those consultants have produced, at the request of the Commission, nine studies of considerable interest which shed light on many questions that had received little or no attention up to now. The list of those studies — two in French, the others in English — appears in Appendix I-I. Those studies are available for consultation at the Public Archives. The Commission expresses the hope that they be translated and published as soon as possible; they will offer a useful complement to this Report, especially since they are actually referred to and quoted on several occasions in the Report.

The Librarian of the Supreme Court of Canada, Mrs. Pauline Cain, and members of her personnel have extended an unfailing courtesy to the Commission; their efficient co-operation has proven extremely helpful.

The Commission is pleased also to acknowledge the co-operation which it has received from various departments and agencies of the Government of Canada. They are listed in Appendix I-J.

Abroad, the Commission has enjoyed the help and is thankful for the collaboration of various departments and agencies attached to several foreign governments, as well as of several quasi-public voluntary organizations. Their names appear in Appendix I-K.

Of course the Commission could not have functioned without the constant help and co-operation of its clerical and other staff. Their names also appear at the beginning of this report. The Commission's thanks go to them and, especially, to Ms. Mary Ann Allen, Director of Administration and Security, Mr. Jean-Paul Drapeau, Director of Investigations, and Mr. Robert A. Short, Security and Hearings Co-ordinator.

The Commission has thought it useful to put at the very beginning of Part I of its Report its 82 public **Findings and Recommendations**.

Then, after putting the subject matter of the inquiry against its proper background, the report deals with the concept itself of war criminals. There follows a short exposition of the method of work adopted by the Commission. This leads into the *Mengele Affair*, which is followed by a detailed study of the various legal remedies that are or should be available to the Canadian authorities to deal with war criminals. The report then goes (by numbers only and without names) into the Master List which the Commission has established and explains the conclusion at which the Commission has arrived on 711 individual cases.

It also expounds the Commission's conclusions on the 38 names in List II and the 71 names in List III.

Part II: The Confidential Report contains the particulars of the *in-camera* sittings of the Commission and spells out the Master List with names and corresponding numbers as well as two other lists. It also contains detailed opinions in 29 specific cases.

All of those considerations, however, fall short of exhausting the mandate of the Commission. Time constraints built into the Order-in-Council itself have rendered this situation unavoidable. Part I of the Report will therefore consider the problem and make suggestions for future action.

Chapter I-3

THE FACTUAL BACKGROUND

Chapter I-3

THE FACTUAL BACKGROUND

9 May 1945. War was over in Europe. Yet crimes had been committed which no armistice could erase. Under the *London Agreement* of 1945, (exhibit P-7), and the *Charter of the International Military Tribunal*, (exhibit P-8), the historical trial of the major Nazi war criminals took place in Nürnberg in 1945-1946; 19 of the 22 accused were convicted, and 12 were sentenced to death. There followed, also in Nürnberg from 1946 through the spring of 1949, 12 cases involving doctors, judges, industrialists, generals, guards and killers. Of the 177 accused who could stand trial, 142 were convicted, and 25 were sentenced to death.

However, members of the Canadian Armed Forces had themselves fallen victim of criminal action. One hundred and seventy-one cases were actually investigated.¹ But what exactly happened afterwards is not easy to determine on the basis of the available evidence. At the outset, the Canadian Forces launched their own prosecutions and held their own public trials in Aurich, Germany. The army tried General Kurt Meyer who was sentenced to death by shooting. The sentence was later commuted to imprisonment which was served in Canada. According to His Honour Bruce J. S. MacDonald, who had acted as chief prosecutor at the trial, Meyer was then sent back to Germany where he died a few years later.² The RCAF prosecuted six accused in three separate trials: Neitz, Jung, Schumacher, Weigel, Ossenbach and Holzer. According to the Honourable A. A. Cattanach, who acted in the three cases as judge advocate, the six accused were found guilty, and the following sentences were meted out: three sentences of death by shooting, one life imprisonment, and two jail sentences of 15 years and 10 years each.³

By then, however, Canadian troops were repatriated, and no Canadian personnel remained overseas for the conduct of further trials. Yet the business of prosecuting the authors of war crimes was far from over. In his final report

¹ Karwandy, evidence, vol. II, p. 140; report of No. 1 Canadian War Crimes Investigation Unit, March 1946, exhibit P-11.

² MacDonald, evidence, vol. II, pp. 173-174.

³ Cattanach, evidence, vol. II, p. 189.

for the No. 1 Canadian War Crimes Investigation Unit, Lt.-Col. MacDonald, (as he then was) commented: ⁴

Owing however to the withdrawal of the Canadian Army and RCAF Occupation Forces from the Continent and the rapid repatriation of Canadian establishments, it will soon be no longer possible to bring war criminals to trial in a Canadian military court overseas. Consequently recommendations have been made to transfer the unfinished task of investigation and trial to the British equivalent organizations, and the latter have consented to undertake this work if desired. The matter is now being considered.

Before the Commission, Mr. MacDonald stated that this was "in fact what took place".⁵

Now in the final report of the Army's War Crimes Investigation Section, dated 30 August 1947, one can read:⁶

As of June 1947 (. . .) Some 14 accused were about to be tried, 16 were in custody and under investigation, and there were 10 accused still at large and the object of search.

The Commission has tried, through personal contacts in London and correspondence with the British Ministry of Defence, to establish what subsequently happened. It has proven impossible to reconstruct completely the sequence of events, but it appears reasonably certain that further trials were held under the responsibility of the British authorities, involving the alleged authors of war crimes committed against Canadian military personnel. Documents P-98 and P-100, from the British Ministry of Defence, show that at least six other trials took place with no less than 28 accused. The following sentences were handed down: 11 sentences to death; four to imprisonment: 20 years, 15 years, and two for seven days; 12 acquittals; and one accused had not been found. Seven other cases were closed, either due to insufficient evidence or due to the disappearance of the accused.

By then — it was either late 1947 or early 1948 — the British were thinking of the political future of Europe: there is no need to recall here the history of post-war events. On 12 April 1948, the Overseas Reconstruction Committee of the British Cabinet "agreed that no further trials of war criminals should be started after 31 August 1948. Any trials started before that date would of course be completed."⁷

On 13 July 1948, the British Commonwealth Relations Office sent a secret telegram to the seven Dominions (as they were then called): Canada,

⁴ Exhibit P-11, Report: 30 March 1946, Introductory Note, p. 2.

⁵ Evidence, vol. II, p. 176.

⁶ Exhibit P-10, Final Report of the War Crimes Investigation Section, 30 August 1947, p. 4, paragraph 20.

⁷ Exhibit P-100, Note of the British Army Historical Branch.

Australia, New Zealand, South Africa, India, Pakistan and Ceylon. It suggested essentially that:

(a) as many as possible of cases which are still awaiting trial should be disposed of by 31st August, 1948, [un-completed trials which began before that date would continue].

(b) In general, no fresh trials should be started after 31st August, 1948. This would particularly affect cases of alleged war criminals, not now in custody, who might subsequently come into our hands.

The British government explained its proposal as follows:

3. In our view, punishment of war criminals is more a matter of discouraging future generations than of meting out retribution to every guilty individual. Moreover, in view of future political developments in Germany envisaged by recent tripartite talks, we are convinced that it is now necessary to dispose of the past as soon as possible.

The British government asked for comments by 26 July. Canada answered on 22 July by an equally secret and cyphered cable:

2. This is to advise you that Canadian Government has no comment to make.

On 13 August 1948, the British Commonwealth Relations Office could write, over the signature of the Honourable Philip Noel-Baker, that:

3. From the Commonwealth point of view therefore the way now seems to be clear, so I assume that the O.R.C. decision of the 12th April will be put into effect.

It is not without interest that there immediately followed the caution:⁸

I understand, however, that no public announcement is likely to be made about this.

And so the matter of war criminals quietly disappeared from the scene; and whether by coincidence or by design, in the third of a century which followed, Canada devoted not the slightest energy to the search and prosecution of war criminals. Assistant Commissioner R. R. Schramm, of the RCMP, has put it bluntly, both in his oral evidence and in his brief P-38. He stated in the latter document:

Based on the presently available records, no formal policy relating to the investigation of war criminals can be identified for the period between 1945-62.

In 1962, a private denunciation concerning Dr. Josef Mengele caused some ripples in the civil service (see below, c. I-6); but the matter subsided rapidly. True, it brought about the first known policy statement of the RCMP with respect to war criminals, but this statement would not likely be found very

⁸ This exchange of views forms part of exhibit P-100.

disturbing.⁹ It put the matter in the hands of RCMP Headquarters or External Affairs and it stressed that:

unless otherwise instructed by Headquarters, Ottawa, investigations into allegations of this nature are not to be conducted by the Force;

that:

Canadian courts have no jurisdiction over such offences

and that:

enquiries are not to be conducted for the primary purpose of determining whether or not a person is responsible for a war crime.

It would have taken a determined person indeed to initiate approaches to the RCMP in the light of such forbidding declarations.

No great opening could be detected in 1975 and 1976: "the Force does not conduct investigations into war crimes."¹⁰

In 1979, the RCMP advises that it¹¹

will only conduct an investigation into allegations of this nature when the request for an investigation and extradition is received through diplomatic channels from the Country of concern.

Significantly, it is only in 1982 that private citizens are taken in consideration in this field; even then, it is only for the purpose of advising them of the policy stated in 1979.¹²

For the first time, in 1983, the RCMP agrees officially to investigate a private citizen's complaint relating to a war criminal:¹³

Upon receipt of information that a suspected war criminal is in Canada, an investigation shall be conducted to substantiate the information.

It is worth pointing out, incidentally, that the French version of this provision appears preferable:

À la réception de renseignements sur la présence possible d'un criminel de guerre au Canada, une enquête doit être menée afin d'en vérifier la véracité.

The true purpose of the investigation is surely to "*vérifier la véracité des renseignements*" rather than to "substantiate the information".

⁹ Exhibit P-38, Appendix A.

¹⁰ Exhibit P-38, appendices B and C.

¹¹ Exhibit P-38, appendices D and E.

¹² Exhibit P-38, Appendix F.

¹³ Exhibit P-38, Appendix G.

In any event from 1945 to 1962, the RCMP had no official policy in matters of war crimes; and from 1962 to 1982 it frowned on private complaints. This attitude may explain that until as recently as 1982-1983, no specific resources were dedicated within the RCMP to war crime investigation, and that three people were assigned to that particular task as from that time.¹⁴

Indeed, as recently as 16 February 1982, the following answer was given by the government to a question put by a Member of the House of Commons:¹⁵

Are attempts being made to track down and/or prosecute former SS, SD, Gestapo or German Nazi party members living or suspected of living in Canada?

No.

The figures given by the RCMP, through Commission counsel, on its activities in the field of war crimes since 1945 also throw an interesting light on the matter: between 1945 and 1985, the RCMP opened 294 investigations concerning war crimes, out of which no less than 252, i.e., 86 per cent, were initiated from the spring of 1982.¹⁶

All of this is compatible with the general picture which emerges from a consideration of the whole of the evidence with respect to the attitude towards war crimes and war criminals in Canada.

Only in the very late 1970s and early 1980s, i.e., more than a generation after the end of World War II, did the question of war crimes begin to loom large on the horizon. More and more public statements started to draw the people's attention to the apparent problem. In October 1978, the Honourable Bob Kaplan, then a Member of Parliament, had introduced Bill C-215: ¹⁷ "An Act respecting war criminals in Canada". It never reached second reading. In 1980, Mr. Kaplan became Solicitor General of Canada, with authority over the RCMP. Mr. Kaplan showed a keen interest in the matter of war criminals: he created an interdepartmental committee to look into all facets of the problem;¹⁸ in April 1980 he met in Washington with Nazi-hunter Simon Wiesenthal;¹⁹ he also met there with Allan A. Ryan, of the Office of Special Investigations;²⁰ he went abroad in 1981 to convince foreign countries that, in the future, Canada would co-operate in connection with extradition requests.²¹ The Cabinet heard of all those activities and, not surprisingly, the RCMP was instructed to take a new approach which was reflected in its policy statements referred to previously (exhibit P-38).

¹⁴ Schramm, evidence, vol. VI, p. 814.

¹⁵ *Hansard, House of Commons Debates*, 16 February 1982, p. 15052.

¹⁶ Evidence, vol. IX, pp. 1082-1083.

¹⁷ Exhibit P-107.

¹⁸ Evidence, vol. XX, p. 2549.

¹⁹ Evidence, vol. XX, p. 2555 ff.

²⁰ *Ibid.*

²¹ Evidence, vol. XX, p. 2575 ff.

It was on 17 June 1982, that Albert Helmut Rauca was arrested in Toronto following a request for extradition by the Federal Republic of Germany. Rauca was finally extradited in 1983 and died in prison while awaiting trial.²² Until this inquiry was launched, Rauca would remain the only war crimes case on Canadian soil.

To be assessed properly, Canada's policy on war criminals ought, however, to be weighed in the perspective of the conduct which was adopted by the main countries interested in the war criminals issue. With that purpose in mind, the Commission, at the very beginning of its work, entrusted Mr. Donald M. Caskie with a comparative analysis of the policies adopted by various Governments in the matter of war criminals. The resulting study considers the following ten countries in alphabetical order:

Belgium
The Federal Republic of Germany (F.R.G.)
France
The German Democratic Republic (G.D.R.)
Italy
The Netherlands
Poland
The Union of Soviet Socialist Republics (U.S.S.R.)
The United Kingdom (U.K.)
The United States of America (U.S.A.)

The Commission refers the interested reader to the study itself for a detailed and most enlightening analysis of the situation; but a few general observations appear to be apposite.

There was considerable activity concerning war criminals in the immediate post-war period. These efforts, however, soon waned in the late 1940s in France, Italy, the United Kingdom and the U.S.A. The Netherlands and Belgium followed suit. The F.R.G. continued to show a substantial interest, though the lasting presence of former Nazis played a non-insignificant braking role. The U.S.S.R., Poland and the G.D.R. contributed a major effort to the pursuit of war criminals. In recent years, this effort has found a new life, especially in the U.S.A. and the F.R.G.

The Commission will not over-burden this Report with statistical data; one set of figures, where available, should suffice.²³

²² **Federal Republic of Germany v Rauca**, 38 *O.R.* (2d) 705, conf. by the Ontario Court of Appeal 41 *O.R.* (2d) 225.

²³ The particulars which follow are taken from Mr. Caskie's study, "Bringing Nazi War Criminals to Justice".

Belgium

4,436 suspects; 523 located; 75 convictions.

30-year limitation came into effect in 1974.

F.R.G.

30-year limitation lifted in 1979 by a vote of 255 to 222.

6,482 convictions (42 between 1979 and 1984). 168 sentences to death or life imprisonment.

Conviction rate: 7.5 per cent from 1945 to 1978; 1.4 per cent for murder, from 1970 to 1978.

France

Limitation lifted in 1964 on crimes against humanity.

As of 1950: some 5,000 convictions (104 death sentences). None recent.

G.D.R.

From 1945 to 1965: 16,572 persons charged;

Conviction rate: 77 per cent.

Sentences: 118 death; 231 life imprisonment.

Italy

Lukewarm. All efforts before 1950. Numbers unknown.

Netherlands

From 1948 to 1952: 300 suspects tried; 20 tried since then.

197 convictions for murder.

Poland

About 40,000 suspects tried. Between 1944 and 1970: 5,340 Germans convicted. No other particulars available.

U.K.

In 1946: about 5,900 active files.

1,085 suspects tried; 240 death sentences. Last activity in 1949.
Some death sentences commuted. Last prisoner released in 1957.

U.S.S.R.

No legal limitation.

No data available. But one suspect executed in 1984; four suspects sentenced to death in 1980 and seven others in 1976 (figures not exhaustive).

U.S.A.

Up to 1949: 2,125 suspects tried; convictions: 1,615; sentences: 348 death; 267 life imprisonment.

1949 to 1979: indifference and inefficiency.

Since 1979: increased activity towards revocation of citizenship and deportation (a few dozen cases).

To a large extent Canada has followed the ebb and flow of those policies. In a study undertaken by Mrs. Alti Rodal, at the request of the Commission,²⁴ Mrs. Rodal writes (p. 58):

The impression one gains from the archival record is one of reluctance on the part of the Allies, and of Britain in particular almost immediately after the war, to continue with war crimes trials.

When World War II ended, Canada showed some willingness to seek retribution from those who had committed crimes against members of the Canadian Armed Forces. But this effort did not last long, and the figures evidencing Canadian results cannot compare with those listed above. Then the issue of war criminals slumped into oblivion for over 30 years whilst, it must be acknowledged, some other countries were continuing the fight. The Commission will leave it to professional historians to examine the reasons which may explain this lack of interest on the part not only of successive governments, but of the people themselves.²⁵ It is however interesting to note Mr. Caskie's opinion upon concluding his own study:

The central factor to consider in understanding why most countries have not sought out, prosecuted and punished Nazi war criminals to their full ability throughout the past forty years is that other issues have taken precedence (e.g., national rebuilding or the "Cold War") over bringing war criminals to justice which has been shifted, deliberately (as in France) or inadvertently to a lesser priority in their national agendas. The immediate post-war search for justice found and punished a considerable number of the obvious big-name

²⁴ Rodal, "Nazi War Criminals in Canada: The Historical and Policy Setting from the 1940s to the Present".

²⁵ *Ibid.*, c. 1, Part II, pp. 6-62.

war criminals. This crusading spirit has been difficult to sustain for a long period of time especially as most of the remaining war criminals were low in rank and importance.

This was the truer for Canada, since that "crusading spirit" never formed part of the Canadian heritage and only began shining in the 1980s.

The Commission accordingly *FINDS* that:

- 1 – Shortly after World War II, trials were held in Europe for crimes committed against members of the Canadian Armed Forces: four trials involving seven accused were held by the Canadian Forces; at least six other trials involving 28 accused were held by the British Forces on behalf of Canada.**
- 2 – In 1948 a stop was put to war crimes trials as a result of a secret suggestion made by the United Kingdom to seven "Dominions", to which Canada responded that it had "no comment to make".**
- 3 – The matter of war crimes officially lay dormant in Canada for a third of a century when it was reactivated mainly at the initiative of then Solicitor General, Honourable Robert P. Kaplan, P.C.**
- 4 – Canadian policy on war crimes during that long period was not worse than that of several Western countries which displayed an equal lack of interest.**

Before moving into a detailed examination of the situation as it now stands, it is, however, proper to stop here and take time to consider the concept itself of war criminals.

Chapter I-4

THE CONCEPT OF WAR CRIMINALS

Chapter I-4

THE CONCEPT OF WAR CRIMINALS

The Order-in-Council setting up this Commission of Inquiry has, for its own purposes, defined "war criminals"— "*criminels de guerre*" — as follows:

. . . persons responsible for war crimes related to the activities of Nazi Germany during World War II

. . . *personnes responsables de crimes commis dans le cadre des activités de l'Allemagne nazie durant la Deuxième Guerre mondiale*

Three conditions must therefore be met for persons to fall under the investigative scrutiny of the Commission:

- (a) That they were responsible for "war crimes" — "*crimes*";
- (b) That such crimes were related to the activities of Nazi Germany; and
- (c) That such crimes were committed during World War II.

In reverse order, the *third* condition offers no difficulty: it is common ground that, in so far as Germany is concerned, the war started with the invasion of Poland on 1 September 1939 and ended in Europe with the surrender of Germany on 9 May 1945.

A question may be raised as to crimes committed between 1 September when Germany invaded Poland and 9 September when Canada declared war on the Axis powers. The latter date must undoubtedly be retained concerning the jurisdiction of Canadian military courts under the *War Crimes Act*.¹ But the Commission is independent of this Act, and its jurisdiction is based on the Order-in-Council which gives it authority to inquire into "war crimes related to the activities of Nazi Germany during World War II": it is, therefore, the war in the perspective of Nazi Germany which must be considered, and crimes in that war which must be punished. 1 September 1939 is the starting point.

¹ (1946) 20 George VI, c. 73.

The *second* condition embraces war crimes “related to the activities of Nazi Germany”. It therefore covers all criminal manifestations of Naziism, within or without traditional Germany and by whomsoever — German or other — they may have been instigated, pursued or accomplished.

Submissions, however, have been received from various quarters that the Commission should extend the field of its investigations to other alleged war criminals so as to cover not only the “Nazi side”, but also the “Soviet side”. But this would require an altogether different inquiry.

The Canadian government has decided to direct a searchlight on “war crimes related to the activities of Nazi Germany . . . — *crimes commis dans le cadre des activités de l’Allemagne nazie . . .*”. It does not belong to this Commission to pass judgment on the wisdom of this decision or on its “moral validity”;² nor should the Commission extend its mandate beyond the borders of its obvious meaning. It is true, as a prominent Member of Parliament has put it, that “. . . during the period 1939-1941(. . .) the Soviet government was in effect a partner of the Third Reich”.³ Yet crimes, if any, committed by the Soviet forces can, by no stretch of imagination, be classified under the heading “crimes related to the activities of Nazi Germany”.

The Commission accordingly finds against such an extended construction of its mandate and must keep to its clearly stated terms of reference: Nazi Germany.

The *first* condition rests on the construction which ought to be given to the English phrase “war crimes”, both read alone and understood in light of the concurrent use of the French word “*crimes*”.

The concept of crimes committed in times of war has evolved over the centuries and was eventually crystallized in the 1945 *Charter* of the International Military Tribunal which sat at Nürnberg. Article 6 of the *Charter* provides:⁴

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:

² Submission of the Executive Committee of Mennonite Central Committee Canada by William Janzen, 26 August 1985 (exhibit P-91), p. 4.

³ Submission of Mr. David Kilgour, M.P. for Edmonton Strathcona, 18 September 1985 (exhibit P-93), p. 2.

⁴ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 1946: London, Cmd. 6964, p. 3.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:
- (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Of course this definition is posterior, generally speaking, to the commission of the acts with which alleged war criminals are charged. But by no means does it constitute new law. Indeed those acts were already broadly covered by the *Hague Convention* of 1907 respecting the laws and customs of war on land (Annex) as well as by the *Geneva Convention* of 1929 relative to the treatment of prisoners of war. It is thus obvious that the *Nürnberg Charter*, whilst plowing in the same direction as previous international instruments, was not pretending to create new crimes nor to effect retroactive retaliation.

The *Nürnberg Tribunal* itself wrote:⁵

The *Charter* is not an arbitrary exercise of power on the part of the victorious nations but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Tribunal added significantly:⁶

The law of the *Charter* is decisive, and binding upon the Tribunal.

One should furthermore find comfort in the fact that the General Assembly of the United Nations has twice reaffirmed the principles proclaimed at *Nürnberg*. As early as 1946 the General Assembly devoted its third resolution to *Extradition and Punishment of War Criminals*,⁷

taking note of the definition of war crimes and crimes against peace and against humanity contained in the *Charter* of the International Military Tribunal dated 8 August 1945;

⁵ *Ibid.*, p. 38.

⁶ *Ibid.*, p. 38.

⁷ Resolution 3 (I), 13 February 1946.

Later in the same year, the General Assembly,⁸

affirm[ed] the principles of international law recognized by the *Charter* of the Nürnberg Tribunal and the judgement of the Tribunal;

The Nürnberg *Charter* therefore stands as the most modern codification of the issue and, in the opinion of the Commission, it offers the most convenient instrument to deal with war criminals.

Now one finds that, after having referred to the crimes at large, the Nürnberg *Charter* divided them into three categories: crimes against peace, war crimes and crimes against humanity. It is interesting to read in this light the Order-in-Council setting up this Commission: in its English version it refers specifically to "war crimes"; in its French version, it uses the shorter expression "*crimes*".

This raises a delicate question as to the jurisdiction of this Commission: is it limited to the definition of "war crimes" given in the 1945 *Charter*, or can it take the broader approach under which "war crimes" should be considered as a generic phrase, like the French word "*crimes*", pregnant as well of the meanings "crimes against peace" and "crimes against humanity"?

The argument in favour of a restrictive interpretation of the scope of the jurisdiction of the Commission is founded on the English version of the *Charter*. One must first remember that, in the words of the Nürnberg Tribunal:⁹

The Tribunal is of course bound by the *Charter*, in the definition which it gives both of war crimes and crimes against humanity.

There appears the stress on the distinction between the different categories of "crimes" and the specific meaning which ought to be attached to the phrase "war crimes".

The international community has endorsed this distinction. For instance, five times in five consecutive years (1969 to 1973), the General Assembly recalled the need to punish those persons responsible for both war crimes and crimes against humanity.¹⁰

In turn the Economic and Social Council proclaimed the same distinction between war crimes and crimes against humanity: in 1965¹¹ and in 1966.¹²

⁸ Resolution 95 (I), 11 December 1946.

⁹ *Ibid.*, p. 64.

¹⁰ Resolution 2583(XXIV), 15 December 1969.

Resolution 2712 (XXV), 15 December 1970.

Resolution 2840 (XXVI), 18 December 1971.

Resolution 3020 (XXVII), 18 December 1972.

Resolution 3074 (XXVIII), 3 December 1973.

¹¹ Resolution 1074 (XL), 28 July 1965.

¹² Resolution 1158 (XLI), 5 August 1966.

Finally, the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* adopted on 26 November 1968 and entered into force on 11 November 1970, bears the same distinction in its very title and expressly uses the phrases, "war crimes" and "crimes against humanity",

... as they are defined in the *Charter* of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations

In Canada, it was also in the narrow sense that both the government in 1945 (*War Crimes Regulations*) and Parliament in 1946 (*War Crimes Act*¹³) used the phrase "war crimes": (schedule, regulations, s.2 [f]):

"war crime" means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939.

Save the inconsequential substitution of "usages" for "customs", one thus finds in the definition, which incidentally is still in force in Canada, the very same words as were used in the 1945 *Charter* to qualify one only of the three types of crimes which the Nürnberg Tribunal was clad with the jurisdiction to try.

Were we to stop at this point, we would probably be led to conclude that, by force of the first condition above-mentioned, the Commission must limit its inquiry to persons allegedly guilty of war crimes as they are statutorily and internationally defined, namely: violations of the laws or customs of war. Thus this inquiry would stop short of investigating, amongst others, possible crimes against humanity.

There is, however, another side to the coin, where one may feel engrained the arguments in favour of a more liberal approach to the mandate of the Commission. For instance, the *London Agreement* of 1945, of which the *Charter* is "an integral part" (art. 2), refers repeatedly in its very title, in its first preambular paragraph and in its arts. 1, 4 and 6 to "war criminals", without any distinction as to the nature of the crimes in which they would have been involved.

The United Nations War Crimes Commission also "agreed that 'crimes against humanity, as referred to in the Four Power Agreement of 8th August, 1945, were war crimes within the jurisdiction of the Commission' ".¹⁴

The matter must also be considered in light of the officially bilingual character of this country. Thus whilst the Order-in-Council which has set up this Commission uses, in English, the phrase "war crimes", one should not

¹³ cf. footnote 1, this chapter.

¹⁴ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission*, London, His Majesty's Stationery Office, 1948, p. 177.

forego the equally important French version of the Order-in-Council which refers to “*crimes*”, without any qualification.

This is also the term which the 1945 *Charter* has used both before and after establishing the three categories of international crimes; and it is interesting to notice that, in the opening paragraph of art. 6 of the *Charter*, the word “crimes” is linked to the phrase “war criminals” — “*criminels de guerre*” — thus showing the clear intention of giving to the latter expression the broadest connotation.

Furthermore, the French version of the Order-in-Council, on the face of it, could not be clearer. Let us recall its second paragraph:

Attendu qu'il est possible que d'autres personnes responsables de crimes commis dans le cadre des activités de l'Allemagne nazie durant la Deuxième Guerre mondiale (ci-après appelés "criminels de guerre") se trouvent actuellement au Canada;

It is obvious that the Order-in-Council embraces each one of the three categories of crimes defined by the *Charter*. If read in its French version alone, it would open the door to no distinction and no discussion, thus giving to the Commission full freedom of inquiry into the three categories of international crimes.

To what extent can the French version of the Order-in-Council be relied upon?

One must first remember the ringing words of ss. 16(1) of the 1982 *Canadian Charter of Rights and Freedoms*:

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

The Order-in-Council was issued by the “Government of Canada”: its two versions therefore “have equality of status”.

When it comes to interpreting the Order-in-Council, one may then turn to the *Official Languages Act*.¹⁵

Indeed, although the Order-in-Council is not an act of Parliament, it partakes of analogous characteristics. Resort can therefore be made, for its interpretation, to the principles which apply in the field of legislation: these may not constitute a binding rule, but they surely should avail as a guide of wisdom.

Now, under the *Official Languages Act*,

The English and French languages (...) possess and enjoy equality of status ... [s.2]
... both (...) versions (...) are equally authentic. [s.8 (1)]

¹⁵ (1970) R.S.C. c. 0-2.

and, in a case like the present one,

... preference shall be given to the version (...) that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects. [s.8(2) (d)].

This last provision has found an interesting application in 1979 in a Québec case under the *Juvenile Delinquents Act*.¹⁶ In his recent treatise, *Construing Bilingual Legislation in Canada*,¹⁷ Mr. Rémi Michael Beaupré has aptly summarized the issue:

Under s.s. 37(3) of the *Juvenile Delinquents Act*, application for leave to appeal "shall be made within ten days of the making of the conviction or order complained of . . .". In French, the application not only has to be made, but it must also be presented: "doit être présentée". In *R. v. Boisvert*, the Superior Court of Québec was at first inclined to the view that, on the basis of the French version, the application had to be actually presented in court within the prescribed period. However, on the basis of the English version "shall be made" and the liberal interpretation placed on it by the anglophone provinces, the court concluded after referring to the principles in para. 8(2)(d) of the *Official Languages Act* and s.11 of the *Interpretation Act*, that the only reasonable interpretation was that the application needed only to be served and filed by the time prescribed.

The Court of Appeal reversed, but the Supreme Court of Canada reinstated the trial judge's decision, in an oral pronouncement rendered on 6 December 1979.¹⁸ Thus in a Québec case the English version was preferred over the French one, in light of the objects of the Statute and the greater flexibility offered by the English version.

In his comprehensive work of 1982, *Interprétation des Lois*,¹⁹ Professor Pierre-André Côté has commented on this method of interpretation:

[Translation]

Undoubtedly the most frequent and least controversial use of the finality of a text consists in referring to such finality in order to define more accurately the meaning of a vague word, to make a choice between various possible meanings or to dispel any other doubt concerning its bearing.

It is indeed beyond dispute that, when the wording opens the door to a difficulty of interpretation, is unclear, one may refer to the finality of the law or of the provision under discussion in order to choose that of the possible meanings which is most likely to realize that finality.

Keeping those principles in mind, the Commission is convinced that, when the Government of Canada ordered this inquiry, it wanted to put finally to rest the question of alleged war criminals in this country. Obviously it was concerned not only with the sole perpetrators of "war crimes" in the strict

¹⁶ (1970) R.S.C. c. J-3.

¹⁷ Beaupré, *Construing Bilingual Legislation in Canada*, Butterworths (Canada) Ltd., Toronto, 1981, p. 54.

¹⁸ See Jules Deschênes, *Ainsi parlèrent les tribunaux*, Wilson & Lafleur Limitée, Montréal, 1981, vol. I, pp. 486-494; and vol. II, published in November 1985, p. XX.

¹⁹ Côté, *Interprétation des Lois*, Les éditions Yvon Blais Inc., Cowansville, 1982, p. 337.

sense of the expression; it simply could not ignore the authors of, for example, crimes against humanity. Indeed, when announcing in the House of Commons the establishment of this Commission, the Minister of Justice, Honourable John C. Crosbie, stated “. . . that we must go to the very depths of the questions posed . . .”.²⁰

So the arguments stand, some in favour of a strict construction, others in favour of a broad interpretation of the scope of the Commission's inquiry. Should the Commission restrict its inquiry to “war crimes” strictly speaking, or is it at liberty to investigate allegations bearing on the three categories of international crimes?

It is the view of the Commission that the English text of the Order-in-Council does not close the door to either interpretation. It is, however, also its view that — using the very words of s. 8 of the *Official Languages Act* — in agreement with the true spirit, intent and meaning of the Order-in-Council establishing the Commission, the attainment of its objects would be best ensured through reliance on the broader French version.

The Commission is, therefore, led to conclude that, in construing and applying the first of the three conditions above-mentioned, the Commission shall take into consideration not only strictly war crimes, but the three categories of crimes listed in Nürnberg.

The Commission accordingly finds that its jurisdiction extends over all persons, whatever their past and present nationality, currently resident in Canada and allegedly responsible for crimes against peace, war crimes or crimes against humanity related to the activities of Nazi Germany and committed between 1 September 1939 and 9 May 1945, both dates inclusive.

²⁰ *Hansard*, House of Commons Debates, 7 February 1985, vol. 128, p. 2113.

Chapter I-5

METHODOLOGY

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1. Internal checks

In parallel with its mandate on the questions of law,¹ the first task of the Commission on the facts consisted in establishing a reliable list of suspects (if any there were).

The obvious source of information was the RCMP which, the Commission is glad to say, gave its full co-operation, especially through Commissioner Robert H. Simmonds, Superintendent John H. Brookmyre (Head of its Special Task Force), and Corporal (now Sergeant) Fred Yetter who has been involved in this matter for several years. Three hundred and thirty-five files were thus put at the disposition of the Commission.

Other substantial sources were:

Joseph Riwash	707 names (supplied at random by Yad Vashem)
Simon Wiesenthal (Vienna)	219 names
Canadian Jewish Congress (and Professor Irwin Cotler)	209 names
Sol Littman	171 names (plus the 2 previous lists and one list from Los Angeles)
B'nai Brith Canada (and David Matas)	100 names
Department of Justice of Canada	81 names
Simon Wiesenthal Center (Los Angeles)	63 names
Canadian Holocaust Remembrance Association	54 names

¹ See below, c. I-7: "Legal Remedies".

Israel Police (M. Russek)	54 names (also included in list of B'nai Brith)
Jewish Federation of North Jersey (R. Krieger)	49 names
U.S.S.R.	43 names
Ephraim Zuroff	29 names

As could be expected, there was some more or less significant overlapping between those various lists of names.

The Commission also published a notice in 110 newspapers across the country calling for the co-operation of the public. This notice appeared in 68 English papers, 24 French papers and 18 ethnic papers. It brought in a small number of responses.

It is not appropriate to publish the names of the other bodies or individuals who also contributed to the work of the Commission, but the names of all the sources of information which supplied to the Commission its raw material appear in Part II of this Report, which the Commission is submitting to the Governor General in Council under the seal of confidence.

The Commission could thus build its Master List of suspected war criminals allegedly resident in Canada: it is included in Part II of this Report as Appendix II-E and contains 774 names. For the protection of reputations, the Commission has made it a duty not to divulge any of those names and has enjoined parties appearing before it in public sittings to adhere to the same policy. The Commission has received general understanding and co-operation in this respect, though Mr. Sol Littman came very close to breaching this injunction when he gave a press conference in Ottawa and distributed a list of suspects on 30 October 1986.

Even while it was compiling its Master List, the Commission realized that it must conduct investigations on all individuals whose names would appear on it in order to determine if there was any record of these individuals having entered Canada, and in the affirmative, whether they were still living in the country. To that end, the Commission needed a team of investigators who would work hand-in-hand with all its seven senior and junior counsel.

The Commission's investigation unit was therefore formed early in 1985, with the hiring of a director of investigations and two other experienced investigators. It soon appeared that the work load was such that two additional investigators had to be added to the unit.

The director and the four investigators were high ranking policemen retired from municipal, provincial and federal police forces, with additional experience in other investigative fields, totalling some 175 years of experience. This wide experience stood the Commission in good stead in establishing the

necessary liaison with various police forces across the land. Also there soon grew a strong co-operation and mutual respect between counsel and investigators, which were indeed essential to the success of their work.

Having settled on that common goal, the Commission forwarded, with one exception, the names of all its Master List suspects to the Department of Employment and Immigration with a request that the department advise if it had any record of landing in Canada. The exception was a list of thirty names which were not pursued because the very nature of the allegation was so insubstantial that any follow-up was inappropriate: e.g., individuals too young to have participated in the war, instances where the cause of suspicion was limited to the suspect's appearance, ethnic background, etc.

With regard to immigration data, prior to 1952 the only permanent record maintained in Canada of an individual's landing in this country was a ship's manifest. This document was not signed by the immigrant, and the greater part of its contents is of no relevance to the work of the Commission.

After 1952, the ship's manifest was replaced by a Canadian Immigration Card (known as Form IMM1000) which, for the first time, required the individual's exact date of birth as well as a statement whether he had ever been convicted of a criminal offence, and which was signed by the immigrant.

As is being noted elsewhere in this Report,² only the ship's manifest and Canadian Immigration Cards were microfilmed and permanently recorded. All other documentary evidence in connection with an individual's application for and entry into Canada was lawfully permitted to be, and usually was in fact, routinely destroyed a very few years after landing in Canada.

The Commission simultaneously conducted investigations with the Department of the Secretary of State for possible applications for citizenship and with the Department of External Affairs for possible passport applications.

Citizenship applications included the individual's place and date of birth, name on entry into Canada together with details of the date and place of entry into Canada. On more than one occasion the Commission received negative replies from Immigration, only to receive positive responses from Citizenship. These multiple lines of investigation were thus occasionally successful in locating individuals who might otherwise have been presumed not to be in Canada.

It should be noted that the information requested in a citizenship application did not include information as to an individual's activities during the war. It did, however, include a photograph and signature of the applicant, which was quite frequently the earliest picture of that individual available to the Commission. These pictures proved useful in having witnesses identify the

² See below, c. I-7: "Legal Remedies."

individual, as they were usually taken within a decade or so of the end of the war.

Passport applications included more recent addresses and photographs of the individual and were thus of greatest assistance to the Commission's investigators in locating the person. As well, they included citizenship particulars, and in instances where Citizenship had provided a negative response and Passport a positive one, this double check assisted the Commission in obtaining the citizenship record.

The above three checks were conducted on every individual on the Master List, save the previously-noted exception. There were, as might be expected, a number of supplementary checks tailored to suit each individual.

For example, in cases where there was any suggestion that the individual had landed in Canada and had been destined for a particular province, the Commission's investigators conducted provincial motor vehicle searches. If a city was named, local telephone companies were checked as were street directories. In addition, if the age of the suspect suggested he might be dead, a provincial check was made with Vital Statistics. Finally, where it was felt appropriate, Canadian Police Information Centre (CPIC) checks were run.

All of these investigations individually had drawbacks: an individual might not have applied for citizenship (although the Commission found this to be rare) or for a passport; he might, because of age or other reasons, not have received a driver's licence within the last five years; he might not have a criminal record; a telephone might not be in his name, etc. However, it was felt that these checks represented a sufficiently broad line of investigation into the fabric of an individual's life that if he were in Canada, it would be unlikely that all checks would be negative.

Of course, when interviewing witnesses, it was essential to ensure that the right suspect was identified. In that respect, the transliteration of names from the Cyrillic to the Roman alphabet presented the Commission with serious difficulties, and oftentimes rendered identification problematic. The Commission's investigators using, among other tools, old and recent photographs, spent considerable effort to assure a proper identification.

Several of the suspects located by the investigation unit were subsequently subpoenaed and appeared before the Commission at *in-camera* hearings where their identity was indeed confirmed.

In the course of time, two other lists came to be added to the main Master List.

First, because of its fixed reporting date, the Commission could not continue its research efforts indefinitely. Yet, names of suspects continued to

be drawn to the Commission's attention during the whole course of its mandate. The Commission kept on investigating until the end of October 1986; but it did not incorporate into its Master List the 31 additional names which had been belatedly brought to its attention nor could it, obviously, complete its work on them.

Furthermore, on 27 October 1986, the Commission was handed over two new lists from the Simon Wiesenthal Center of Los Angeles, through its Washington, D.C. counsel, Mr. Martin Mendelsohn. One list of 26 names was supposed to bring new suspects to the knowledge of the Commission. The other list of 37 names was expected to be known to the Commission, but might contain new information. It was found that, out of those 63 names, 56 already appeared on the Commission's Master List. The remaining seven, all contained in the list of 26, were added to the list of late arrivals which thus grew to 38 names.

On 30 October 1986, Mr. Sol Littman delivered to the Commission another list of 26 suspects; but it was simply a copy of the list of 26 mentioned in the preceding paragraph.

The list of those 38 additional names which came to be known within the Commission as its *Addendum*, together with its list of sources, appears in Part II of the Report as Appendix II-F, and the number opposite each name is identified by the letter A: A-01, A-02, etc. The Commission's findings and recommendations concerning those 38 names form a separate section in chapter I-8.

In the course of time, the Commission was apprised of operation "Matchbox" aimed at securing for the Allies the greatest number of top-notch German scientists. The operation presented a serious security problem inasmuch as those scientists might well have been involved in the Nazi war effort. Fresh in everybody's mind must then have been the discussions which would eventually lead to the trial at Nürnberg of the I.G. Farben directors.³

The Government of Canada became involved in the operation and insisted upon "the most careful security screening before the individual cases are finally approved".⁴ The admission of selected German scientists and technicians and details of their employment were settled by Order-in-Council P.C. 2047, on 29 May 1947.

The security screenings were conducted by two distinct panels established by the British Board of Trade. The DARWIN panel was assigned the responsibility of recruiting and screening of scientists for industry while the other panel, under the Deputy Chiefs of Staff Committee, dealt with scientists

³ Judgment rendered on 29 July 1948.

⁴ Letter from A.L. Jolliffe, Director of Immigration, to A.D.P. Heeney, Clerk of the Privy Council, 9 November 1946.

destined for military research. In both situations the panel was to verify if the applicant was a member of the Nazi Party and whether he was sufficiently qualified to contribute something worthwhile in his field of endeavour in the host country.

A memorandum dated 6 January 1947, from Parsons, RCMP, to Jolliffe, Immigration, stated that the RCMP found the method used for screening "quite suitable for [its] requirements". It may, therefore, be safely assumed that a candidate having engaged in war crimes would have been rejected by the panel examining him and consequently would not have gained admission to Canada. Similarly, a pro-Nazi would have been rejected.

The Commission has learned that 71 German scientists and technicians were considered for admission to Canada. The list is reproduced in Part II of this Report as Appendix II-G. Each name is identified by a number preceded by the letter S: S-01, S-02, etc.

In connection with this particular group, the Commission tapped the Public Archives, which produced a wealth of information. The Commission also conducted searches with the departments of Employment and Immigration and External Affairs, Passport Division. Verifications were also made with the United Nations War Crimes Commission records in New York City, but due to the lack of identifiers, barely any part of the flimsy information can be used.⁵ The records in question contain no date or place of birth and describe in general terms only the occupations and occasionally the crimes of which the subject is suspected. The few possibilities do not apply to those scientists and technicians found living in Canada.

The Commission's findings concerning the 71 names of German scientists and technicians form a separate section in chapter I-8.

2. Privacy and access to information

One check that was not available, but which would have been of considerable relevance in locating individuals, was information relating to whether an individual was receiving or had ever received old age security payments. Because over 40 years have passed since the conclusion of World War II, a large number of those individuals engaged in that conflict are now 65 years of age or older. Alleged war criminals of that age residing in Canada may in appropriate circumstances be eligible to receive old age pensions under the *Old Age Security Act*.⁶ Clearly, the knowledge that an individual alleged to be a war criminal resident in Canada receives such a pension or that he ceased to receive it on a certain date would have been of great assistance to the Commission in attempting to locate the individual or ascertain that he had

⁵ This question will be examined in more detail in section 3 of this chapter, dealing with external checks.

⁶ 1970 R.S.C., c. 0-6.

died. In addition, it would have been, in almost all cases, more recent information than landing records and citizenship or passport applications.

When it was created, the Commission was "authorized to have complete access to personnel and all relevant papers, documents, vouchers, records and books of any kind in the possession of departments and agencies of the Government of Canada. . .".

On 4 April 1985,⁷ the Commission was appointed an "investigative body" for the purposes of ss. 8.(2)(e) of the *Privacy Act*.⁸ It was thus empowered to have access to "personal information under the control of a government institution"; this last phrase includes the Department of National Health and Welfare.⁹

On 4 July 1985, the Commission submitted to the latter department a request for information concerning an individual suspect. The information was supplied on 6 September 1985 by counsel for the Department of Justice.

On 8 October 1985, the Commission submitted to the Department of National Health and Welfare a further request concerning several suspects. The request was denied on 8 November 1985 by counsel for the Department of Justice. The refusal to supply the information was founded on s. 19 (1) of the *Old Age Security Act* which precludes the disclosing of "all information with respect to any individual applicant or beneficiary, obtained by an officer or employee of Her Majesty in the course of the administration of this Act. . .".

It must be recalled that ss. 8(2) of the *Privacy Act* permits the disclosure of personal information "subject to any other Act of Parliament".

The Commission filed a complaint with the Privacy Commissioner who dismissed it on 30 May 1986 (Appendix I-S), essentially on the following grounds:

- a) the *Privacy Act* is not an access to information statute;
- b) the *Privacy Act* enables, but does not require, disclosure;
- c) the authority to disclose is subject to limitations found in other Acts of Parliament;
- d) s. 19 of the *Old Age Security Act* appears to impose such limitations;
- e) a dispute concerning the interpretation of s. 19 might more appropriately be resolved by a court of law.

⁷ Order-in-Council P.C. 1985-1206, Appendix I-L.

⁸ 1980-81-82-83 S.C., c. 111, Schedule II.

⁹ *Ibid.*, s. 3 and Schedule.

The *Privacy Act* did not appear to open to the Commission any avenue for judicial review of this decision.

The Commission has considered the possibility of resorting to the *Access to Information Act*.¹⁰ Indeed, s. 4 provides for access "notwithstanding any other Act of Parliament". Two preliminary hurdles must, however, be overcome:

- 1) Under s. 19, the information sought by the Commission must not be "personal information as defined in section 3 of the *Privacy Act*". In the view of the Commission, upon a careful reading of the definition, a convincing argument can be made that no valid objection may be founded on that provision.
- 2) However, under s. 24 of the Act, disclosure is prohibited if it "is restricted by or pursuant to any provision set out in Schedule II". Now, this Schedule refers specifically to s. 19 of the *Old Age Security Act*. It should be expected that, upon a request made by the Commission under the *Access to Information Act*, the Justice department would give the same advice as it did under the *Privacy Act* concerning the effect of s. 19 of the *Old Age Security Act* and refuse to disclose the information.

The second hurdle would then have meant a complaint to the Information Commissioner, followed, in case of dismissal, by judicial review before the Trial Division of the Federal Court of Canada.

The Commission decided that there was no purpose in following the route of the *Access to Information Act* for two reasons:

- 1) The delays involved were inordinate and the process totally impractical, since the Commission was (at that time) requested to report by 30 September 1986;
- 2) The result was uncertain. It depended essentially on the construction of the word "obtained" in s. 19 of the *Old Age Security Act*, to wit: is the information sought by the Commission "information obtained by the government in the course of the administration of the Act" and, as such, privileged? or is it not rather "information generated on the basis of information collected pursuant to the administration of the Act" and thus amenable to disclosure, as Justice counsel wrote to the Commission on 6 September 1985?

At any rate, all those difficulties and uncertainties should not hamper the administration of justice. Yet, they have contributed to increasing the workload of the Commission in trying to trace the suspects in this country, as they had rendered more difficult the investigation of the RCMP to which similar

¹⁰ 1980-81-82-83 S.C., c. 111, Schedule I. See below, c. I-8.

information was refused while it was looking ten years ago for Albert Helmut Rauca, a war criminal who had found refuge in Canada in 1950 and was actually receiving benefits from the Department of Health and Welfare.

The Commission accordingly *RECOMMENDS* that:

- 5- **In order not to thwart lawful investigations by commissions of inquiry or the RCMP or investigative bodies specified in the regulations pursuant to ss. 8(2)(e) of the *Privacy Act* (1980-81-82-83, S.C. c. 111, Schedule II):**
 - a) **the mention of s. 19 of the *Old Age Security Act* (1970 R.S.C., c. 0-6) should be deleted from Schedule II to the *Access to Information Act* (1980-81-82-83 S.C. c. 111, Schedule I);**
 - b) **s. 19 of the *Old Age Security Act* should be amended by adding to the exceptions listed in ss. 19(2)(a): commissions of inquiry, the RCMP and the above-mentioned investigative bodies;**
 - c) **ss. 19(2) of the *Old Age Security Act* should be further amended in order to make compulsory, rather than discretionary, the disclosure of information requested in the discharge of their duties by the bodies enumerated in this recommendation.**

3. *External checks*

The Commission also conducted a series of external checks with foreign sources. Whereas the internal checks had been directed at locating the individual, the external checks were concerned with the allegations made against the individual.

The fundamental check that was made on virtually every name on the Master List was with the Berlin Document Center (BDC), which houses roughly 30 million documents. These include all documents relating to membership in the Nazi Party, records of Nazi Party courts, various levels of information on an individual's involvement in the Waffen-SS and documents relating to the implementation of certain government policies such as the naturalization of the *Volksdeutsche* who were resident in areas that are now part of the East bloc. The only names not checked with BDC were those of individuals whom the Commission knew had died or on whom all internal checks had produced no evidence of entry into Canada prior to sending the request to BDC.

Another basic check was made with the Central Office of Land Judicial Authorities for the Investigation of National-Socialist Crimes in Ludwigsburg, West Germany. This office was organized in 1958 and investigates Nazi war crimes exclusively.

Under German law, before charges relating to Nazi war crimes can be laid, it must be determined that Germany is either, a) the place of the crime; b) the place of arrest of the suspect; or c) the country of origin of the suspect.

It is the function of Ludwigsburg to establish whether or not any of these conditions has been met. If a prosecution is warranted, it is handled by the relevant prosecutor's office, but Ludwigsburg is provided with copies of all relevant legal documents for its central registry. Ludwigsburg is, therefore, a source of information as to all individuals against whom such proceedings have been initiated in West Germany and will also have information as to individuals whose names are mentioned or who appear as witnesses in the course of such proceedings.

The remaining external checks were restricted to individuals that the Commission believed were in Canada. They included, among others which are referred to below, the German Military Service Office for notifying the next of kin of members of the former German Wehrmacht (WASSt) in Berlin; the Berlin Sick Book Depository; and the Central Information Office of the Federal Archives (at Aachen-Kornelimünster).

WASSt was established in 1939 shortly before the outbreak of the war as a data centre as defined by art. 77 of the *Geneva Convention* on the treatment of prisoners of war. Its purpose was to collect and disseminate information pertaining both to prisoners of war captured by Germany and to members of the Wehrmacht who were either killed, wounded or missing in action or prisoners of war themselves. Over the years the records housed by WASSt have grown to include certain Waffen-SS, Police, Navy and Reich Labour Service documentation, encompassing today more than 400 million documents.

The Berlin Sick Book Depository contains the documentation pertaining to the sick and wounded of both world wars and is of particular use in establishing that an individual was in a particular place at a particular time. A negative response can mean either that the person was not involved in the war or that the person was not wounded or ill.

The archives at Aachen-Kornelimünster handle matters related to the personnel files of civilian employees of the Wehrmacht, the Waffen-SS and the Reich Labour Service. Its main function is to provide information on military service.

These external investigations are universally regarded as an essential first step in any investigation of an individual suspected of war crimes. Occasionally they produce clear evidence supporting allegations of the commission of war crimes, for example, awards granted for killing a predetermined quota of Jews. More frequently however, they serve other purposes. They may tend to exonerate an individual in instances such as those in which the accusation bears on atrocities committed as a member of the SS, whereas all records indicate that the individual was never a member of that organization. Alternatively, positive responses may cumulatively provide information as to an individual's

whereabouts, unit and rank, all of which may be of assistance in attempting to locate potential witnesses and in determining the likelihood that the individual might have been in an area or unit at a time that war crimes were being committed. This information may then be pursued further to obtain more specific evidence of criminality.

In addition to the foregoing external checks, there were other resources utilized by the Commission on a case-by-case basis where the origin or nature of the allegation warranted it. Thus, the Commission tapped several other foreign sources of information. They are listed in Appendix I-K and equally deserve the gratitude of the Commission for their unselfish and useful cooperation. More particularly, the Commission forwarded specific names on its Master List and in some cases specific questions to *Centre de documentation juive contemporaine* in Paris, the Office of Special Investigations (OSI) in Washington, D.C., the Wiesenthal Documentation Center in Vienna, and the Yad Vashem archives in Israel, as well as to the appropriate departments or agencies of several Eastern and Western governments. Leaving aside the latter, a word on the former appears apposite.

The *Centre de documentation juive contemporaine* is a French Jewish organization which was clandestinely set up in Grenoble in 1943 during the German occupation, in order to collect documentation on the Holocaust. In 1944, after the liberation of France, the CDJC was transferred to Paris and since 1956 has been located at 17 rue Geoffroy-Lasnier in the building housing the memorial to the Unknown Jewish Martyr. The CDJC has numerous collections of documents from the French Gestapo, the German embassy in Paris, the German Supreme Military Command in France and the French *Commissariat Général aux Questions Juives*. It also possesses vast collections of documents gathered by the Allied authorities in Nürnberg, proceedings of the trials of Nazi war criminals in France, Germany and elsewhere, and collections of photographs.

The CDJC concerns itself with topical matters connected with the Nazi period such as the fight against racism, the punishment of war criminals and the compensation of victims by the German Federal Republic.

The Office of Special Investigations (OSI) in Washington was established in 1979, as a unit within the Criminal Division of the United States Department of Justice. Its mandate was to locate Nazi war criminals in the United States, and also to institute prosecutorial proceedings against such individuals where appropriate. Because of its broader mandate and accumulated years of practical experience, the OSI was a valuable source of historical information in addition to providing information on specific individuals having some American connection during or after the war. Of particular value to authorities who might contemplate initiating proceedings against individuals resident in Canada was a series of step-by-step model investigations in the following subject areas: Latvia, Lithuania, Estonia, Slovak Hlinka Guard, Hungary,

Romania, Yugoslavia, Poland, Ukrainian Police, Schutzmannschaft (Ukrainian), Einsatzgruppen, concentration camp and SS lists.

The Wiesenthal Documentation Center was generally a source of names of individuals alleged to be war criminals. As a rule, the Center provided little more than an individual's name, rank, place and date of birth together with the generalized allegation of war crimes such as being a member of the Galicia Division of the Ukrainian Waffen-SS. Occasionally, the Center provided an address in Canada of an individual having a name similar to that of a suspected war criminal. Generally, however, it must be stated that the Center's information was long on allegations and generalities, and short on evidence and specifics.

The Yad Vashem archives are located in Jerusalem. While they consist largely of copies of materials available elsewhere, they can be valuable as a source of survivor testimony, specifically Polish survivors.

In order to pursue those external checks efficiently, it became necessary to establish personal contact with the above-mentioned and other foreign agencies. Thus, the following working meetings were organized:

In 1985

- | | |
|--------------|-------------------------------------------------------------------------------------------------------------|
| 20 May | Commission counsel at the Dutch Ministry of Justice, The Hague. |
| 22-23 May | Commission counsel at the British Ministry of Defence and British Public Records Office, London and Surrey. |
| 7-8 July | Commissioner, Commission counsel and Secretary at Office of Special Investigations, Washington. |
| 23 July | Commissioner at Berlin Document Center. |
| 18 August | Commissioner at High Commissioner for Refugees, Geneva. |
| 2 September | Commission counsel at Dutch Ministry of Justice, The Hague. |
| 30 September | Commission junior counsel and Commission historian at OSI, Washington. |
| 1 October | |
| 1 November | Commission counsel to meet Mr. Simon Wiesenthal and Mr. Ralph Blumenthal, New York. |
| 22 November | Commission counsel at <i>Centre de documentation juive contemporaine</i> , Paris. |

In 1986

- | | |
|----------|----------------------------------------------------|
| 18 April | Commission junior counsel and Commission historian |
| 4 May | visit five archival depositories in Germany. |

Those working sessions were organized, for the most part, in the context of trips undertaken for other purposes. They proved extremely beneficial to the Commission both on a short, and a long-range basis.

In the meantime, suitable arrangements with the U.S.S.R. and Poland, though discussed with their respective authorities, could not be completed for reasons which will be fully explained below.¹¹

It should also be noted that, relatively early in the course of its deliberations as to what foreign checks would be relevant and appropriate, the Commission made a conscious decision that, with one exception, it would not forward names on its Master List to any East European countries. The reason for this was the Commission's concern that, for ideological or political reasons, the recipient country might wish to publicize the names of those individuals and attempt to create the impression that the Commission or the Government of Canada had somehow conceded that these individuals were war criminals and not simply names of individuals being investigated. The other consideration was the well-being of relatives of these individuals who are still residing in the Eastern bloc countries.

This was a particularly difficult decision to take, because a substantial number of individuals on the Master List were alleged to have committed the crimes of which they were accused in areas that subsequently came to be part of the Eastern bloc. However, the Commission felt that the potential risks in disclosure of names outweighed the possible evidence that might be forthcoming.

As noted, however, there was one exception. In cases where an East European country had formally advised Canada that an alleged war criminal from that country was resident in Canada, the Commission concluded that its concerns about publication of the individual's name and well-being of relatives were unwarranted. Examples of such cases included correspondence from the Embassy of the U.S.S.R. to the departments of the Solicitor General and of External Affairs dated 1 April 1980 and 15 July 1985 respectively, in which specific allegations against named individuals were set out. In instances such as these, the Commission did correspond with the appropriate East European government, but only in respect of those individuals and only to request oral or documentary evidence in support of the allegations involved.

In light of the recommendations of the Commission with respect to several individuals on the Master List, the Government of Canada may wish to review this decision not to consult with East European authorities other than to the limited extent noted above.

A final source of information consisted of the CROWCASS¹² and UNWCC¹³ lists (exhibit P-95). The CROWCASS lists were the product of joint American, British and French efforts to identify and locate security suspects and war criminals among Axis prisoners of war in Allied detention

¹¹ See below, c. I-8.

¹² CROWCASS stands for Central Registry of War Criminals and Security Suspects.

¹³ UNWCC stands for United Nations War Crimes Commission.

centres. (The "security suspect" category was soon dropped as it became apparent that "none of these persons was wanted by any specific nation for any specific war crimes").¹⁴ The UNWCC lists were to serve the wider purpose of assisting member governments in apprehending all war criminals, regardless of their postwar whereabouts. Both sets of lists were drawn up between 1944 and 1948 and distributed, amongst others, to the Canadian government. Here they appear to have served a single purpose: finding whether any of the names might figure on the list of our own prisoners of war. Otherwise, according to the Secretary of State for External Affairs, "... it is not the practice to distribute them to any other Canadian authorities."¹⁵ These lists could not, therefore, be used by immigration officers or visa control officers to prevent the entry of war criminals into Canada.

Forty years later, an effort at clarifying the situation was made by the Commission through a comparison between these lists and the Commission's Master List. Unfortunately, not all lists appear to have been received by Canada: at least not all of them have been traced in the Public Archives. CROWCASS would have issued 20 wanted lists and 20 detention lists.¹⁶ UNWCC would have issued 80 lists.¹⁷ Yet, according to Mr. R.G. Hayward,¹⁸ less than half that number could be found and were made available to the Commission (5,800 pages in all):¹⁹ they are the following:

CROWCASS

Wanted List Part I

Wanted List Part II

Wanted Lists 4, 5, 6, 9, 10, 11

Detention Lists 1, 2, 3, 4, 5, 6, 8

UNWCC

Wanted List 27

Lists IX, X

Lists 1 to 27

Lists 31 to 37

List 40

¹⁴ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*. His Majesty's Stationery Office, London, 1948, p. 378.

¹⁵ Letter from Secretary of State for External Affairs to Acting High Commissioner for Canada, London, 9 September 1946: exhibit P-94.

¹⁶ Karwandy, evidence, vol. II, p. 134.

¹⁷ Hayward, evidence, vol. II, p. 199.

¹⁸ Evidence, vol. XVIII, p. 2321; letter 9 July 1985, exhibit P-94.

¹⁹ Evidence, vol. XVIII, p. 2324.

Of course, the Commission was not satisfied with this situation. It, nonetheless, began with a comparison between the available lists and its own Master List. This effort produced a short list of 55 names where there appeared the possibility of additional information. Later, the Commission obtained the five lists missing from the first 40 UNWCC lists, as well as the last 40 lists issued by the same authority. The Commission thus came into possession of a full set of all UNWCC lists.

At the same time, however, the Commission received the distressing information that the CROWCASS lists could lead nowhere: there exist no independent archives or files corresponding to the names appearing on these particular lists.

Working first on its short list of 55 names, the Commission sent representatives to the United Nations archives located in New York City to examine the corresponding case files held there in the archives of the United Nations War Crimes Commission.

The UNWCC holdings consist of the 80 lists already mentioned, an alphabetical, consolidated card file of some 40,000 names, as well as about 8,000 case files. Each card contains the name of either an accused war criminal against whom a *prima facie* case could be made ("A" classification), a suspected war criminal ("S" classification) or an Axis national who may have been a witness to specific war crimes ("W" classification). The case files from which the names have been culled often contain allegations against a number of individuals based on a single incident. They were compiled by the national war crimes offices of member countries of the UNWCC. The majority relate to instances of military brutality in France, Belgium and the Netherlands, although some files contain charges against the staffs of concentration camps in Germany and present-day Poland. Allegations range from stealing trucks to mass murder.

Poland, Czechoslovakia and Yugoslavia were UNWCC members, and their charges are also included in the files. The Soviet Union was not a member. Thus there are essentially no UN files concerning Russians, Ukrainians or Balts, who yet account for a substantial proportion of the Commission's Master List.

The utilization of UNWCC files in the work of the Commission raises several problems. Foremost among these is the fact that the data bases upon which the UNWCC lists and the Commission's Master List have been formed are virtually mutually exclusive. While our information in non-Soviet cases usually consists of a name, a vague allegation (e.g., "speaks German", "SS member") and a range of vital statistics from Canadian sources, the UNWCC files provide a name (often only a surname), a fairly precise description of the alleged war crime and, as a rule, no vital statistics.

An example, hypothetical but concrete, will illustrate the difficulty. Let us assume that one Hans Schmidt — the German counterpart of the classical

John Smith — has been denounced to the Commission as having “fought for Hitler”. The Commission obtains all the available information about his immigration to and life in Canada. The UNWCC files may provide one or two Hans Schmidts, without dates or places of birth, as well as over 400 allegations against a “Schmidt”, with no given names mentioned. The investigator is left with no reasonable criteria for choosing between these 400-plus allegations. Any one of them could conceivably be “our” Schmidt.

Faced with this dilemma, the Commission checked its short list as a sampling. Of those 55 names, only five UNWCC files could be said with any degree of certainty to be identical with the Commission’s own subjects. These were files on subjects of Dutch origin and, generally speaking, they contained no new information.

Thus, judging by this sampling, even if the Commission were to avoid the extraneous intermediary step of checking the Master List against the remaining 45 lists it has since gathered from the archives, and were to work directly with the UNWCC card file, the results would likely be minimal at best.

In order to have exhausted every potential for information, no matter how slight, the Commission would have had to have:

1. checked the Master List against the UNWCC card index in New York City. (During their development, the CROWCASS and UN listings came to be correlated to the extent of approximately 90 per cent. Step 2 would cover the remaining 10 per cent.)
2. checked the Master List against the consolidated CROWCASS list of names.

This situation raised serious questions involving human and financial resources which were not limitless. The Commission must then consider the following elements:

- a) the largely unrelated data bases;
- b) the meagre results brought by the checking of a first series of 55 names, though these showed the closest connection with the various lists;
- c) the absence of files corresponding, in any event, to the CROWCASS lists;
- d) the large expense involved, since it had taken five-and-a-half working days in New York to check 55 names;
- e) the time constraints imposed on the Commission.

In light of those circumstances and of the necessity of bringing the work of the Commission to a close within a reasonable time, the Commission concluded that it had no other alternative than not to pursue the search through

UNWCC beyond the steps it had already taken. The results actually acquired are reflected, as a matter of fact, in several of the individual reports which appear in chapter I-8: the reader will usually find them negative, or too vague by way of identification to be really useful.

But outside of those internal and external checks, special attention had to be given at the outset to the case of Dr. Josef Mengele. This will be the topic of our next chapter.

Chapter I-6

THE MENGELE AFFAIR

Chapter I-6

THE MENGELE AFFAIR

The opening paragraph of Minute-of-Council 1985-348 states:

WHEREAS concern has been expressed about the possibility that Joseph Mengele, an alleged Nazi war criminal, may have entered or attempted to enter Canada;

Two weeks before the passage of this Minute there had indeed been a public outcry following the publication on 23 January 1985 of an article over the signature of "Ralph Blumenthal, the *New York Times*".¹ The article was captioned: "Records indicate Mengele sought Canadian visa". The third paragraph read:

Other records indicate that Mengele applied to the Canadian Embassy in Buenos Aires for a Canadian visa in 1962 under a pseudonym and that the Canadians informed American intelligence officials of the attempt.

One month earlier Mr. Sol Littman, Canadian representative of the Simon Wiesenthal Center, had written to the Prime Minister of Canada a letter where he unequivocally affirmed:²

The documents we received on Mengele, who has been the object of world-wide search since the close of WW II, produced two shocking pieces of information.

(...)

2) Mengele, employing the alias of Dr. Joseph Menke, applied to the Canadian embassy in Buenos Aires for admission to Canada as a landed immigrant in late May or early June, 1962.

The relation between Littman's letter and Blumenthal's article is established. In the course of an interview with Commission counsel in New York, Blumenthal stated "that it was Mr. Sol Littman to whom he had been

¹ Corporal W. F. Yetter, of the RCMP, testified that this article had been published in the *Ottawa Citizen* (evidence, vol. V, pp. 531-532). The photostat copy, which has been produced as exhibit P-22, does indeed bear a handwritten note to that effect. Yet the signature over the article: "by Ralph Blumenthal — the *New York Times*", and its stated origin: "New York" render the attribution of this article to an Ottawa newspaper doubtful. Be that as it may, however, "there were several articles in the media at that time" (*ibid.*) and their combined effect was obvious.

² Exhibit P-154, 20 December 1984.

directed by the Simon Wiesenthal Center in Los Angeles, who introduced the element of an application by Mengele to come to Canada from Buenos Aires".³

Littman confirmed: "I am reasonably sure that most of the information that Mr. Blumenthal printed came directly from me."⁴

In his testimony before the Commission in December 1985, Littman conceded his paternity of the assertion of facts concerning Mengele:⁵

Q. I see. Let us just take a look for a moment, if we may, at your letter of December the 29th, Exhibit 154. In that letter, sir, you assert as a fact that Mengele, employing the alias of Dr. Josef Menke, applied to the Canadian Embassy in Buenos Aires for admission to Canada as landed immigrant.

Now, I ask you, sir, whether or not — whether that assertion of fact, did it come from the documents, did it come from the Immigration Officer or did it come from Corporal Yetter?

A. The assertion of fact, Mr. Whitehall, is mine.

Q. The assertion of fact is yours?

A. Yes.

And to describe the basis of his assertion of facts, Littman could find no better words than "speculation";⁶ "impression";⁷ "possibility";⁸ and "hypotheses".⁹

The Commission could not, of course, foresee that turn of events, and it devoted some substantial time inquiring into the Mengele affair. It will now report in an effort to put this matter finally to rest.

Doctor Josef¹⁰ Mengele, the infamous "Angel of Death" of Auschwitz, was born in Günzburg, Germany on 16 March 1911. A member of state youth organizations from the age of 13, he joined the SA at the age of 22. He became a medical doctor and was admitted into the SS in 1938 where he rose to the rank of captain in 1943. The same year he was assigned to the concentration camp of Auschwitz where he conducted the cruel experiments which history has recorded. After the war he reportedly fled to South America where, at the

³ Evidence, vol. XXIII, p. 3293.

⁴ Evidence, vol. XXIII, p. 3298.

⁵ Evidence, vol. XXIV, p. 3361.

⁶ Evidence, vol. XXIII, p. 3305; vol. XXIV, p. 3363.

⁷ Evidence, vol. XXIII, pp. 3315-3316.

⁸ Evidence, vol. XXIV, p. 3363.

⁹ Evidence, vol. XXIII, p. 3316.

¹⁰ This is the spelling of Mengele's own signature: see exhibit P-149.

moment of writing, his fate remains shrouded in mystery. According, however, to certain accounts, he would have drowned in Brazil in 1979.¹¹

The only question for the Commission is that posed in the Minute-of-Council: did Mengele enter or attempt to enter Canada?

It seems that the question arose for the first time in 1962. Unfortunately, the destruction of some of the government and police files in the long period which followed robs any inquiry of the possibility of achieving absolute certainty. There remains, however, a wealth of elements which should permit the Commission to reach a conclusion "beyond a reasonable doubt".

The Commission proposes to examine the two problems in order: Did Mengele enter Canada? Did he attempt to enter Canada?

1 - *Did Mengele enter Canada?*

Like a pyramid standing unsteadily on its apex, the whole story developed out of a tip given to the Ontario Provincial Police (OPP) in January 1962 by an informant whose identity, concealed at the time, appears to have been lost. According to this informant, one Menke, living in Southern Ontario, was no other than Dr. Josef Mengele.

The OPP passed the information over to the Royal Canadian Mounted Police (RCMP) which, in turn, sought instructions from the departments of Justice and of External Affairs. This triggered inquiries in Europe: England, the Netherlands, Germany as well as contacts with the U.S. armed forces which could produce documents out of the Berlin Document Center. The sum total of this investigation was negative.

Since then, and according to standard procedure, the file of the RCMP has been destroyed. Fortunately, however, the Justice department had kept copies of several RCMP reports which contribute substantially to re-constitute the sequence of events.¹²

The Commission had been told that the OPP file had also been destroyed. Further inquiries, however, led to the discovery that the OPP file was still in existence, and it was produced as exhibit P-143.

Several federal and provincial police officers were also traced, as well as additional documents, so that the whole picture can now be quite satisfactorily

¹¹ William G. Eckert, M.D. and Wilmes R.G. Teixeira, M.D., Ph.D., "The identification of Josef Mengele — a triumph of international cooperation", in: *The American Journal of Forensic Medicine and Pathology*, September 1985, p. 188. Also a further report on new dental evidence, dated 26 March 1986, by Dr. Lowell J. Levine and Dr. Carlos F. Valerio.

¹² Exhibit C-25.

rebuilt. The Commission proposes to deal with this matter in light of the various aliases known to have been used by Mengele.

The following eight aliases are attributed to Mengele (they are numbered for convenience only):

- 1) Helmut Gregor
- 2) Helmut Gregori
- 3) Helmut Gregorio
- 4) Dr. Fausto Rindon
- 5) S. Jose Alvares Astiazu
- 6) S. Jose Alvares Mengele
- 7) Joseph Menke
- 8) George Menk

The first six of the above aliases were supplied to the RCMP by Interpol-Wiesbaden.¹³ Searches were made in the various government departments which would or might have been involved had Mengele entered Canada under his own name or any one of those six aliases; they failed to produce any positive results,¹⁴ and it is now accepted that there is no point in pursuing the search in that direction.

There remain the two other aliases: Joseph Menke and George Menk. These came to the surface as a result of the information which, as indicated earlier, was supplied to the OPP in January 1962. Since both the OPP and the RCMP worked on this information, and questions have been raised about their action, it appears necessary to draw a picture of the events in their chronological order. For purposes of brevity, the Commission will use the following abbreviations:

DMJ:	Deputy Minister of Justice
External Affairs:	Under Secretary of State for External Affairs
USAREUR:	U.S. Army Europe — Central Registry
VCO:	Visa Control Officer

On the basis of the available evidence, events developed as follows:

1961

Exhibit

11 September:	Sale of a farm in Washington, County of Oxford, Ontario, halfway between Woodstock and Kitchener, by Fern E. Miller to George Menk.	P-145
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¹³ Yetter, evidence, vol. V, p. 597.

¹⁴ See evidence, *passim*, of Yetter (RCMP), Sabourin (Immigration), De Wolfe Lane (Secretary of State, Citizenship Branch), Black (External Affairs) and exhibit P-148.

1962

14 January:	Information given by a man (identity unknown) to OPP Constable J. McPherson that the German owner (since the fall of 1960, according to the informant) of a farm in Oxford County, by the name of Menk(e), looked very much like Dr. Joseph Mengele.	P-143
15 January:	McPherson reports to Graham, OPP Criminal Investigation Branch.	P-143
16 January:	OPP file opened under name "Joseph Menke". Graham reports to OPP Assistant Commissioner Franks. Franks reports to RCMP Superintendent Woods-Johnson.	P-143
17 January:	Woods-Johnson acknowledges receipt to OPP.	P-143
9 February:	RCMP submits to DMJ draft request for information to External Affairs.	P-24
16 February:	DMJ asks RCMP: what steps to be taken if Mengele is a war criminal?	P-25
23 February:	RCMP to DMJ: will ask for information from OPP. RCMP to OPP: what have been Menke's activities in Germany?	P-26 P-143
28 February:	OPP (Toronto) to OPP (London): get information from McPherson.	P-143
6 March:	OPP McPherson sends three-page report stating, <i>inter alia</i> , that the relevant information on Mengele "must be on record and available to police forces on an international level".	P-143
7 March:	OPP report sent to Franks.	P-143
9 March:	OPP report sent to RCMP.	P-143
22 March:	RCMP sends OPP information to DMJ; suggests reference to External Affairs.	C-25

1962

10 April:	McPherson reports: informant getting impatient.	P-143
13 April:	RCMP requests from DMJ instructions from Justice and External Affairs.	C-28
16 April:	Franks sends to RCMP report of 10 April to OPP.	P-143
19 April:	RCMP to OPP: waiting for instructions from Justice.	P-143
27 April:	DMJ exposes to External Affairs steps to be taken.	C-28
18 May:	Sale of farm by George Menk to Ferber.	P-146
8 June:	RCMP to DMJ: requests instructions.	C-25
18 June:	Bailey (RCMP-Chief VCO-Cologne) asks USAREUR for information on Joseph Menke alias of Mengele.	P-23
26 June:	McCharen, of USAREUR, sends to Bailey file on Mengele.	P-152
3 July:	OPP reports: McPherson will do nothing.	P-143
10 July:	RCMP Webster and Blythe go to Woodstock, are shown the farm of the suspect by McPherson and find Menk gone to parts unknown.	P-143
?	Blythe locates Menk in Kitchener, Ontario.	P-143
13 July:	VCO (The Hague) writes to the Chief VCO in Köln (Bailey) that there is nothing to report in the Netherlands.	C-25
15 July:	McPherson recommends OPP file be closed.	P-143
20 July:	OPP file closed. Bailey reports to RCMP on various sources abroad.	P-143 C-25 & P-141
31 July:	RCMP report: title search on Menk's farm, etc.	C-25

1962

3 August:	RCMP report: Menk found in Kitchener.	C-25
7 August:	RCMP overall report.	C-25
16 August:	RCMP to DMJ: considerable doubt that Menk is Mengele.	C-25
5 September:	RCMP: identification of Menk by photographs of Mengele has been negative.	C-25
6 September:	RCMP report by Blythe.	C-25
11 September:	External Affairs to DMJ: apologizes for delay due to complexity of matter; maybe extradition should be considered.	C-28
12 September:	DMJ to RCMP: copy of above.	

A certain number of facts now emerge beyond dispute:

- 1) The suspect at whom the OPP informant pointed in January 1962 was George Menk; this is established by the two deeds of purchase and sale of the farm in Oxford County where the suspect was living;
- 2) The informant gave to the OPP only the name of *Menk*, for which OPP Constable McPherson wrote *Menke*;
- 3) Probably because the search was launched for an alias of Dr. *Joseph Mengele*, the OPP opened its file in Toronto under the name of *Joseph Menke*;
- 4) This is how *Joseph Menke* appeared first as an alias for Mengele and as the caption for both the OPP and the RCMP files;
- 5) *Joseph Menke* also appears as an alias for Mengele on an index card in the USAREUR file; but that card was typed on 3 July 1962: it is information not given to Canada, but coming from Canada, i.e., a result of Bailey's letter of 18 June 1962 (exhibit P-23);
- 6) The OPP file was closed on 20 July; however on 31 July the RCMP found the true name of the suspect through its title search; that is likely the reason why, as from its report of 7 August, the RCMP started using the caption *George Menk* instead of *Joseph Menke*;
- 7) As the OPP had been conscious from the outset of the possible international implications of the matter, so the RCMP also reacted, and it repeatedly sought guidance and instructions from

the departments of Justice and of External Affairs; this goes a long way to explain the delays in the RCMP investigation.

The evidence shows that the alias *Joseph Menke* was the result of compounded errors or assumptions; it is, therefore, on *George Menk* that this inquiry ought to focus.

George Menk had landed in Canada, at the Port of Québec, on 15 June 1958. He was 44 years old.¹⁵

Some physical features were common to Mengele and Menk:

- i) They were about the same age: Mengele was born in 1911, Menk in 1914;¹⁶ in 1962 this difference may well not have shown materially;
- ii) They were about the same height: Mengele was 1.8 m,¹⁷ (6 feet); Menk was 5 feet 10 inches to 6 feet.¹⁸
- iii) They both had brown or light brown hair (*ibid.*).

Furthermore both had a wife bearing the same name: Menk's wife was called Maria, Mengele's first wife was called Irene Maria.¹⁹

But there the similarities ended. The facts militating against the Menk — Mengele connection can be summarized as follows:

- i) Mengele was never shown to be a heavy man: he was "medium build".²⁰ Menk weighed around 200 lbs.²¹
- ii) The OPP's informant felt that there were, between Mengele and Menk, "points of similarity in appearance including the shape of their head and ears".²²

However, photographs of Mengele were shown to acquaintances of Menk: according to the RCMP officer in charge, Staff Sergeant Harvey Blythe, " [they] were of the opinion that he would not, in fact, be Mengele".²³

- iii) By 1962, Mengele had a second wife and a stepson.²⁴

¹⁵ Exhibit C-26.

¹⁶ Exhibit C-26.

¹⁷ Exhibit P-27.

¹⁸ Exhibit C-25.

¹⁹ For Mengele, see exhibit P-28; for Menk, see exhibit C-26.

²⁰ Exhibits P-27 and C-25.

²¹ Exhibit C-25.

²² Exhibit P-143.

²³ *Ibid.*

²⁴ See the book quoted in footnote 63, this chapter.

Menk was divorced and had a son and a daughter in Germany.²⁵

- iv) Samples of the signature of Mengele were obtained by the Commission from the Berlin Document Center.²⁶ Two samples of the signature of George Menk appear on the deed of sale of his farm.²⁷ Those signatures were compared by Mr. Gérard de la Durantaye, document examiner since 1952 and acting head of the document section of the Ontario Centre of Forensic Sciences. Mr. de la Durantaye is an acknowledged expert in the field of hand-writing, and his impressive qualifications have not been challenged, nor indeed his conclusions.²⁸ After comparing the signatures of Mengele and Menk (together with two others which are irrelevant here), Mr. de la Durantaye concluded: "The four groups of signatures on D1 to D4 differ from each other and no significant similarities have been found between them which would indicate that two or more of these groups of signatures were written by the same person".
- v) Circumstantially, a most determining factor is the fact that, in 1962 alone, Menk made three trips to Germany:²⁹ it is unlikely that, had he been Mengele, he would have taken such risks.
- vi) Finally — recalling the pyramid standing on its head — the OPP expressed doubt on the reliability of its informant after having found that "considerable information originally received from the Informant has been proven false".³⁰

Incidentally, George Menk never became a Canadian citizen³¹ and never applied for a passport (*ibid.*) On the basis of the available information, it appears that he did not return to Canada after his last departure for Germany in late 1962.

Regarding aliases numbers 7 and 8 (see above), the evidence therefore leads to the following conclusions:

- a) *Joseph Menke* was merely the product of various errors or assumptions added one to the other and had no factual connection with Mengele;
- b) *George Menk* was not an alias of Mengele, but was the name of a person different from Mengele.

²⁵ Exhibits C-25 and C-26.

²⁶ Exhibit P-149.

²⁷ Exhibit P-146.

²⁸ Exhibit P-151.

²⁹ Exhibit C-25.

³⁰ Exhibit C-25.

³¹ Exhibit P-148.

The story of Dr. Mengele and his eight aliases is a story no part of which ever took place in Canada; so much so that Mr. Irwin Cotler, counsel for the Canadian Jewish Congress, was moved to state before the Commission on 1 May 1985:³²

It [The Freedom of Information Act] also disclosed, which was not in the Canadian reports, that, in fact, there was no evidence in that Freedom of Information Act that he [Mengele] was, in fact, in Canada.

. . . Secondly, when hearings were conducted afterwards in both the United States and in Jerusalem, on my own — I was not yet party to this Commission — I made inquiries and I was advised by those who were involved in those hearings that they had no information at that time that Mengele was in Canada.

On the whole, there exists therefore no compelling evidence that Dr. Josef Mengele ever entered Canada. On the contrary, the Commission *FINDS* without hesitation that:

6 – On the basis of the weight of the available evidence, it is established beyond a reasonable doubt that Dr. Joseph (Josef) Mengele has never entered Canada.

To this story must be added a footnote.

The name of Menke was treated as an alias of Dr. Mengele. In the course of time, however, it was uncovered that Joseph Menke was also a real person and, at that, a major in the SS forces. His record has been obtained from the Berlin Document Center and filed before the Commission as exhibit P-150.

On 25 March 1985 Mr. Sol Littman wrote to the Prime Minister of Canada (exhibit P-155). In his letter, Mr. Littman made the following assumption concerning Joseph Menke:

It was this man, who outranked Mengele in the SS, who was apparently the real subject of the enquiry conducted by Canadian authorities in 1962.

This assumption led Mr. Littman to pose several questions concerning Menke, immigration and espionage.

The existence of this SS major was not known to the police investigators in 1962, and there are absolutely no grounds to link him to the inquiries which were then carried out either in Canada or abroad. Indeed, all police files dealt with Menke as an alias of Mengele (before the reality of George Menk was discovered) and Bailey, in Germany, referred to his information “that a man . . . using the name of Joseph Menke, may be identical to Josef Mengele.”

³² Evidence, vol. V, p. 580.

An inquiry into Joseph Menke personally is, therefore, totally foreign to an inquiry into Dr. Josef Mengele. Yet it has been suggested as part of the general duties of this Commission.

The point can be summarily dealt with inasmuch as there is not a shadow of evidence that SS Major Josef Menke (as he wrote his name) ever came to Canada. The same inquiries concerning the first six aliases of Mengele were carried out on Joseph (Josef) Menke, with the same negative results.³³

The evidence concerning Joseph Menke as an alias is, of course, of equal force concerning Joseph Menke as an individual person. Those results were confirmed in late November 1985 by the departments of Employment and Immigration, Secretary of State (Citizenship) and External Affairs (Passport).³⁴

Furthermore, Joseph Menke was not disguised as George Menk. Joseph Menke was nine years older than George Menk.³⁵ The difference in their handwriting is obvious even to a layman and has been authoritatively established by Mr. de la Durantaye.³⁶

Given all those factors, the Commission *FINDS* that:

7 – Apart from being an alias for Dr. Joseph (Josef) Mengele, the name of Josef Menke was also that of an actual SS Major who, however, never came to Canada.

2 – *Did Mengele attempt to enter Canada?*

The already-quoted newspaper story of January 1985 “revealed” that, in 1962, Mengele had applied to the Canadian embassy in Buenos Aires for a Canadian visa.

In his letter of 20 December 1984, Mr. Sol Littman had conveyed to the Prime Minister of Canada the same information.

Now there was no Canadian immigration officer in post in Buenos Aires in 1962. An External Affairs officer might give an applicant a form to fill out and to send to the Department of Immigration in Ottawa where it would be processed; the Buenos Aires embassy would keep no record.³⁷

³³ See footnote 12, this chapter.

³⁴ Exhibit P-148.

³⁵ Exhibits C-26 and P-150.

³⁶ Exhibit P-151.

³⁷ Evidence, Black (External Affairs), vol. V, p. 606; O’Leary (Immigration), vol. VI, pp. 748-749, p. 867; McLaughlin (External Affairs), vol. XIV, pp. 1744-1745.

Again, searches have been made through various government departments: they have failed to turn up any positive information concerning an application for a visa by Mengele either under his own name or under any of his several known aliases.³⁸

Before the Commission, the former Solicitor General of Canada, Mr. Robert P. Kaplan, P.C., testified as follows:³⁹

We tracked Mengele to a certain extent and I received information from time to time, allegations and police evidence from various countries about Mengele, and I never heard at any time that he might have applied to come to Canada or that he might have been in Canada until the very well-known story, that Mengele was alleged to have applied to come to Canada from a South American Canadian mission. So that I never heard anyone say that there was any possibility that he had come to Canada.

The Commission, therefore, tried to find out where and what was the basis in fact for the story concerning the Buenos Aires incident.

In late 1984, documents had become available in the U.S.A. under the *Freedom of Information Act*. They have been filed before the Commission as exhibit P-152, together with Bailey's letter of June 1962, which was rendered public in Canada sometime around February 1985.

It is fair to say that the documents released in the U.S.A. make no reference whatsoever to a Buenos Aires approach by Mengele.

Commission counsel interviewed journalist Ralph Blumenthal in New York on 1 November 1985. Mr. Blumenthal freely acknowledged that he had had access to no other documents than those released in the U.S.A.; that the words "other records" used in his article referred to no other documents and, "with the benefit of hindsight . . . might appear a bit loose"; that the Buenos Aires connection had been brought to his attention during a conversation with Mr. Sol Littman who, in turn, had referred to a conversation he had had with "a retired Canadian immigration officer".⁴⁰

Some ten days later, the *New York Times*' solicitors advised Commission counsel that Mr. Blumenthal would not be permitted to appear as a witness before the Commission nor would he sign an account of his conversation and that "there would be no further communication".⁴¹ The Commission regrets the refusal of the *New York Times* to co-operate with it; subsequent events however, have robbed that refusal of its potentially negative effects.

³⁸ Evidence, Yetter (RCMP), vol. V, p. 569; Sabourin (Immigration), vol. V, p. 599; Black (External Affairs), vol. V, pp. 604-605; O'Leary (Immigration), vol. VI, pp. 772-773.

³⁹ Evidence, vol., XXI, p. 2766.

⁴⁰ Evidence, vol. XXIII, pp. 3290-3295.

⁴¹ Evidence, *ibid.* p. 3295.

Indeed, Mr. Littman admitted quite honestly that he had fed Blumenthal with the information the latter printed.⁴² The basis for his assertions was three-fold:

- a) The U.S.A.-released documents;
- b) A memo from R.H. Hodges, retired, Central Intelligence Corps officer, of New York State, tracing Mengele's wanderings back and forth between Argentina and Paraguay;⁴³
- c) A conversation with "a retired Canadian immigration officer".⁴⁴

Using Littman's own word, on that basis he "speculated" that:⁴⁵

If there is a Visa Control officer in Germany who is looking into what appeared to be an application, from where did he apply — since in those years it appeared that he was skipping back and forth between Paraguay and Buenos Aires. It seemed that the most likely possibility was that he had made his application from Buenos Aires.

There was the source of the Buenos Aires connection and of all the fracas which followed. Now: What were the facts? And what advice did Littman actually receive?

The facts

George Melvin Bailey, now retired, was stationed in June 1962 at the Canadian embassy in Cologne, West Germany. He was an officer in the RCMP and discharged the duties of chief visa control officer in West Germany.⁴⁶ His duties were essentially two-fold: he was in charge of security screening of applicants for immigration to Canada; he was also in charge of security or police inquiries requested from Canada.

In the first branch of his duties he, and his subordinates, would use the "green form" to make security checks from various sources on potential immigrants, and then make a decision. In the other branch of his duties, he would write to his sources and would report to headquarters in Canada.

Bailey's letter to USAREUR of 18 June 1962 (exhibit P-23) falls into the second category:⁴⁷ it bears on Joseph Menke "residing in Canada" (the identity of George Menk had not yet been ascertained); it is a security check asked from Canada, not an immigration check originating in Germany. Normally the USAREUR answer (exhibit P-27) would be sent back to RCMP headquarters in Ottawa.⁴⁸ That was a security check "emanating from Canada" (*ibid.*).

⁴² Evidence, vol. XXIII, p. 3298.

⁴³ Evidence, vol. XXIV, p. 3362.

⁴⁴ Exhibit P-153, p. 2.

⁴⁵ Evidence, vol. XXIV, p. 3363.

⁴⁶ Evidence, vol. XXIII, p. 3160 *ff.*

⁴⁷ *Ibid.*, p. 3166.

⁴⁸ *Ibid.*, p. 3169.

This conclusion is bolstered by Bailey's report of 20 July 1962 to RCMP headquarters concerning "Joseph Menke with alias".⁴⁹ It deals with the same case and, again, is "a result of an investigation made concerning a security request from Canada", not an immigration check.⁵⁰

This evidence of Mr. Bailey is quite consonant with the various police reports and government correspondence which have been filed: an investigation had been launched in Canada on Joseph Menke, possible alias of Mengele, the departments of Justice and of External Affairs were involved, information was sought: obviously this was a Canadian security check, not an immigration procedure. In any event, Buenos Aires certainly does not form part of the picture at this point.

Such was the situation of fact.

The advice

Here the picture gets blurred; and, much to its regret, the Commission must say that it takes a dim view of the attitude of Mr. Littman.

In his letter of 19 October 1985 (exhibit P-153), Littman wrote to one of Commission counsel that he had "presented [the available material] for interpretation to a retired Canadian immigration officer". He gave the same information to Blumenthal.⁵¹

Before the Commission, Littman corrected his letter: he had consulted not one, but two persons.⁵² Furthermore, in answer to Mr. Meighen's direct question, he refused to divulge their names in public, though he professed to be ready to give them *in camera* "... on the understanding that their names be protected and that they not be embarrassed in any way".⁵³ Littman was supported by Messrs. Matas and Cotler.⁵⁴

The Commissioner, taking a contrary view, gave detailed reasons in support of his position⁵⁵ and concluded:

So I rule that the question of Mr. Meighen is relevant, is well put in a public hearing of this Commission, and should be dealt with and should be answered here and now.

⁴⁹ Exhibit P-141.

⁵⁰ Evidence, vol. XXIII, p. 3173.

⁵¹ Evidence, vol. XXIII, p. 3293.

⁵² Evidence, vol. XXIII, pp. 3304 and 3305.

⁵³ *Ibid.*, p. 3308.

⁵⁴ *Ibid.*, pp. 3310, 3317-3319; Messrs. Matas and Cotler appeared respectively for the League for Human Rights of B'nai Brith Canada and for the Canadian Jewish Congress.

⁵⁵ *Ibid.*, pp. 3319-3324.

The Commission granted Littman's request for an adjournment. The next day, Littman agreed to submit to the Commission's ruling, after declaring:⁵⁶

Finally, I must state clearly that the conclusions I drew as a result of these conversations were mine and mine alone. If there was any error, the error was also mine.

According to Littman, the two people he had consulted were Messrs. Al Naylor and Fred Yetter. Of course the Commission called them as witnesses.

Sergeant Fred Yetter, of the RCMP, recalled a conversation with Littman concerning the documents obtained by the latter (Bailey's own letter, exhibit P-23, was not yet known). According to Yetter:⁵⁷

. . . Mr. Littman assumed or speculated that possibly it was in relation to a visa application for Mr. Mengele or Mr. Menke or whatever to apply to come to Canada.

Yetter explained to Littman the dual functions of Bailey in Germany: immigration requests from Germany or security requests from Canada. On the basis only of USAREUR's reply to Bailey, Yetter advised Littman:⁵⁸

So, there is no way that you could say that that reply that he had was in relation to an application for a visa to enter Canada. You would have to have the whole picture.

Littman was, therefore, put on notice that, in view of the paucity of available information, it was dangerous to make the assumptions with which he was playing.

Mr. Alfred C. Naylor is not a "retired immigration officer". He is an active foreign affairs officer with the Department of External Affairs, on secondment to Immigration in Toronto. He has been in the service over 38 years.⁵⁹

Mr. Naylor remembered to some extent a telephone conversation during which Littman read to him a "Bailey report" and asked whether it was accurate.⁶⁰ Naylor testified (*ibid.*):

. . . when he [Littman] read the report out, he indicated that it was from Bailey, an RCMP officer, and that — he asked me did I think the report was correct and I said I — knowing the RCMP whom I hold in very high regard — I said it would be in detail enough to accept as an accurate.

Naylor did not discuss with Littman the duties of a visa control officer,⁶¹ nor the possibility of an application by Mengele in Buenos Aires to come to Canada.⁶²

⁵⁶ Evidence, vol. XXIV, p. 3336.

⁵⁷ *Ibid.*, p. 3380.

⁵⁸ *Ibid.*, p. 3381.

⁵⁹ Evidence, vol. XXV, p. 3416.

⁶⁰ *Ibid.*, pp. 3418-3420.

⁶¹ *Ibid.*, pp. 3426 and 3427.

⁶² *Ibid.*, p. 3442.

So, there the matter rests.

There is no documentary evidence whatsoever of an attempt by Dr. Joseph Mengele to seek admission to Canada from Buenos Aires in 1962.

The affirmation has come from Mr. Sol Littman, and from him alone.

The documents which were then available to him related to a security request from Canada, not an immigration check from Germany, and do not bear out the theory of Mengele's visa application in Buenos Aires.

The advice which Littman solicited (whether it were from one or two people) did not support his assumptions, but put him on notice about their fragility.

As stated at the outset, all that Littman could rely on was "speculation, impression, possibility, hypothesis". Yet he chose to transmute them into statements of facts which he publicized, with the results that are now known.

This is a case where not a shred of evidence has been tendered to support Mr. Littman's statement to the Prime Minister of Canada on 20 December 1984, or Mr. Ralph Blumenthal's article in the *New York Times* on 23 January 1985.⁶³

Indeed Mr. Littman has stated before the Commission:⁶⁴

Well, let me put it this way. We have accepted the fact that Mengele did not come to Canada and, in all likelihood, never applied to come over to Canada. We had no difficulty accepting that.

The Commission accordingly *FINDS* without the slightest hesitation that:

8 – Dr. Joseph (Josef) Mengele did not apply in Buenos Aires in 1962 for a visa to enter Canada, either under his own name or under any of his several known aliases.

⁶³ There is not a single word about Canada in the recent book on this topic: *Mengele — The Complete Story*, by Gerald L. Posner and John Ware, McGraw-Hill Book Company, New York, 1986.

⁶⁴ Evidence, vol. XXIV, p. 3340.

Chapter I-7

THE LEGAL REMEDIES

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THE LEGAL REMEDIES

The Commission has been invited to advise the Governor-in-Council as 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."

In 1984, the Law Reform Commission of Canada made a tentative approach to the problem in its working paper on "Extraterritorial Jurisdiction".¹ However, it did not come to any firm conclusion, but recommended (p. 86):

43. That the Government of Canada authorize a study of the complex subject of war crimes including relevant aspects of international law, comparative law, constitutional law, criminal law and military law with a view to determining what war crimes legislation should be enacted by Canada to replace our present outdated legislation. Until that study is done, any other recommendations would be premature. Regardless of who undertakes the study, the Ministry of the Solicitor General of Canada and the Departments of Justice, National Defence and External Affairs should be included as participants in it.

[Footnotes omitted]

Equally well aware of this situation and of the awesome difficulties of which it was pregnant, the Commission tried to set up a task force designed to challenge those difficulties. By letters of 13 and 21 March 1985, the Commission invited the six departments of Justice, Solicitor General, Secretary of State (Citizenship), National Defence, Employment and Immigration and Secretary of State for External Affairs to delegate representatives who, together with Commission Counsel, would devote their full attention to a crash program in order to recommend to the Commission viable solutions to the questions posed by the Order-in-Council.

This invitation, however, did not generate any enthusiastic response. Outside of documents supplied by the Department of Justice and some advice from the Secretary of State (Citizenship), the Commission was thus left to its own initiative. It therefore collected all available material from government and private sources. It also commissioned eight independent studies from law

¹ Law Reform Commission, "Extraterritorial Jurisdiction", Working Paper 37, Ministry of Supply and Services, Ottawa, 1984.

professors and private practitioners across Canada. And of course it carried out its own searches. As a result, the Commission lists and will study the legal remedies in the following order of preference:

1- Extradition

2- Prosecution in Canada

- a) Under present law
 - 1. Canadian law
 - 2. International law
- b) Under amendments to the law

3- Denaturalization and Deportation

Before embarking upon a study of each remedy, it appears advisable to state, in brief, the basis for this order of preference.

Extradition, when requested and granted, would afford the opportunity of a trial in the country which is most intimately connected with the crimes alleged against the suspect. In a trial here, Canada stands in the position of a "surrogate" prosecutor. Thus extradition offers the best solution for suspected war criminals to be brought to justice, both from a legal and from a practical point of view.

In certain cases, however, extradition may not afford a workable remedy; criminal prosecution in Canada must then be considered. The Commission will look into various alternatives under Canadian law and international law. It will also discuss the advisability of various amendments to the present legislation.

As a last resort, Canada might look to denaturalization and deportation. The Commission gives to this process its lowest ranking because it does not really deal with the substantive issue of war crimes: it merely transfers the suspect to another country, provided there be one willing to accept the outcast. It is true that it is the remedy used by the U.S. Department of Justice. In his book *Quiet Neighbors*,² Allan A. Ryan, Jr. recalls the proud boast of 2,000 years ago: *Civis Romanus sum* and he comments:

(p. 340)

By revoking citizenship, the polity — the American people joined together in a society and a government — takes the most solemn and drastic step available to it: the civil equivalent of excommunication.

(p. 342)

A verdict of denaturalization is a formal decree of expulsion from our political body, a judgment that the individual is not fit to share the single common bond that unites the rest of us: the bond of citizenship.

Indeed the punishment should not be minimized; yet it does not offer the best answer to the evil of war crimes. In the opinion of the Commission, assuming that no other remedy is available, denaturalization and deportation

² Ryan, *Quiet Neighbors*, Harcourt Brace Jovanovich, New York, 1984.

could be used as a means of chasing war criminals away from Canada; but they are not the best way of really bringing them to justice.

1) Extradition

“Extradition of alleged Nazi war criminals is next to impossible.”³

This chapter will examine, at least under certain aspects, the validity of this statement.

Before proceeding with this study, a *caveat* must be sounded: the Commission will strictly limit itself to the legal aspects of extradition. Under s. 21 and s. 22 of the *Extradition Act*, the Minister of Justice possesses the discretion to order the discharge of a fugitive, once he has determined that the alleged offence or the intended prosecution is of a political character. Indeed, it is a known fact that Canada will not extradite, as a matter of policy, to a foreign country whose judicial or legal system does not provide sufficient guarantees of an independent and impartial administration of justice. Some such countries may be involved in this inquiry.

Section 7 of the *Charter of Rights and Freedoms* guarantees to everyone the benefit of the principles of fundamental justice. Whether this provision now fetters the ministerial discretion with previously unknown limitations favouring the citizen, is a question which may eventually have to be considered either by the Executive or the Judiciary; the Commission will express no view on the subject.

Under those circumstances, suffice it to say that a deliberate decision, not an oversight, explains that the Commission's analysis of the remedy of extradition in connection with war criminals shall not take into consideration the Minister's statutory discretion.

The same deliberateness has led the Commission to refuse to bow to insistent requests that it discard, as a matter of principle, the remedy of extradition: the latter falls squarely within the Commission's terms of reference.

“Extradition is the surrender by one state at the request of another of a person who is accused, or has been convicted, of a crime committed within the jurisdiction of the requesting state.”⁴

³ Williams and Castel, *Canadian Criminal Law: International and Transnational Aspects*, Butterworths, Toronto, 1981, p. 177.

⁴ La Forest, *Extradition to and from Canada*, 2nd ed., Canada Law Book Ltd., Toronto, 1977, p. 1.

Extradition is governed by the *Extradition Act*.⁵ For the machinery to be set in motion, there must be a request by a foreign government. Concerning developments since the last war, some confusion has set in as a result of statements made by former Solicitor General Robert Kaplan and by Mr. Sol Littman.

During the course of his evidence before the Commission, Mr. Kaplan stated that "there were well over 100 requests".⁶ It has now been made clear that Mr. Kaplan was referring to police investigations in relation to possible extradition rather than to formal extradition requests (*ibid.*) and that, indeed, the majority of them had been "initiated in Canada rather than initiated by a foreign request".⁷

The other confusing statement was made by Mr. Littman in a report which he wrote for the benefit of the Solicitor General of Canada and which he supplied on 23 August 1985 (the report itself is undated).^{7a} At page 34 Mr. Littman said: "It was during this time [in the early 1960s], however, that the Soviet Embassy made representations to the Canadian government for the *extradition* to the U.S.S.R. of some 35 persons alleged to have committed crimes against humanity on Soviet territory. To the best of my knowledge, the Canadian government dismissed the requests as Soviet propaganda and made no official response." (emphasis added).

A close examination of the relevant documents shows that, indeed, the U.S.S.R. supplied to the Canadian government in 1979-1980 a list of 37 suspected war criminals who would have found harbour in Canada; but the Soviet Union had formally sought the extradition of only three of them. The other names were supplied for express purposes of denunciation, not extradition.

Actually, since World War II, Canada has received but a modest number of requests for the extradition of alleged war criminals. On the basis of information supplied by the departments of Justice, Solicitor General and External Affairs, as well as by the RCMP and the CSIS (Canadian Security Intelligence Service), those requests are listed as follows:

1951: from Yugoslavia, concerning one suspect;

1958: from Czechoslovakia, concerning two suspects;
requests re-submitted in 1959;

⁵ (1970) R.S.C. c. E-21. This inquiry is not concerned with the *Fugitive Offenders Act*, (1970) R.S.C. c. F-32 which provides for rendition between Commonwealth countries.

⁶ Evidence, vol. 21, p. 2752.

⁷ *Ibid.*, p. 2754.

^{7a} Exhibit P-159.

1964, 1965

and 1967: from the U.S.S.R., concerning three suspects;

1971: from Czechoslovakia, concerning one suspect;

1981: from the Netherlands, concerning one suspect;

1982: from Federal Republic of Germany, concerning one suspect (Rauca); case closed;

1982: from Poland, concerning one suspect;

1981-1984: from the U.S.S.R., concerning one suspect; renewed from 1964.

This list must now be read in conjunction with the list of countries with which Canada enjoys the benefit of "extradition arrangements" within the meaning of s. 2 of the *Extradition Act*.⁸ The following conclusions must then be kept in mind in relation with the above-mentioned requests:

- a) Canada never had an extradition treaty with Poland;
- b) There is no extradition treaty in force between Canada and the U.S.S.R.;
- c) Following the forced incorporation of Estonia, Latvia and Lithuania into the U.S.S.R., the 1928 treaties between Canada and those three Baltic states are regarded as inoperative;
- d) There are treaties in force between Canada and, among others,
 - Czechoslovakia
 - France
 - Federal Republic of Germany
 - Hungary
 - Israel
 - Italy
 - Netherlands
 - Romania
 - Yugoslavia.⁹

Given the prerequisite of a request by a foreign government, the possibility of extradition of a suspected war criminal may be conveniently examined under four different headings:

⁸ Exhibits P-15 and P-83.

⁹ Williams and Castel have written in 1981: "Canada can only extradite a fugitive pursuant to a request from a country with which we have an extradition treaty or arrangement. Records indicate that Canada has never received such an extradition request". (*op. cit.*, p. 177). This statement appears to be mistaken.

- a) Request from the Federal Republic of Germany;
- b) Request from Israel;
- c) Request from another country having a treaty with Canada;
- d) Request from a country having no treaty with Canada.

a) Request from the Federal Republic of Germany

The only request for extradition for war crimes which the Canadian courts had occasion to deal with was presented by the F.R.G. in the matter of **Helmut Rauca**.¹⁰ Rauca was extradited and died in prison while awaiting his trial in West Germany. There is no similar request pending. The Commission will, nevertheless, discuss the situation for the following reasons:

- i) A similar request may well be presented in the future;
- ii) The F.R.G. is the logical country to which to extradite war criminals, since their crimes were committed under German direction and in territories under German control;
- iii) Experience has shown that in recent West German trials, evidence of the commission of war crimes could be reliably obtained from neighbouring countries.¹¹

From a practical point of view, the jurisdictional basis that the F.R.G. can assert in support of a request for extradition is territorial: that the offence has been "committed within the territory of" the F.R.G., i.e., "all territory, waters and airspace under its jurisdiction".¹² This assertion involves two basic assumptions, both of which have been accepted by the Canadian courts in **Rauca**:

- i) That the F.R.G. "is not the 'legal successor' to the German Reich, but is identical with the German Reich, even though territorially it is not identical with the Reich";¹³
- ii) That " 'territory' as used in the treaty under consideration includes those areas occupied by and under the *de facto* control of Germany during the Second World War."¹⁴

¹⁰ **Federal Republic of Germany v. Rauca**, 1982, 38 *O.R.* (2d) 705, aff'd by 1983, 41 *O.R.* (2d) 225.

¹¹ **State Court of Hamburg, re Victor Bernhard Arajs**, 27 October 1980. **State Court of Munich, re Dr. Kurt Christmann**, 19 December 1980.

¹² Extradition Treaty between Canada and Germany, 1979 T.S. no. 18, art. I and XXX (1).

¹³ 41 *O.R.* (2nd) 225, p. 235.

¹⁴ *Ibid.*, p. 249.

By way of illustration, those two propositions underpinned the order of extradition against Rauca for crimes allegedly committed in Lithuania whilst this country was under Nazi Germany occupation.

It is worth noting, in passing, that even though the treaty between Canada and Germany came into force in 1979, s. 12 of the *Extradition Act* makes it applicable to crimes "committed . . . before the date of the arrangement".

For the rest, there is no point in belabouring the various questions which were raised and solved in *Rauca*: the stage has now been set for other requests by the F.R.G., should it wish to proceed.

The Commission *FINDS* that

- 9- Extradition of a war criminal to the Federal Republic of Germany should, if requested, be favourably considered, once *prima facie* evidence has been brought of the suspect's commission of the alleged crime.

b) Request from Israel

At first glance, considerable hurdles would have to be overcome by the State of Israel: indeed, the war crimes were committed before it existed, on a territory which was not its own, and against people who, by definition, have only become its nationals later on, if at all.

Yet Israel has affirmed its jurisdiction against all those odds in the matter of *Eichmann*.¹⁵

The District Court stated:¹⁶

(p. 56)

The principle of continuity applies also to the power to legislate: the Israel legislator may amend or supplement Mandatory legislation retroactively by enacting laws applicable to criminal acts which were committed prior to the establishment of the State.

(p. 57)

The fact that this people has since the catastrophe changed from object to subject, from the victim of racial crime to the possessor of authority to punish the criminals, is a great historic right that cannot be abrogated. The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of the law of nations.

¹⁵ *Attorney General of the Government of Israel v. Eichmann*, 1961, 36 *I.L.R.*, 5 District Court, p. 18; 1962, Supreme Court, p. 277.

¹⁶ *Ibid.*, pp. 56 and 57.

The Supreme Court of Israel confirmed:

(p. 304)

We sum up our views on this subject as follows. Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

However, the 1967 *Extradition Agreement* between Canada and Israel¹⁷ presents two insuperable obstacles to extradition requests by Israel on account of war crimes:

- i) Under its art. 1, the offence must have been “committed within the territory of one party”, i.e., in this case, of the State of Israel;
- ii) Under the exchange of notes of 4 February 1969, the Agreement “shall apply only to offences committed or convictions which have taken place after the date of signature”, i.e., after 10 March 1967.

True, s. 12 of the *Extradition Act* covers crimes “committed before the date of the arrangement”. But s. 3 of the Act provides that “no provision of this Part that is inconsistent with any of the terms of the arrangement has effect to contravene the arrangement”.

The two above-quoted provisions of the Agreement are clear and no miracle of construction can render them capable of encompassing crimes committed under the aegis “of Nazi Germany during World War II”.¹⁸

The Commission therefore *FINDS* that

10- Under the 1967 *Extradition Agreement* between Canada and Israel as it now stands, no request for extradition based on Nazi war crimes can be entertained.

However, agreements are not necessarily entered into for eternity: where need arises, they can be improved. Such is the case here. The two above-mentioned obstacles can and should be lifted, both as to time and as to territory.

i) As to time

It is a singular provision which was introduced into the Canada – Israel Treaty in 1969, i.e., two years after its signature, and which prevents extradition for an offence or conviction anterior to the signature of the treaty.

¹⁷ 1969 T.S. no. 25; also 1970 *Canada Gazette*, Part I, 10 January 1970, p. 63.

¹⁸ See Order-in-Council P.C. 1985-348.

As has been seen before, the contrary principle is sanctioned at large in s. 12 of the *Extradition Act*. Also the U.S.A. – Israel Extradition Treaty¹⁹ which was signed on 10 December 1962, i.e., more than four years before the Canada – Israel Treaty, contains no exclusion in time similar to the one found in the 1969 amendment to the Canadian treaty. Indeed this situation was recently considered by the U.S. District Court in *Israel v. Demjanjuk*,²⁰ which raised a war crimes issue and where the Court said (p. 34):

The drafters could have excluded charges under this statute from the Treaty — or even all charges arising during the World War II period — had they wished to do so. Article 21 of the extradition treaty between Israel and Canada explicitly excludes “offenses committed or convictions which have taken place” before the treaty was signed. Extradition Agreement Between the Government of the State of Israel and the Government of Canada, (1970) U.N.T.S. 270 [entered into force December 19, 1969]. The United States – Israel Treaty contains no such limitation or exclusion.

In the matter of *Federal Republic of Germany v. Rauca*,²¹ the respondent was extradited, in 1982, on charges of war crimes, pursuant to the 1979 treaty between Canada and the F.R.G. which does not contain any time-limitation provision either.

The Commission was accordingly curious to find out what motives could have prompted Israel and Canada to agree, as they did, on a strictly prospective application of this treaty. The Secretary of State for External Affairs graciously made his department’s file available to the Commission.

The negotiations started in May 1964. Canada presented a draft which made the treaty retroactive to cover offences committed on or after 1 January 1949 (later internal inquiries failed to disclose the reason for the choice of that particular date). Israel commented that it did not understand the reason for that specific date and that the question should be left to the application of the parties’ respective prescription law. Canada deleted the provision from its draft.

Then Israel presented its own draft which provided, in the article dealing with ratification, that the treaty would apply to offences committed or convictions obtained not earlier than three years before the date of signature. Canada suggested that this should be included in a separate article.

The working draft for the final stage of the negotiations was furnished by the Canadian side and excluded all mention of retroactivity.

¹⁹ 14 UST. 1717.

²⁰ Misc. no. 83-349, Northern District of Ohio, 15 April 1985.

²¹ See footnote 8, this chapter.

Apparently it had been decided "to let the law take its course".

The treaty, silent on the matter, was signed in Ottawa on 10 March 1967. On 17 March, the Honourable Paul Martin wrote to Senator David Croll: "Israel never suggested that war crimes should be covered by this Agreement". But in the following months the question of retroactivity in general gave rise to a flurry of letters and memos within the civil service, where External Affairs felt that "the subject is of considerable importance".

However, throughout those exchanges one definitely senses that Canada was not interested in retroactive application of the treaty and was looking for a way to make this conclusion clear, without embarrassing complications. Finally, Israel agreed to non-retroactivity and even went so far as to suggest the exact wording of a suitable amendment to the treaty. Save one word — without importance here — this is exactly the text of the amendment "proposed" by Canada on 4 February 1969 and "accepted" by Israel on the same day.

In the field of war crimes, this Amendment is a cruel embarrassment. It covers both offences and convictions posterior to the date of signature of the treaty. As to offences, this is a clear bar to extradition for war crimes. As to convictions, in theory a conviction could conceivably be obtained now in Israel, on which this state could found an extradition request. But this Inquiry is interested only in alleged war criminals who are "currently resident in Canada": by definition, the conviction would have to be registered in absentia. Now s. 2 of the *Extradition Act* excludes from the very definition of conviction "a condemnation under foreign law by reason of contumacy". All avenues are thus blocked under the 1969 Amendment.

The Commission is ignorant why the question of war criminals was apparently not raised by Israel either during the original negotiations or during the discussions which led to the amendment to the treaty. However that may be, abrogating this amendment should be the first task of those who are interested in bringing war criminals to justice.

In the course of the testimony which the former Solicitor General of Canada, Mr. Robert P. Kaplan, P.C., gave before the Commission on 9 October 1985, he stated:²²

I am suggesting that the bar which exists in our treaty ought to be removed. On the recent visit to Canada of the Foreign Minister of Israel, Yitzhak Shamir, I raised the matter with him in a meeting that he had with some members of the Liberal caucus in Ottawa. After raising the point, he took note of it, and a few weeks later we were informed that Israel would be prepared to see the treaty amended in that way.

For all those reasons, it would be appropriate, and consonant with the general policy of the *Extradition Act*, that the 1969 Amendment to the Canada – Israel Treaty be abrogated so as to let s. 12 of the *Extradition Act* have its full effect.

²² Evidence, vol. XX, p. 2621.

ii) As to territory

Curiously enough, on this count also the Canadian treaty with Israel is more restrictive than the U.S. treaty. Article I of the Canadian treaty establishes that the offence must have been "committed within the territory of one party", in this case, Israel.

In the American treaty, arts. I and III contain the following relevant provisions:

[art. I]. . . offenses . . . committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

[art. III] *When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances. . . .*

There is no reason of high policy known to the Commission why the Canadian treaty could not be broadened to incorporate the provisions found in the American treaty. For the purposes of the present discussion, it is immaterial whether Canadian laws, addressing the issue of war crimes, "provide for the punishment of such an offence in similar circumstances". Assuming, for purposes of discussion only, that they do not, the quoted provisions nevertheless allow for executive discretion, once extraditability has been found by the Court; and justice could follow its course.

On 31 October 1985 the U.S. Court of Appeals (6th Circuit) had the occasion of interpreting this particular provision of the U.S.A. – Israel Extradition Treaty when it dismissed Demjanjuk's last appeal:²³

We agree with the two courts which have construed the language which is common to the treaties with Sweden and Israel. In our view the treaty language makes two things clear: (1) the parties recognize the right to request extradition for extraterritorial crimes, and (2) the requested party has the discretion to deny extradition if its laws do not provide for punishment of offenses committed under similar circumstances. This provision does not affect the authority of a court to certify extraditability; it merely distinguishes between cases where the requested party is required to honor a request and those where it has discretion to deny a request. That the specific offense charged is not a crime in the United States does not necessarily rule out extradition.

It is true that jurisdiction must then be found to exist with the Israeli courts to deal with war crimes. The question has been given an affirmative answer, on the basis of the principle of universal jurisdiction in matters of war crimes, and of the 1950 Israel Statute: Nazis and Nazi Collaborators (punishment) Law, 5710-1950; see **Eichmann** (footnote 15) and **Demjanjuk** (footnote 20).

²³ **Demjanjuk v. Petrovsky**, U.S. Court of Appeals, Sixth Circuit, no. 85-3435, at p. 14.

The Commission accordingly *RECOMMENDS* that:

11- The 1967 extradition agreement between Canada and Israel should be amended:

- a) To abrogate the restriction, introduced into art. 21 in 1969, as to the date of the offence or the conviction for which extradition is sought; and
- b) To allow for executive discretion by the requested state, following the model in art. III of the 1962 U.S.A. – Israel Extradition Treaty, when extraterritorial jurisdiction is asserted by the requesting state.

c) Request from another country having a treaty with Canada

Among such countries, there are requests for extradition pending from Czechoslovakia, the Netherlands and Yugoslavia. In the three cases, treaties now binding Canada were entered into by the United Kingdom on 26 September 1898 with the Netherlands;²⁴ on 23 November 1900 with Serbia (Yugoslavia);²⁵ and on 11 November 1924 with Czechoslovakia.²⁶

Under the first two treaties, the crime must have been committed “in the territory of” the country concerned; under the third treaty, “within the jurisdiction of” that country. La Forest ventures the view that “whether this makes any difference is not entirely clear”.²⁷ However that may be, the alleged war crimes were committed whilst those countries were occupied by Nazi Germany. They might well form the basis of requests for extradition by the F.R.G., since Nazi Germany exercised at the time *de facto* jurisdiction and control over their respective territories. But this should be no obstacle for those countries, now that they have recovered their independence, to request extradition on their own authority.

Indeed, in the 1950s, Yugoslavia requested from the U.S.A. the extradition of Andrija Artukovic.²⁸ The latter moved to strike the claim “on the ground that the Federal People’s Republic of Yugoslavia is not the proper demanding government as the crimes, if any, were not committed within its jurisdiction.” (p. 387). The extradition commissioner denied the motion (p. 388) and allowed the request to proceed on the merits.

²⁴ Brit. Tr. Series 1899/1; *Canada Gazette* XXXII, p. 1783.

²⁵ Brit. Tr. Series 1901/8; *Canada Gazette* XXXV, p. 546.

²⁶ Can. T. S. 1928/8; *Canada Gazette* LXVIII, p. 274.

²⁷ La Forest, *op. cit.*, p. 44.

²⁸ *U.S. v. Artukovic*, 170 *F. Supp.*, p. 383.

Should there be two competing requests directed against the same individual, "his extradition shall be granted to that State whose demand is earliest in date".²⁹

The Commission accordingly *FINDS* that

- 12- Requests for extradition of war criminals by other countries having a treaty with Canada should be favourably considered, when the usual conditions provided by law are met.**

d) Request from a country having no treaty with Canada

Canada has received such requests from Poland and the U.S.S.R.. Both countries have suffered from war crimes on their territories, but there is no extradition treaty in force between either one of them and Canada.

Part II of the *Extradition Act* deals with "Extradition Irrespective of Treaty" and establishes the necessary mechanism, upon a proclamation of the Governor General (s. 35), but it applies only to "crimes . . . committed after the coming into force of this Part" (s. 36). This mechanism is therefore of no avail for Nazi war crimes.

In support of its request of 1982, Poland alleged "the provisions of Article VI of the *Convention on the Prevention and Punishment of the Crime of Genocide* adopted by the United Nations General Assembly on December 9th, 1948 to which both the Polish People's Republic and Canada have acceded." This art. VI reads as follows:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article III includes conspiracy, incitement, attempt to and complicity in genocide.

The International Penal Tribunal referred to in art. VI has never been constituted.

The only remedy foreseen by the Convention passes therefore through extradition. But in the Canadian system, extradition is a creation of statute and treaty. If there ever existed a possibility of extradition at common law, such has long ago been superseded in Canada by exclusive statutory authority.

²⁹ Article XIV of *Treaty with the Netherlands*; art. XIII of two other treaties.

³⁰ (1933) *O.R.* 675, at p. 678.

In Re: Insull,³⁰ an Ontario extradition judge decided:

. . . extradition is purely a creature of the treaty and the statute. There is no inherent power in our Courts to deal with alleged offences in a foreign state except in so far as authorized by statute validating a treaty with another country.

In the same vein La Forest writes:³¹

It is submitted, however, that, Parliament having enacted a comprehensive scheme of extradition, including power to surrender without treaty, any prerogative power in this domain has been suspended.

Indeed, art. VII of the Genocide Convention implicitly acknowledges that situation:

Genocide and the other acts enumerated in art. III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition *in accordance with their laws and treaties in force.*

(emphasis added)

But this art. VII deserves a closer examination.

The first paragraph would render, and is indeed meant to render, nugatory the power of the Minister of Justice, under s. 22 of the *Extradition Act*, to order the discharge of the fugitive when he has determined that the offence is of a political character. In matters of genocide, this was an essential provision.

As to the second paragraph of art. VII, it should first be kept in mind that when the *Extradition Act* speaks of an "extradition arrangement" as "a treaty, convention or arrangement . . . made by Her Majesty with a foreign State", it does not refer exclusively to bilateral arrangements; the definition is equally apt to cover multilateral arrangements such as an international convention. La Forest states:³²

Canada is a party to a number of multinational conventions which make provision for extradition for certain types of crime. These conventions, which apply to a large number of countries, show the desire on the part of the international community to curb transnational crime.

There remains to be seen whether the Genocide Convention contains, in the second paragraph of its art. VII, such an "extradition arrangement" which might enter the purview of the *Extradition Act*. The answer to this question hinges upon the extent of the constraining effect which one is prepared to give art. VII; and this effect depends, in turn, upon the strictness of the construction which one is led to draw from a careful reading of the provision.

Reading art. VII with a view to giving the convention the most far-reaching effect possible, one may logically argue that extradition is of the essence of the convention so that, through international co-operation, the

³¹ La Forest, *op. cit.*, p. 18.

³² La Forest, *op. cit.*, p. 31.

authors of a genocide be punished wherever they may have found a temporary refuge. The second paragraph of art. VII should therefore be read as mandatory; extradition under the convention would be compulsory irrespective of the existence of a treaty, and the reference to "laws and treaties" would only mean that they should be complied with where they exist.

Under that interpretation, the Genocide Convention stands as an extradition convention in its own right, it answers to the definition of an "extradition arrangement" and it falls under the applicable provisions of the *Extradition Act*.

Others, however, see no compelling reason to give to a convention such a wide-ranging application in the absence of clear wording to that effect. Had the United Nations wanted to achieve that compulsory result, they could easily have said so. Indeed, in the Secretary General's first draft of the convention, the relevant paragraph reads as follows: "The High Contracting Parties pledge themselves to grant extradition in cases of genocide." But the draft was amended in order to add: "in accordance with their laws and treaties in force". Some significance must be attached to that amendment; and it can only mean, upon a strict construction of the words used, that the provision was not meant to be mandatory, that extradition is not compulsory and that it can only be requested when there are laws and treaties covering the case.

Under that interpretation, the Genocide Convention does not stand as an extradition convention in its own right, it does not constitute an "extradition arrangement" under the *Extradition Act* and it does not fall under the Act.

There is no binding authority on the topic, and the learned opinions are divided.

In his treatise on *The Status of Refugees in International Law*,³³ Grahl-Madsen advocates the compulsory character of the extradition provision in the convention:

It must be assumed that the pledge to extradite shall in principle apply, also in the absence of any extradition treaty between the States concerned. The reference to laws and extradition treaties means that extradition may, however, be refused in cases where extradition would be contrary to the laws of the requested State (e.g. in the case of one of its own nationals) or to express provisions of the relevant extradition treaty. Furthermore, it means that the extradition of persons falling under the Genocide Convention is subject to the procedural provisions of extradition laws and treaties.

In his *Commentary* on the Genocide Convention,³⁴ Nehemiah Robinson started by affirming the binding effect of the convention. But he seems to have been immediately leaning towards a less sweeping conclusion:

³³ Grahl-Madsen, *The Status of Refugees in International Law*, vol. II, A.W. Sijthoff, Leyden, 1966, pp. 32-33.

³⁴ Robinson, *Commentary*, Rausen Bros., New York, 1960, pp. 87- 88.

On the basis of paragraph 2, the parties to the Convention are bound to grant extradition of persons charged with crimes falling under the Convention; ordinarily, a State, if not bound by a treaty or its own legislation (on the basis of reciprocity) can refuse extradition for any crime. However, the obligation is made conditional upon the provisions of the domestic law in the country where the culprit has found refuge and upon the treaties it has concluded with the requesting State on matters of extradition. Thus, the crimes coming under the Convention are not regarded as extraditable offenses per se but only within the general limitations of the domestic law in the State of asylum and its treaties in force, regarding extradition for non-political crimes. It should be noted that the above-mentioned Convention for the Suppression of Counterfeiting Currency of April 20, 1929, provides that the offenses dealt with by the Convention shall be deemed to be included in the various extradition treaties concluded by the contracting parties. The Genocide Convention, on the other hand, leaves all these questions to the treaties in force.

Several authors have taken the strict-constructionist point of view and sustained the non-compulsory character of art. VII of the Convention. In 1972, Professor John M. Raymond published a passionate plea against the United States joining the Genocide Convention.³⁵ Dealing specifically with art. VII, he wrote:

In point of fact, the obligation is to provide by treaty or law for such extradition.

Thus, the scheme of the Convention is that each state that is a party shall, by appropriate measures, make the specified acts punishable when committed within its jurisdiction, and extraditable when committed within the jurisdiction of any other party.

Two years later, Professor M. Cherif Bassiouni published his treatise on *International Extradition and World Public Order*,³⁶ where he expressed the opinion that,

. . . paradoxically the 1948 Genocide Convention, only requires states not to qualify genocide and other offenses described in the Convention as political offenses.

In 1977 Mr. Barry M. Schiller wrote "Life in a Symbolic Universe: Comments on the Genocide Convention and International Law."³⁷ He stated:

It appears that the full legal significance of the Genocide Convention instead lies in the good faith obligation of signatories to enter into bilateral treaties of extradition, and to disavow the characterization of genocide as a "political crime" under the terms of such treaties.

In Canada, La Forest shares the latter view:³⁸ ". . . it [the Genocide Convention] does not provide for compulsory extradition . . .".

So does Jack Silverstone:³⁹ "Article VII does not provide for compulsory extradition."

³⁵ Raymond, "Genocide: An Unconstitutional Human Rights Convention?" 12 *Santa Clara Lawyer* 294 (1972), p. 308.

³⁶ Bassiouni, *International Extradition and World Public Order*, A.W. Sijthoff, Leyden, 1974, p. 14.

³⁷ Schiller, "Life in a Symbolic Universe", 9 *S.W.U.L.R.* 47 (1977), p. 68.

³⁸ La Forest, *op. cit.*, p. 31.

³⁹ Silverstone, *War Criminals in Canada: Legislative Options*, Library of Parliament, Ottawa, 1981, p. 19.

The Commission shares the same opinion. When a contractual text is open to two interpretations, one of which respects the freedom of the parties and the wording of the convention whilst the other imposes on the parties a special duty and, on the text, a particular stricture, freedom must win. Should it be felt that such an interpretation betrays the intention of the members of the General Assembly and that the latter had actually wanted to impose on themselves new duties of co-operation to combat genocide, it is to that august body that the requesting state, Poland in this instance, should make its submission.

For the time being, Canada has taken the stand that the Genocide Convention "did not provide a legal basis for extradition":⁴⁰ the Commission approves that view.

In 1985 the U.S.S.R. renewed extradition requests which it had submitted in 1964 and 1967, basing them on the following instruments:

The Declaration on the Punishment for Crimes Committed during the War: St. James, 13 January 1942;

The Declaration on German Atrocities: Moscow, 30 October 1943;

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis: London, 8 August 1945;

United Nations General Assembly Resolution 3(I): 13 February 1946;

United Nations General Assembly Resolution 170(III): 31 October 1947.

According to Mr. W.H. Corbett,⁴¹ Canada took the following position:

Canada is not a party to the "Declaration of Hitlerites" [*Sic*] or the "Regulations of the International Military Tribunal" and is not bound by them. Canada views U.N. Resolutions as recommendations only and not binding legal obligations. None of these therefore provides a legal basis for extradition.

According to the same source, the U.S.S.R. "... responded by stating that domestic law must yield before contemporary international law which obliges all states to prosecute crimes against peace and humanity." (*Ibid.*)

One must therefore find whether the international instruments listed above create any legal obligations for the individual members of the society of nations and, in the affirmative, whether those obligations have been carried into Canadian domestic law, eventually with corresponding rights and duties.

The 1942 *St. James's Declaration* was issued by nine governments whose countries were occupied by Nazi Germany. Eight other countries, including

⁴⁰ Exhibit P-83.

⁴¹ Exhibit P-83, p. 2.

Canada, appeared as observers. The Declaration takes note of Nazi violence against civilian populations, declares as one of the principal war aims the punishment of those guilty for such crimes and expresses the international determination that judgments be passed and sentences be carried out.

It is immediately apparent that this Declaration, politically important as it may have been at the time, had none of the trappings of a treaty, imposed no legal obligation on Canada and cannot, by any stretch of imagination, serve as the foundation of an extradition order.

The 1943 *Moscow Declaration* is a declaration of policy on the part of the United Kingdom, the U.S.A. and the U.S.S.R.. It provides for the return and trial of war criminals. The three Allied Powers purported to be "speaking in the interests of the thirty-two [thirty-three] United Nations". It is not known whether Canada was consulted before, or took any position after the document was issued (exhibit P-83). In any event it is obviously not a formal international agreement; furthermore Canada is not a party to it.

The *Moscow Declaration* was an important political commitment, but it lacks the elements necessary to make it an instrument binding on Canada, creating for Canada legal obligations and thus providing a juridical basis for extradition.

The 1945 *London Agreement* was the basis for the Nürnberg trials. It was signed by the United Kingdom, the U.S.A., the U.S.S.R. and France. It provided for the accession of other governments, and some 19 did. For reasons unknown however (exhibit P-83), Canada never became a party to this Agreement.

For the same reasons, as in the case of the *Moscow Declaration*, the *London Agreement* does not provide a juridical basis for a request for extradition of war criminals from Canada.

As to the resolutions of the General Assembly of the United Nations, it must be recalled that art. X of the *Charter of the United Nations* only gives the General Assembly a power of recommendation. Such is, indeed, the very wording of the resolutions on which the U.S.S.R. relies. By definition, those resolutions do not constitute binding arrangements, quite irrespective of the votes which Canada may have cast, and again they cannot provide, under Canadian law, a juridical basis for extradition.

Thus nothing in the Soviet request could be used by a Canadian extradition judge as the legal basis for an order of committal of a suspected war criminal with a view to surrendering him to the U.S.S.R..

The Commission accordingly *FINDS* that

13- Requests for extradition of war criminals by countries having no treaty with Canada cannot be entertained either under the 1942 *St. James's Declaration*, the 1943 *Moscow Declaration*, the 1945

London Agreement, the 1946 and 1947 relevant Resolutions of the United Nations General Assembly or the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

In spite of the natural temptation to close the discussion here — since Poland and the U.S.S.R. have put forward no other argument in support of their requests for extradition — one must, in all fairness, explore another possibility: the avenue which may be opened by the *Geneva Conventions Act*⁴² adopted by Canada in 1965.

As we have already seen, an actual “treaty” between Canada and the requesting state is not an absolute necessity under the *Extradition Act*: s. 2 is satisfied provided there exist an “arrangement” by way of a “convention”, which may as well be a multilateral agreement. But three conditions precedent must be satisfied:

- a) That both Canada and the requesting state be parties to the convention;
- b) That the convention provide for extradition, thus qualifying as an “extradition arrangement”;
- c) That the convention cover acts which fall under the definition of war crimes.

By the *Geneva Conventions Act*, Parliament has “approved” the four conventions signed at Geneva on 12 August 1949 (s. 2). They deal respectively with the wounded military, the wounded seamen, prisoners of war and civilian persons. Since the requests of Poland and the U.S.S.R. deal essentially with crimes committed against civilians, the Commission will study the matter in connection with Convention IV “relative to the Protection of Civilian Persons in Time of War”.⁴³ This should not be considered as an exclusion of the possibility of requests founded on crimes committed against, for example, prisoners of war.

The Commission now turns to the three above-mentioned conditions:

- a) Canada, Poland and the U.S.S.R. are all signatories of the Convention.
- b) Article 146 of the Convention provides for extradition; its first two paragraphs read as follows:⁴⁴

⁴² (1970) R.S.C. c. G-3.

⁴³ Schedule IV of the Act.

⁴⁴ The 1977 Protocol I provides that “The High Contracting Parties shall co-operate in the matter of extradition” (art. 88.2). Canada has signed the Protocol, but never ratified it.

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

The Convention qualifies as an “extradition arrangement” under s. 2 of the *Extradition Act*. Yet, the above-noted provisions raise in turn the questions of compulsion and retroactivity.

i) Compulsion:

The Convention does not make extradition compulsory; it allows for either prosecution in Canada or extradition. But this factor does not prevent the application of the *Extradition Act*; it rather ties in nicely with the discretion given to the Minister of Justice by s. 22 (political offences) and s. 25 (generally).

ii) Retroactivity:

The *Geneva Conventions Act* was adopted in 1965. The Convention itself was signed in 1949. It is silent on its own application in time. But when it comes to extradition, s. 12 of the Act governs: it matters not whether the crime was “committed . . . before or after the date of the arrangement”.

c) The persons who are protected under the Convention are defined by its art. 4; the first paragraph will suffice for the present purposes:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Given that definition, the Convention describes the prohibited breaches in its art. 147:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

This description closely parallels that of war crimes which the Commission has given in chapter I-4.

Thus, the three conditions outlined above are filled: *Geneva Convention IV* is an “extradition arrangement” within the meaning of the *Extradition Act*.

Some allegations of the requesting states dealt with crimes committed against prisoners of war. Convention III "relative to the Treatment of Prisoners of War"⁴⁵ then becomes relevant. Article 129 provides for trial or extradition, and art. 130 describes the "grave breaches" which are prohibited. Those provisions are couched in substantially the same terms as the corresponding articles in *Convention IV* and lead to the same conclusions.

The Commission accordingly *FINDS* that

- 14- Even in the absence of a bilateral treaty, requests for extradition of war criminals from Canada may be entertained under the 1949 Geneva Conventions relative to the treatment of prisoners of war and relative to the protection of civilian persons in time of war, provided the requesting state be a party to the relevant convention (as are Poland and the U.S.S.R.) and the charge constitute both one of the "grave breaches" described in such convention and a war crime.**

In order to overcome the undeniable difficulty created by the absence of a treaty with the countries which may have an interest in trying war criminals who now reside in Canada, three other remedies have been advocated. The Commission will examine them now.

i) One remedy would be to enter into a treaty with the requesting country: this, as the French saying goes, is a "*La Palissade*". The wisdom and the practicability of the suggestion are, however, highly questionable.

ii) Another remedy would be to amend Part II of the *Extradition Act* to allow it to apply to crimes committed before, and not only after, the Proclamation extending the Act to the requesting state. Indeed, extradition treaties usually cover crimes committed as well before their signature; so does Part I of the *Extradition Act* (s. 12).

One has to go back nearly a century to find an explanation for the present contrary provision (s. 36) in Part II of the *Extradition Act*. Section 36 reads as follows:

36. This Part applies to any crime, mentioned in Schedule III, that is committed after the coming into force of this Part as regards any foreign state to which this Part has by proclamation been declared to apply.

Saving mechanical amendments, that provision comes directly from ss. 3(2) of the first ancestor of Part II of the *Extradition Act: An Act to extend the provisions of the Extradition Act*,⁴⁶ which was assented to on 2 May 1889.

⁴⁵ Schedule III of the Act.

⁴⁶ (1889) S.C. (52) Vict. (c. 36).

When Mr. Weldon, a private member, moved the first reading of the Act,⁴⁷ he mentioned that “there is an *ex post facto* clause in the Bill”.⁴⁸ This clause was contained in ss. 3(2) and read as follows:

2. The provisions of this Act shall apply to any crime mentioned in the said schedule, *whether such crime was committed before or after the coming into force of this Act, as regards any foreign state as hereinafter provided.*

(emphasis added)

After second reading, the House resolved itself into Committee⁴⁹ and a long debate took place on ss. 3(2). The first speaker, Mr. Lavergne, moved an amendment in order to delete the words which have been underlined in the above-quoted draft;⁵⁰ the purpose of the amendment was obviously to provide that the Act would not apply to crimes committed before the coming into force of the Act. There followed a discussion which was truly — and with all due respect for the distinguished members of the House — a “*dialogue de sourds*”.

The mover of the Bill, Mr. Weldon, did his best to put the matter in its proper perspective:⁵¹

Honourable members have said that a retroactive law is an unjust law and that retroactive criminal legislation is unjust legislation. I agree to that; but the element of injustice is in making a thing criminal and punishable to-day which was innocent at the time the so called criminal action was done. If a man did a thing not knowing there were penal consequences and that subsequently, legislation attaching penal consequences was enacted, then the injustice would come in, and I agree that if this Bill had such provisions it would be in its essence retroactive, and would be bad. We are not now making a criminal law; we are not defining a crime, we are not now saying that an act shall be a guilty act which was not guilty when the offence was committed. They who burned houses, they who committed burglaries, they who robbed banks and they who wrecked railway trains, knew when they committed these crimes that they were crimes and we are not now legislating to make them more criminal. By accident these criminals escaped the officers of justice and crossed the boundary line and all we say is that when a *prima facie* case is made out against them “let them go back”.

Mr. Wallace also spoke in favour of the proposed provision; but Messrs. Curran, Tisdale, Denison, Mitchell and Skinner all supported the amendment.⁵²

Those defending the Bill deprecated the situation where rascals crossed the border from the U.S.A. and flaunted in Canada their ill-gotten gains. But their opponents lamented the hardships that might be caused to those people who, after committing offences years ago, had settled in Canada and become respectable citizens (one hears an echo of that argument in connection with war criminals today).

⁴⁷ *Hansard*, House of Commons Debates, 1889, vol. I, p. 346.

⁴⁸ *Ibid.*, p. 347.

⁴⁹ *Ibid.*, vol. II, p. 1470.

⁵⁰ *Ibid.*, p. 1475.

⁵¹ *Ibid.*, p. 1476.

⁵² *Ibid.*, pp. 1475-1479.

Hansard then states laconically (*ibid.*): "Amendment agreed to".

In the Senate the debate was still shorter and gives no clue either on the change of policy embodied in the amendment.^{52a}

It is therefore impossible to find out from the parliamentary debates what moved the government in 1889 to bow to an opposition amendment striking off the *ex post facto* provision in the Bill. It appears that, a few years before, the British government had objected to Canada legislating at all on extradition and had taken the position that this matter must be regulated by treaty.⁵³

Be that as it may, the legislative history of ss. 3(2) of the 1889 Act does not shed any convincing light on the current s. 36 of the *Extradition Act*: the reasons advanced a century ago by the promoters of the original provision strike the Commission as much more cogent than the rather sentimental plea raised against it at the time, even though the latter convinced the majority of both Houses.

More recently, another objection has been raised which Professor L.C. Green has stated in short, as follows:⁵⁴

Any attempt to charge a person with genocide in relation to acts committed during the Second World War, or grave breaches as defined in the 1949 Conventions would be met by the plea that in accordance with Article 15 of the International Covenant on Civil and Political Rights, to which Canada acceded in May 1976, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".

It should first be remembered that Professor Green was likely discussing the possibility of a prosecution in Canada; rather we are concerned here with extradition where, as we have seen, the underlying policy is different as to time.

Furthermore, it is not wholly accurate to consider that at least some grave breaches of the *Geneva Conventions* "did not constitute a criminal offence at the time when they were committed". Long before they were given the additional label of "grave breaches", such acts, which at the same time qualified as war crimes, had been prohibited as criminal: e.g., murder, rape, robbery. A prosecution would not offend, therefore, against art. 15 of the Covenant.

The 1981 memorandum of the Interdepartmental Committee chaired by Mr. Martin Low⁵⁵ presented another argument against the proposed amendment, as follows (p. 21):

^{52a} *Debates of the Senate*, 25 April 1889, pp. 605-606.

⁵³ *Ibid.*, p. 1385.

⁵⁴ Green, "Canadian Law and the Punishment of War Crimes," *Chitty's Law Journal*, vol. 28, September 1980, 249 at p. 251.

⁵⁵ Exhibit P-77, spring 1981.

Furthermore, there is an argument that the restriction of Part II to offences committed after its proclamation is intended to operate as a safeguard, since its invocation is on proclamation by the Governor in Council, without any recourse to Parliament, unlike a treaty which at least must be tabled in Parliament.

Assuming that opening the door to all "prior" offences would be considered unwise, surely no one would object to an amendment limited to war crimes: the safeguard would then actually be built into the legislation itself.

The Commission, therefore, agrees with the suggested amendment: without the long process of treaty negotiations, it would permit extradition strictly for war crimes and without running afoul of the general policy of the Act. Though the phrase "war crimes" has not actually been used in the Act, there is no doubt that the crimes generally alleged against suspected war criminals fall under one or the other of the 22 categories of offences enumerated in schedule III of the Act, namely: murder, attempted murder, manslaughter, theft, rape, abduction, indecent assault, kidnapping, robbery and conspiracy.

iii) Another suggested remedy is deportation. But it cannot avail against a Canadian citizen. However, suspected war criminals have usually been granted the privilege of Canadian citizenship. The problem will be discussed below under the heading: Denaturalization and Deportation.

The Commission accordingly *RECOMMENDS* that

- 15- Section 36 of the *Extradition Act* (1970 R.S.C. c. E-21) should be amended in order to apply to crimes — limited to war crimes — committed before the Proclamation of Part II of the Act (this principle is already enshrined in s. 12 of Part I of the Act).**

e) Addendum: offences of a political character

One more word would appear apposite.

Some may fear that attempts at extradition will always be frustrated by the plea that the alleged crimes were "of a political character".⁵⁶ This would be wrong.

War crimes have generally been committed against helpless victims: euthanasia, mass murders, general evictions, wanton destructions, etc. Those acts did absolutely not partake of "political disturbance", "physical struggle for the mastery of the government of the country", "avoidance of political persecution" which have been characterized by jurisprudence as the labels of political offences.

⁵⁶ Section 22 of the Act.

In 1966, the authorities were reviewed by the Court of Appeal of Ghana which allowed, confirming the trial judge, the extradition request of the Federal Republic of Germany against one Dr. Horst Schumann.⁵⁷ The request was founded on the systematic killing of 30,000 inmates in medical institutions and concentration camps. The defence of “offences of a political character” was unanimously dismissed. The Chief Justice wrote (p. 437):

It is clear beyond argument that the appellant's case is not covered by these principles. It is not his case that the poor helpless lunatics at the Munsungen Asylum or the Jews at Auschwitz had rebelled against the Nazi ideology and had thereby created some form of political disturbance which needed quelling, nor indeed does he claim to have committed the offence charged with a view to avoiding political persecution or prosecution.

Two years later, in 1968, the Queen's Bench Division in England was faced with the same question in **Re Gross, ex parte Treasury Solicitor**.⁵⁸ The examination of a witness in England was requested by the West German Ministry of Justice in support of the prosecution of four SS guards who were charged with murders in a concentration camp. The examination could not be ordered if, in the words of the Statute, the case involved “any criminal matter of a political character”. The Court dismissed the objection and ordered the examination to take place. The Court commented (p. 810):

One must look at the situation at the time when the offence was alleged to be committed. At that time the accused persons, so far from being at odds with the state or in political opposition to the existing government, were servants or officers of the government, and, insofar as they were actuated by political motives or by a political object or a political motive or were seeking furtherance of a political cause or campaign (assuming that the epithet “political” was apposite), it was the object, motive, cause or campaign which their own party or government was seeking to achieve.

But the “political offence” objection was given effect in 1984 by the District Court of New York in the context of the Northern Ireland struggle: **Doherty v. Government of the United Kingdom**.⁵⁹ Doherty, a member of the Provisional Irish Republican Army, was charged with the murder of a British Army Captain during an ambush. He escaped from prison and fled to the U.S.A. where he was arrested. The U.S. Court denied the extradition request presented by the United Kingdom; it held that the offence was “political” inasmuch as it had been committed in the course of an armed struggle by an organized group aiming at the overthrow of the political regime. But in the course of its discussion of the question, the Court made some comments which should be quoted at some length, because they throw an interesting light on how war crimes should be assessed:

(p. 274):

How then is the political exception doctrine to be construed and what factors should limit its scope? Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense. Surely the

⁵⁷ (1966) 39 *I.L.R.* 433.

⁵⁸ (1968) 3 *All E.R.* 804 (Chapman, J.).

⁵⁹ (1984) 599 *Fed. Supp.* 270.

atrocities at Dachau, Auschwitz, and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been, and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offense. Moreover, it would not be consistent with the policy of this nation as reflected by its participation in those trials, for an American court to shield from extradition a person charged with such crimes.

The Court concludes therefore that a proper construction of the Treaty in accordance with the law and policy of this nation, requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception of the Treaty.

(...)

(p. 275):

Whatever the precise contours of that elusive concept (political offense) may be, it was in its inception an outgrowth of the notion that a person should not be persecuted for political beliefs and was not designed to protect a person from the consequences of acts that transcend the limits of international law.

Those principles received application in the judgment rendered on 15 April 1985 by the District Court of the North District of Ohio in the matter of **Israel v. Demjanjuk**.⁶⁰ This was an extradition request based on "murder, malicious wounding, etc."; it is common knowledge that the respondent was sought for war crimes. Respondent raised the "political offense" exception provided for in art. VI (4) of the treaty between Israel and the U.S.A. The Court dismissed the plea and, in the course of a detailed discussion of the issue, said in part:

(p. 49)

The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. The murders were committed against an innocent civilian population in Poland after the invasion of Poland was completed. No allegations have been advanced, or could be sustained, claiming that those Jews and non-Jews killed were part of an active attempt to change the political structure or overthrow the occupying government.

(...)

(p. 50):

Respondent's claim that the killing of defenseless civilians at Treblinka was part of the Nazi war effort, and therefore is political in character, is frivolous and offensive.

(...)

The crimes alleged are inconsistent with international standards of civilized conduct.

(...)

⁶⁰ Misc. no. 83-349, Northern District of Ohio, 15 April 1985.

(p. 51):

The murdering of numerous civilians while a guard in a Nazi concentration camp, as part of a larger "Final Solution" to exterminate religious or ethnic groups, is not a crime of a "political character" and thus is not covered by the political offense exception to extradition.

All those comments in this recent jurisprudence apply generally to the suspected war criminals who are considered by the Commission.

The Commission therefore *FINDS* that

16- War crimes do not partake of the nature of "offences of a political character" and are not, as such, placed out of the reach of the extradition process.

As Mr. Narvey has rightly pointed out:⁶¹ "Extradition remains the best way of bringing to justice alleged Nazi war criminals found in Canada, when it is available". It may not, however, be always available: Mr. Matas has called this "the extradition gap".⁶² He has summed up the situation very succinctly:⁶³

There are, in Canada, alleged Nazi war criminals who are non-German. The crimes they were alleged to have committed were committed outside the present boundaries of the F.R.G. Canada does not have an extradition treaty with the country that has jurisdiction over the place of the crime. "Depending upon the particular circumstances of the case", the F.R.G. may not make an extradition request. In this sort of case, extradition is not a remedy.

This conclusion may be too hasty: the Commission has pointed out earlier the possibility of a recourse under the *Geneva Conventions Act*. Nevertheless, the option of prosecution in Canada remains open and raises many intriguing questions. To these we will now turn.

2) Prosecution in Canada

In March 1980, the Deputy Solicitor General wrote to his Minister:⁶⁴

No action can be initiated in Canada for the apprehension and prosecution of alleged war criminals . . .

In September 1980, Professor L.C. Green expressed the following view:⁶⁵

While it might be considered distasteful or even unjust that persons present in Canada against whom there is evidence of complicity in the commission of war crimes during the

⁶¹ Narvey, "Trial in Canada of Nazi War Criminals", 1983, 34 C.R. (3d) 126, p. 135.

⁶² Exhibit P-69, p. 32.

⁶³ *Ibid.*, p. 33.

⁶⁴ Exhibit P-108, 6 March 1980, p. 3.

⁶⁵ Green, *op. cit.*, footnote 54, p. 253.

Second World War should go unpunished, it seems clear that there is no basis in Canadian law as it now exists, and that includes the War Crimes Act, whereby such persons could be brought to trial.

In March 1981, the Interdepartmental Committee chaired by Mr. Martin Low summarized the opinion of the Department of Justice as follows:⁶⁶

The view of the Department of Justice is that as a matter of law, prosecution, either under a revised *Criminal Code* or under the existing or a revised *War Crimes Act*, is not a credible policy option for resolving the issue of war criminals.

In March 1983, the then Solicitor General of Canada, Honourable Robert P. Kaplan, stated before the Justice and Legal Affairs Committee of the House of Commons:⁶⁷

But no country has a perfect system of justice; and one of the limitations in this particular case, in dealing with these individuals, is the fact that there is no present legislation that permits a totally domestic remedy to be imposed.

Finally, in April 1983, the Ontario Court of Appeal wrote in *Rauca*,⁶⁸

... like the Chief Justice of the High Court, we are not persuaded that there is, at present, a right to prosecute the appellant for the recited crimes in Canada.

There is, therefore, a highly respectable body of opinion in Canada that the law as it now stands does not allow for the prosecution of war criminals.

But the Commission has heard impassioned pleas to the contrary; and Mr. Matas who, with Mr. Bert Raphael, Q.C., had appeared before the Court of Appeal in *Rauca* on behalf of the intervenant Canadian Jewish Congress, wrote pointedly in his brief:⁶⁹

The Canadian Jewish Congress did appear as an intervenant in the Ontario Court of Appeal, but the extent of its intervention was limited by the Court. The Congress wished to argue in Court that prosecution was possible, but was ordered by the Court not to argue that proposition.

The Ontario Court of Appeal did not state categorically that prosecution was not possible in Canada. The Court repeated, twice, only that it was "not persuaded" that prosecution was possible. In view of the fact that it heard argument for only one side, that prosecution was not possible, but refused to hear argument for the other side, that prosecution was possible, it is hardly surprising that it was not persuaded by the argument it refused to hear.

The Commission proposes therefore to examine the matter afresh. Several issues must be addressed which the Commission will consider as follows:

- a) Under present law
 1. Canadian law

⁶⁶ Exhibit P-77, p. 25.

⁶⁷ *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 124, 17 March 1983, p. 26.

⁶⁸ See footnote 10, this chapter, p. 245.

⁶⁹ Exhibit P-69, p. 75.

- i) *Criminal Code*
- ii) *War Crimes Act*

iii) *Geneva Conventions Act*

2. International law

- i) Conventional international law
- ii) Customary international law

b) Under amendments to the law

a) Under present law

1. Canadian law

- i) *Criminal Code*

There are two governing provisions in the *Criminal Code*:⁷⁰

[s. 5(2)] Subject to this Act or any other Act of the Parliament, no person shall be convicted or discharged under section 662.1 of an offence committed outside Canada.

[s. 8(a)] Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 662.1

(a) of an offence at common law.

Outside of s. 281.1,⁷¹ which deals with genocide and has obviously no retroactive effect to the last war, the *Criminal Code* contains no provision relevant to the prosecution in Canada of the authors of Nazi war crimes.

Yet it is argued that prosecution is nevertheless possible at common law.⁷²

The argument is premised on the postulate that “war crimes are common law offences in Canada”: this basic submission already needs, and lacks, a convincing demonstration.

Then the argument tries to get around the prohibition of s. 8(a) by introducing into the latter a distinction between common law offences which are prescribed by international law and those which are not: war crimes would fall into the first category, again mainly on the strength of the author’s *ipse dixit*.

Finally, the same proponent of this submission calls in aid the *Canadian Charter of Rights and Freedoms* and argues that it supercedes, by implication, s. 8(a) of the *Criminal Code*.

⁷⁰ (1970) R.S.C., c. C-34.

⁷¹ Added to the *Criminal Code* by 1970 R.S.C., c. 11 (1st Supp.), s. 1.

⁷² Exhibit P-69, p. 65 ff.

On the face of it, the whole argument is extremely fragile; it draws its strength from a postulate followed by an unsubstantiated distinction leading to an implied abrogation: it takes more than that to carry the conviction that, when Parliament enacted s. 8(a) of the *Criminal Code*, it wanted, without so saying, to preserve a right at common law which furthermore had not been exercised even once since World War II.

Also, whilst s. 426 of the *Criminal Code* provides that “every superior court of criminal jurisdiction has jurisdiction to try any indictable offence”, it must be read together with s. 5(2): “No person shall be convicted in Canada for an offence committed outside of Canada.”

It is not easy, to say the least, to find, in the absence of any statutory provision, a foundation for either the existence of the offence or the jurisdiction of a competent court. Indeed, the Commission is convinced that there is no basis on which a court in Canada could or would establish such a prosecuting mechanism so foreign to the present state of the law both as to substance and as to procedure.

However, in his brief of 22 August 1986, Mr. Narvey discusses at great length a new argument which occurred to him “only during the last several weeks”: it is drawn from s. 746 of the *Criminal Code* of 1953-1954 and aims at showing that war crimes can be prosecuted under the *Criminal Code* as it now exists.

The basic premise of the submission in Mr. Narvey’s brief is that s. 746 has survived the entry into force of the 1970 general revision of the Canadian statutes and has still effect in Canada.⁷³

Section 746 reads:

746. (1) Where proceedings for an offence against the criminal law were commenced before the coming into force of this Act, the offence shall, after the coming into force of this Act, be dealt with, inquired into, tried and determined in accordance with this Act, and any penalty, forfeiture or punishment in respect of that offence shall be imposed as if this Act had not come into force, but where, under this Act, the penalty, forfeiture or punishment in respect of the offence is reduced or mitigated in relation to the penalty, forfeiture or punishment that would have been applicable if this Act had not come into force, the provisions of this Act relating to penalty, forfeiture and punishment shall apply.

(2) Where proceedings for an offence against the criminal law are commenced after the coming into force of this Act the following provisions apply, namely,

- (a) the offence, whenever committed, shall be dealt with, inquired into, tried and determined in accordance with this Act;
- (b) if the offence was committed before the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act or by the law that would have applied if this Act had not come into force, whichever penalty, forfeiture or punishment is the less severe; and

⁷³ (1970) R.S.C. 2nd Supp., Appendix B, Schedule A, p. 411; *History and Disposal of Acts*, pp. 443 and 486; 1964-1965 S.C., c. 48.

- (c) if the offence is committed after the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture, or punishment authorized or required to be imposed by this Act.

Based on the above-mentioned premise, the reasoning then unfolds as follows:

- a) s. 746 deals with “offences against the criminal law” of Canada;
- b) violations of the laws or usages of war are offences against the criminal law;
- c) the *War Crimes Act* could have been enacted under either one or both of s. 91(7) — Military and Defence — or s.91(27) — Criminal Law — of the *Constitution Act 1867*;
- d) hence war crimes can be tried either under the *Criminal Code* or under the *War Crimes Act*;
- e) Mr. Narvey concludes as follows (p. 66):

The above discussion of venue also shows that trial under s. 746, as incorporating the words “at any place” from Regulation 6(1), meets the requirements of s. 5(2) of the *Code* for trial in Canada of an offence committed outside Canada, namely that the trial be pursuant to an Act or Acts of the Parliament of Canada.

The above interpretation of s. 746 also avoids any conflict with s. 8 of the *Code*. Trial under s. 746 would not be for a common law, British, or pre-Confederation offence, as mentioned in s. 8, but for an offence against the criminal law, as mentioned in s. 746 and interpreted above.

Intiguing and attractive at first, the argument follows quite a circuitous road — “circular”, admits Mr. Narvey at p. 54; but it suffers from a fatal flaw stemming from a failure to grasp correctly the basic legislative scheme of statute revision.

Considerable stock is made by Mr. Narvey of the mentions which appear in certain tables annexed to the 1970 Revised Statutes. But the Statute Revision Commission and its six Commissioners could not prepare any kind of table: they found their authority in the *Act Respecting the Revised Statutes of Canada*.⁷⁴ Section 4 of that Act provides:

There shall be appended to the Roll a Schedule A similar in form to the Schedule A appended to the Revised Statutes of Canada, 1952; and the Commission may include in the Schedule all Acts and parts of Acts that, though not expressly repealed, are superseded by the Acts so consolidated, or are inconsistent therewith, and all Acts and parts of Acts that were for a temporary purpose, the force of which is spent.

The Revision Commission has actually prepared that Schedule A, from which it first appears that, upon the 1970 Revised Statutes entering into force, including the revised *Criminal Code*, c. 51 of the 1953-1954 Statutes, i.e., the *Criminal Code*, is repealed *in toto*, save for s. 746 and s. 751. What has

⁷⁴ (1965) 13-14 El. II, c. 48.

happened to those sections? The Revision Commission indicates in its table entitled "History and Disposal of Acts" that the two sections were "not repealed and not consolidated"; in French: "*ni abrogé ni refondu*". So the two sections are identified by the symbol "NC/NR".

It is interesting to note that, in other appropriate cases, the Revision Commission uses the abbreviation "Om." which means: "omitted or repealed by Revision (Spent)".

Again, however, those statements by the Revision Commission find their basis and their meaning in the law; and one must go back to the above-quoted s. 4 of c. 48.

The decision not to consolidate part of a law and to mark it "Om.", i.e., spent, is based on the last part of s. 4 which authorizes the Revision Commission to include in the Schedule "all Acts and parts of Acts that were for a temporary purpose, the force of which is spent". Good examples are s. 745 and s. 747 of the *Criminal Code* which had, in turn, repealed previous Acts.

The decision not to consolidate part of a law and to mark it "NC/NR" is based as well on the previous part of s. 4 which authorizes the Revision Commission to include in the Schedule "all Acts and parts of Acts that, though not expressly repealed, are superseded by the Act so consolidated, or are inconsistent therewith". A good example of this is s. 746 of the *Criminal Code*. Section 746 may not be expressly repealed: that does not mean that it continues in force and would be applicable today. To use the very words of s. 4: in the expert judgment of the members of the Statute Revision Commission, s. 746 has become inconsistent with the *Revised Criminal Code* of 1970 or, at the very least, it is superseded by the new Code. The French text of s. 4 is still clearer. It refers to the Acts: "*qui, même si elles ne sont pas expressément abrogées, sont remplacées par les lois ainsi codifiées ou sont incompatibles avec elles*".

In other words, s. 746 died a quiet death on the day the 1970 *Revised Statutes* were born.

That is easily understandable when one keeps well in mind the nature of s. 746 itself. This is a provision which had obviously not been designed to achieve the task which Mr. Narvey would assign to it now. The marginal note says that s. 746 is "transitional". That is no doubt the reason why it was neither repealed nor consolidated in 1970. But surely its framers — and Parliament — never envisaged that it could be used to assure a "transition" over a period of half a century. The Revision Commissioners simply acted according to reason. Section 746 cannot now be called in aid to help prosecute war criminals.

The Commission accordingly *FINDS* that

17- No prosecution for Nazi war crimes can be successfully launched under the *Criminal Code* as it now stands.

ii) *War Crimes Act*⁷⁵

On 8 February 1980, the then Minister of Justice and Attorney General of Canada, Honourable Jacques Flynn, wrote to the Executive Vice-President of the Canadian Jewish Congress:⁷⁶

For these reasons, I would not seek to invoke the *War Crimes Act* for the purpose of prosecuting alleged war criminals in Canada in respect of events that took place outside Canada.

A year later the Interdepartmental Committee chaired by Mr. Martin Low concluded:⁷⁷

The Department of Justice is of the view that it is doubtful that the legislation is applicable to a trial in Canada of a civilian person. The Department of Justice consequently has concluded that the *War Crimes Act* could not now be successfully invoked as a basis for a military trial in Canada, of a Canadian citizen or resident, for offences allegedly committed outside Canada against non-Canadians.

The Commission must now examine the reasons which have apparently prompted those expressions of opinion and which led Professor Jacques Bellemare, in the study which the Commission had entrusted to him, also to conclude (p. 17):

[Translation]

Given all the limitations which are built into a prosecution under the *War Crimes Act*, as well as all the reservations which we have expressed previously, it appears to us extremely doubtful that a Nazi war criminal currently residing in Canada could be prosecuted under the Act.

Indeed, the Commission has been flooded with a number of briefs in support of the contrary view by the Canadian Jewish Congress and by Messrs. Cotler, Matas, Narvey, Richler and Silverstone. One wonders how such a debate can arise.

The *War Crimes Act* is a short piece of legislation. It contains only three sections which in their entirety read as follows:

1. The War Crimes Regulations (Canada) made by the Governor in Council on the thirtieth day of August, one thousand nine hundred and forty-five, as set out in the Schedule to this Act, are hereby re-enacted.
2. This Act shall be deemed to have come into force on the thirtieth day of August, one thousand nine hundred and forty-five, and everything purporting to have been done heretofore pursuant to the said Regulations shall be deemed to have been done pursuant to the authority of this Act.
3. This Act shall continue in force until a day fixed by proclamation of the Governor in Council and from and after that date shall be deemed to be repealed.

The Act has never been repealed.

⁷⁵ (1946) 10 George VI, c. 73.

⁷⁶ Exhibit P-108.

⁷⁷ Exhibit P-77, p. 11.

Apart from the one-year retroactivity provided for by s. 2, the whole substance of the Act is found in the schedule which contains the *War Crimes Regulations (Canada)*. They run for six thickly-printed pages. A summary is in order.

First of all, the definition of "war crime" must be noted:

"war crime" means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939.⁷⁸

The Act therefore applies only to war crimes *stricto sensu*: "It is quite clear that the War Crimes Act applies to war crimes, but not to crimes against humanity."⁷⁹

In short, the Regulations provide as follows:

- 4(1): Convening of military courts by an officer commanding Canadian forces "in the field or in occupation of enemy territory or otherwise";
- 5: Military courts are assimilated to field general courts-martial;
- 6(1): The convening officer may direct the arrest of a suspected war criminal then within the limits of his command;
- 6(3): The accused shall have no right to evidence under oath or to cross-examination at the summary hearing;
- 8: The accused cannot object to any member of the court nor plead to the jurisdiction of the court;
- 9: Prosecutor and accused are allowed the right to counsel;
- 10(1): Oral or written evidence otherwise inadmissible can be admitted;
- 10(3,4 and 5): Presumption on *prima facie* evidence of collective or vicarious criminal responsibility;
- 11(1): Sentences include the death penalty;
- 14: Mitigation of sentence is in the hands of "the senior combatant officer of the Canadian Forces in the theater in which the trial took place."

⁷⁸ Regulation 2 (f).

⁷⁹ Brief of Canadian Jewish Congress, p. 55.

No one can conceivably deny that this is legislation designed for military trials in times of war. Indeed, it served as the legal basis for the four war crime trials, involving seven accused, which Canada held in Germany shortly after the end of the war.⁸⁰

Forty years later, it is argued that this legislation should be used, in times of peace, to arrest and bring a Canadian citizen or resident before a military court in Canada and to try him for an offence committed abroad, on the basis of *ad hoc* rules of evidence and under threat of the death penalty! What more eloquent indictment could there be of that process? It would fly in the face of our most cherished liberties and our most precious institutions. As Professor Green aptly noted:⁸¹

Assuming such preemptory action to have been taken, it may be presumed that every civil and human rights organization in the country would leap to the defence of the person involved.

War crimes, heinous as they may be, must not be allowed to sway our faith in, and our respect for, the supreme law of the land.⁸²

*Canadian Bill of Rights*⁸³

dignity and worth of the human person;

respect for the rule of law;

right to life and liberty;

right to due process of law;

right to protection of the law;

protection against cruel and unusual punishment;

right to a fair hearing in accordance with the principles of fundamental justice;

right to bail;

Canadian Charter of Rights and Freedoms

right to life and liberty;

right not to be deprived thereof, except in accordance with the principles of fundamental justice;

⁸⁰ Cattanach, evidence, vol. II, p. 185.

⁸¹ Green, *op. cit.*, footnote 54, p. 253.

⁸² *Canada Act 1982*, s. 52(1).

⁸³ (1960) 8-9 Elizabeth II, c. 44.

right to be tried within a reasonable time;

right to bail;

right to trial by jury;

protection against cruel and unusual punishment.

All those goals which Canadian society has set for itself can certainly not be achieved by short-circuiting the legal process in the name of the hunt for Nazi war criminals. The Commission shares the view which Professor Maxwell Cohen expressed in his letter to the Honourable David Crombie.⁸⁴

It would be, perhaps, difficult to conceive of such a military or quasi-military court, under this 1946 Act, being applied to Canadian residents or citizens at this time.

Yet, serious people have piled up mountains of arguments in favour of the use of the *War Crimes Act*: the Commission will now examine those which appear to deserve of study. There are three of them; they are not necessarily listed by order of importance.

The *first* argument draws from authority: in **MacKay v. The Queen**⁸⁵ the Supreme Court of Canada held that the trial of a soldier by a standing court-martial, in a narcotics matter, had been fair, and that the Court had met the required criteria of impartiality.

That judgment, however, is not conclusive of the question in matters of war crimes, where a civilian is put on trial. In **MacKay**, which involved ordinary criminal offences, tradition could be called in aid: McIntyre J. wrote (p. 403):

From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason.

Of course no such tradition exists with respect to civilians, and **MacKay** cannot be considered as a binding precedent, should a court-martial attempt to try a civilian.

One can, furthermore, contrast with profit the judgment of the Supreme Court of the United States in **Toth v. Quarles**.⁸⁶ A former serviceman, returned to civilian life, was arrested by the military under a charge of murder and taken to Korea for trial by a court-martial. The Supreme Court quashed the proceedings and declared unconstitutional the Act of Congress allowing for the court-martial of a civilian. In the course of his opinion on behalf of the majority, Mr. Justice Black said:

⁸⁴ Exhibit P-87, letter of 2 January 1981, p. 4.

⁸⁵ (1980) 2 S.C.R. 370.

⁸⁶ (1955) 350 U.S. 11.

(p. 17)

... conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

(p. 22)

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

The Commission is of the opinion that the argument, in support of the *War Crimes Act*, based on authority is neither compelling nor persuasive.

The *second* argument is based on the Statute and Regulations.

Civilians in Canada could be subjected to the Act as a result of the interplay of the following provisions of the Regulations:

2(c): Convening officer;

4(1): Convening officer;

6(1): Power of arrest.

The argument follows the following course: a military court may be convened in principle by “[a]ny Canadian flag, general or air officer commanding any Canadian forces, wherever such forces may be serving, whether in the field or in occupation of enemy territory or otherwise.” The convening officer may direct the arrest of a suspected war criminal, provided he be “a person then within the limits of his command or otherwise under his control”. Those definitions cover all commands in Canada.

But, over and above the quite logical interpretation of Regulation 4(1), that its “wherever” must be restricted to the actual theater of war because of the following “whether”, the reasoning is affected by a fatal flaw: the limits of command of the military in Canada do not encompass Canadian civilians who are not otherwise subject to military jurisdiction; it would be an unwarranted and unprecedented assumption of jurisdiction by the military to try and bring a civilian in Canada before a military court under Regulation 5. Thus, Williams and Castel conclude: “War criminals presently in Canada do not fall within the jurisdiction of a convening officer.”⁸⁷

⁸⁷ Williams and Castel, *op. cit.*, footnote 3, this chapter, p. 169.

⁸⁸ Paper of 8 July 1981, submitted to the Commission, p. 13.

Jonathan Richler reaches the same conclusion in other words:⁸⁸

However, for those persons who are alleged to have committed war crimes during the Second World War and who presently reside in Canada as civilians, I would submit that their arrest and trial by a Canadian military court convened under the Regulations is not authorized.

(...)

Such persons are now subject to Canadian legislation and, in their newly acquired status of Canadian civilian, are protected by the *National Defence Act* (prior to 1950, the *Army Act* and Rules of Procedure) from being subjected to military proceedings and may now only be tried by civilian courts.

The *third* argument tends to validate the exclusion of a jury trial under the Act. It is rendered necessary in view of the protection afforded generally by s. 11 (f) of the *Canadian Charter of Rights and Freedoms*:

Any person charged with an offence has the right

(...)

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

The proponents of this argument submit that the Act falls under the exception relative to “an offence under military law tried before a military tribunal”.

That the trial take place before a military tribunal, that observation is undoubtedly sound. But that the “war crime” be an “offence under military law” is far less certain: it includes, for instance, deportation of civilian population to slave labour, which is unknown to military law.⁸⁹

Mr. Matas takes stock of the distinction between “military offences” and “strictly military offences”.⁹⁰ War crimes fall, according to him, into the first category. Yet according to his own quotation from Professor Schultz, it is the second category that comprises “offences against the rules of military order and discipline” or, in the words of the Charter, “offences under military law”.

Indeed, Mr. Matas writes further on that “war crimes . . . are offences against ordinary criminal law, judged by military tribunals”. Assuming this statement to be correct, it certainly does not square with the exception in s. 11(f) of the Charter.

The Ontario Court of Appeal was right when it wrote in **Rauca**:⁹¹

Further, a proceeding against the appellant under that Act could run afoul of s. 11(f) of the Charter which guarantees, except in the case of an offence under military law tried before a military tribunal, the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or more.

⁸⁹ *National Defence Act*, 1970 R.S.C., c. N(4), including Code of Service Discipline.

⁹⁰ Exhibit P-69, p. 90.

⁹¹ See footnote 8, this chapter, pp. 245-246.

Thus, none of the arguments which are put forward in support of the modern use of the *War Crimes Act* succeeds in achieving its purpose. The Commission shares the view expressed in his brief by Mr. John I. Laskin (p. 24): "the procedures under the *War Crimes Act* would not stand up to the legal guarantees in the Charter. The Act is essentially an out-dated piece of legislation enacted at another time and for another purpose."

The Commission accordingly *FINDS* that

18- No prosecution for Nazi war crimes can be successfully launched under the *War Crimes Act* (1946, 10 George VI, c. 73) as it now stands.

iii) *Geneva Conventions Act*⁹²

This is still another vehicle that has been advocated in certain quarters as a means to bring war criminals to justice in Canada. But again opinions are divided, and an analysis of the opposing views is indicated.

There is no necessity of coming back to the particulars of this legislation: we have already seen that this Act was adopted by Canada in 1965, and that Canada thus brought into its domestic law the four Conventions to which it is a party and which it had signed in Geneva in 1949 with a view to alleviating the evils of war for both military and civilians.

The Act provides for trial in Canada of the authors of the "grave breaches" defined in the Conventions, should any such breach, had it been committed in Canada, be an offence under Canadian law. The question is: can the Act of 1965 and the Conventions of 1949 be used to punish crimes committed during World War II? — in other words, do the Act and the Conventions have a retroactive effect?

Both the Act and the four Conventions are silent on their application in time. The matter falls, therefore, to be determined in accordance with the general principles of statutory construction. The answer would be simple, had Parliament stated clearly its intention that the Act be retroactive not only to the date of the Conventions, i.e., 1949, but even to the beginning of World War II. However, Parliament did not so state, and the proponents of retroactivity are left to their interpretation effort.

The Commission is not impressed by the argument of Messrs. Silverstone, Narvey and Cotler that a retroactive character is given to the Act through the use of the past tense in ss. 3(2): "Where a person has committed an act or omission that is an offence, etc.". True, this provision contemplates an application to past events but, read together with ss. 3(1), it cannot be

⁹² (1970) R.S.C., c. G(3).

retroactive, at most, prior to 1949. Still more logical appears Maxwell's comment that "the form 'has been' was 'often used to refer, not to a past which preceded the enactment, but to a time which will have become a past time only when the event occurs on which the statute is to operate'."⁹³

Actually, the main argument in favour of the retrospective effect of the *Geneva Conventions Act* is derived from the distinction between substantive and procedural enactments. According to Messrs. Cotler, Matas, Narvey and Silverstone, the Act is not substantive inasmuch as it does not create new offences; it is merely procedural in that it provides a new forum for trying offences already known to the law. Since nobody has a vested right in procedure, and a change in the rules is always effective at once, unless the law says otherwise, the *Geneva Conventions Act* should be "a convenient legislative vehicle"⁹⁴ to prosecute war criminals.

On the surface, the argument is attractive; but it passes lightly over other elements which would be essential to give it weight.

We are dealing here in the field of criminal law; the courts are particularly reluctant, and rightly so, to give to an enactment a retroactive effect unless the law, or its implied meaning, be quite clear on the point. For instance, if a right of appeal is granted whilst a criminal prosecution is pending, the accused cannot take advantage of that right after his conviction.⁹⁵

Furthermore, the matter does not really involve a strict question of procedure. What we are rather concerned with is the jurisdiction of Canadian courts: such is not, and cannot be, a simple matter of procedural rules; it goes to the root of the legal system and, as such, partakes of substantive law.⁹⁶

Finally the Act itself — which should not be lost sight of during this discussion — offers no indication of a retroactive intention on the part of Parliament; rather the contrary. The situation gets still clearer where the Act is appreciated in the light of its four Schedules. Such is not only a permissible process, but under the circumstances, an obviously mandatory one. Professors Emanuelli and Slosar write:⁹⁷

[Translation]

As a result of the process by which conventional international law is transformed into domestic law, an international convention becomes a part, directly or indirectly, of this

⁹³ Langan, ed., *Maxwell On Interpretation of Statutes*, (12th ed.), Sweet & Maxwell, London, 1969, p. 219.

⁹⁴ Silverstone, *op. cit.*, footnote 39, p. 14.

⁹⁵ Côté, *The Interpretation of Legislation in Canada*, Les éditions Yvon Blais Inc., Cowansville, 1984, p. 141. *The Colonial Sugar Refining Company, Limited v. Irving*, [1905] A.C. 369 (P.C.); *Doran v. Jewell* (1914), 49 S.C.R. 88; *Singer v. The King*, [1932] S.C.R. 70; *Boyer v. the King*, [1949] S.C.R. 89; *The Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038 at 1040; *R. v. Antoine* (1983), 41 O.R. (2d) 607 at 613 (C.A.).

⁹⁶ Côté, *op. cit.*, p. 140; see also authorities quoted in footnote 95.

⁹⁷ Emanuelli and Slosar, "L'application et l'interprétation des traités internationaux par le juge canadien", 1978, 13 *R.J.T.* no. 1, 69, p. 76.

[national] context and it then becomes legitimate for the judge to refer to the convention for purposes of construction of a statute.

Indeed, that is what the Supreme Court of Canada did when it interpreted the *Copyright Act of Canada* in light of the *Convention of Rome* which was reproduced as its third schedule in the case of *CAPAC v. C.T.V. Television Network Limited et al.*⁹⁸

Now art. 2 of each of the four *Geneva Conventions* provides as follows:

In addition to the provisions which *shall* be implemented in peacetime, the present Convention *shall* apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention *shall* also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto *shall* remain bound by it in their mutual relations. They *shall* furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

(emphasis added)

There could scarcely be expressed a clearer intention that the Conventions would apply to events posterior to their signature. As a minimum conclusion, there could scarcely be a case where it would be more difficult to deduce, from the text, an implied intention of retroactive application.

The Canadian Jewish Congress showed, in its submission on the point, a significant and healthy hesitation:⁹⁹

If this argument [retroactivity] is right, the prosecution under the Geneva Conventions Act of a Nazi war criminal may well succeed. There is little doubt that an accused prosecuted under the Act would raise as a defence that the Act was meant to apply only to war crimes committed after March 18, 1965. The Committee is of the opinion that the better course of action would be, rather than to prosecute under this Act, to prosecute under new legislation, of the sort described later in this report, not open to this defence.

The Commission is comforted in its conclusion by many opinions which have been conveyed or quoted to it. The Commission will briefly refer to them in chronological order.

⁹⁸ (1968) S.C.R., 676, p. 682.

⁹⁹ Brief, footnote 79, this chapter, p. 52.

Professor L.C. Green:¹⁰⁰

This means that persons accused in relation thereto could not be charged with grave breaches as these are defined under the 1949 Geneva Conventions, for these did not become operative for Canada until the enactment of the Geneva Conventions Act 1964-65 c 44.

Williams and Castel:¹⁰¹

Were it not that the Act and the Conventions are not retroactive . . .

Jonathan Richler:¹⁰²

Nevertheless, problems of retroactivity arise in two senses. First, the Geneva Conventions were only adopted in 1949. There is, therefore, some doubt as to whether they can be made to apply to offences committed during the Second World War. This objection could perhaps be met by adopting the position that the Conventions were not new law but merely declaratory of existing law and custom. Secondly, the *Geneva Conventions Act* which was the vehicle by which the Conventions were incorporated into Canadian law was not enacted until 1965 and is not retrospective. This needless to say, presents a formidable barrier to prosecution under this Act.

Interdepartmental Committee:¹⁰³

The Conventions themselves do not apply retroactively to offences committed during World War II and the legislation does not, as a result, provide any basis for action in Canada against alleged war criminals.

Court of Appeal of Ontario in **Rauca**:¹⁰⁴

Not only is the Geneva Conventions Act not a statute of general application but it is a piece of substantive law which does not have a retroactive effect.

Professor Jacques Bellemare, in his study for the Commission, concluded as follows:

[Translation]

Thus it appears clear to us that the Geneva Conventions and the Canadian enforcing Act have been designed for the future only and cannot serve as a basis for prosecuting Nazi war criminals.

Finally, in his own study for the Commission Mr. Laskin concluded (p. 29) that "the *Geneva Conventions Act* is not available to prosecute war crimes which took place during World War II."

For all those reasons the Commission *FINDS* that

19- No prosecution for Nazi war crimes can be successfully launched under the *Geneva Conventions Act* (1970 R.S.C., c. G-3) as it now stands.

¹⁰⁰ Green, *op. cit.*, footnote 54, this chapter, p. 251.

¹⁰¹ Williams and Castel, *op. cit.*, footnote 3, this chapter, p. 174.

¹⁰² Richler, *op. cit.*, footnote 88, this chapter, pp. 6 and 7.

¹⁰³ Exhibit P-77, p. 11.

¹⁰⁴ See footnote 8, this chapter, p. 245.

2. International Law

The question is whether war criminals can be prosecuted in Canada by virtue of international law alone. This question must be dealt with under its two aspects: conventional international law (under treaties, conventions and other agreements) and customary international law (under usage or custom, or general principles).

i) *Conventional international law*

It is well settled in Canada that “. . . without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power”.¹⁰⁵

The Judicial Committee of the Privy Council later stated very clearly the doctrine as to the respective fields of endeavour of the executive and the legislative branches: “Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.”¹⁰⁶

In the Supreme Court of Canada, Madame Justice Wilson took the opportunity of commenting on that aspect of the law in **Operation Dismantle Inc. et al. v. Canada et al.**:¹⁰⁷

A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation.

It has, indeed, been stated recently that [translation] “296 treaties ratified by Canada did not require specific legislation by the Parliament of Canada for their implementation”.¹⁰⁸ This does not detract, however, from the principle. It is clear that, even though Canada be a party to an international agreement providing for a right to prosecute war criminals, this agreement in itself is not sufficient to create such a remedy under Canadian law: domestic implementing

¹⁰⁵ By J. Lamont, in the Supreme Court of Canada, **Re: Arrow River and Tributaries Slide and Boom Co. Limited v. Pigeon Timber Co. Limited**, (1932) S.C.R. 405, p. 510.

¹⁰⁶ **Attorney General for Canada v. Attorney General for Ontario**, (1937) A.C. 326, p. 347. See also Macdonald, “International Treaty Law and the Domestic Law of Canada”, *Dalhousie Law Journal*, 2, 1975-76, 307; Brun et Tremblay, *Droit constitutionnel*, 1982, p. 451; Emanuelli and Slosar, “L’application et l’interprétation des traités internationaux par le juge canadien”, 1978, 13 *R.J.T.* no. 1, 69; **Francis v. R.**, (1956) S.C.R. 618; **Collin et al v. Kaplan**, (1983) 1 F.C. 496, at 499; **Vincent v. Minister of Employment and Immigration**, 48 N.R. 214, (1983) F.C.A., p. 217 and p. 221.

¹⁰⁷ (1985) 59 N.R. 1, p. 50.

¹⁰⁸ Rigaldies and Woehrling, “Le droit interne canadien et le droit international”, 1980, 21 *Cahiers de droit* 293, p. 314, footnote 64.

legislation is necessary. As from then, however, it is not in the international instrument, but in this legislation itself that the prosecution will find its true foundation.

Now there are not many such international agreements supplemented by national legislation creating a right of prosecution against war criminals in Canada; actually, only two have been drawn to the attention of the Commission: the *Geneva Conventions* and the *Convention on the Prevention and Punishment of the Crime of Genocide*. The former have been introduced into Canadian law by the *Geneva Conventions Act*;¹⁰⁹ the latter has led to the adoption of s. 281.1 of the *Criminal Code*.

However, substantial obstacles lie in the path of those who advocate the use of those pieces of legislation: firstly, they do not directly relate to war crimes. But assuming that this first obstacle could be overcome through the argument of analogy, they do not profess to be retroactive to World War II. Both laws were enacted several years later (in 1965 and 1970 respectively) and they contain no retroactive provision: in particular, the Commission is unable to discern such an intention in the wording of s. 3(2) of the *Geneva Conventions Act*.

In the opinion of the Commission, conventional international law cannot support the prosecution of war criminals in Canada.

ii) *Customary international law*

In contradistinction with the law under treaties or conventions, customary international law does become part of domestic law without the necessity of implementing legislation, saving the cases of conflicting statute law or of well-established rules of common law.

In England, the Court of Appeal has, by a majority opinion, explicitly acknowledged and sanctioned that position in 1977 in **Trendtex Trading Corporation Limited v. Central Bank of Nigeria**.¹¹⁰ The Court was dealing with the customary international law of sovereign immunity. Lord Denning wrote (p. 889):

As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change, and the courts have applied the changes without the aid of any Act of Parliament.

(...)

¹⁰⁹ (1970) R.S.C., c. G-3.

¹¹⁰ (1977) 1 *All E.R.* 881.

Seeing that the rules of international law changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.

In Canada, judicial pronouncements have not been as clear.¹¹¹ But rather than entering into a detailed study of the jurisprudence and learned commentaries, the Commission is satisfied with referring to the comprehensive analysis published in 1983 by Professors Maxwell Cohen and Anne F. Bayefsky.¹¹² The Commission shares the conclusion therein expressed “that the Canadian view of the relation of customary international law and municipal law is adoptionist” (p. 279).

For our purposes, however, that is only the first step in our examination of the matter of war crimes in Canada, in light of customary international law.

A further distinction is called for which, thin as it may appear at first glance, is bound to acquire a growing importance as the analysis of the topic progresses: it is the distinction between law as embodied in custom as such and law as embodied in the general principles recognized by the community of nations.

It is not easy — the Commission is even prepared to go as far as to say it is not possible — to state positively that international law has established, by custom, a right of prosecution of which Canada could avail itself against war criminals. The Supreme Court of Canada has recently considered the question of custom in international law in the **Newfoundland Continental Shelf Reference**.¹¹³ The Supreme Court stated (p. 118): “In order to constitute a custom there must be substantial uniformity or consistency, and general acceptance.”

In the context of the Newfoundland case, the Court then concluded (p. 124): “We think that in 1949 State practice was neither sufficiently widespread to constitute a general practice nor sufficiently consistent to constitute settled law.”

Applying those principles to the question of war crimes and without entering into an unduly long demonstration, it should suffice to say that universal jurisdiction is far from being generally recognized and that the practice of states is rather lacking in eloquence when one embarks upon an attempt at examining the various forms which, according to the International Law Commission,¹¹⁴ state practice can take, namely: treaties, decisions of

¹¹¹ See, for instance, “The Embassies Reference”, (1943) S.C.R. 208 and “The Armed Forces Reference”, (1943) S.C.R. 483, *passim*.

¹¹² Cohen and Bayefsky, “The Canadian Charter of Rights and Freedoms and Public International Law”, 61 *Canadian Bar Review* 265, 1983, pp. 276-280.

¹¹³ (1984) 1 S.C.R. 86.

¹¹⁴ (1950) *Y.B.I.L.C.* II, pp. 368-372.

international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and practice of international organizations. The poverty of those sources is blatant and obviously does not meet the standard necessary for the establishment of a customary rule at international law. In any event, even were it not so, the prohibition enacted in s. 8 of the *Criminal Code* against common law offences would remain.

International law as embodied in custom cannot act as a basis for prosecution of war criminals in Canada.

The situation is, however, different when one looks at the customary international law in the sense of “the general principles of law recognized by the community of nations”. Indeed, one might even say that we are then leaving the field of custom and entering the realm of principles. The Statute of the International Court of Justice would appear to lend some weight to such a contention since, after having listed international conventions and international customs as sources of international law, in art. 38, it adds to them in paragraph (c): “the general principles of law recognized by civilized nations”.

What the expression “the general principles of law” embraces is a matter for debate. Quoting from *Oppenheim on International Law*,¹¹⁵ the Supreme Court of Canada wrote tersely in the **Newfoundland Reference**¹¹⁶ that “[s]ource (c) refers to principles of municipal law”. With all due respect, this is rather too short. In the very preceding sentence, Oppenheim said: “The meaning of that phrase has been the subject of much discussion”; and the appended long footnote bears witness to that statement.

On 13 October 1922 a three-member Arbitration Tribunal rendered its decision in a dispute between the U.S.A. and Norway.¹¹⁷ The Tribunal said:

(p. 384):

The words “law and equity” used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.

The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state.

(...)

The tribunal cannot ignore the municipal law of the parties, unless that law is contrary to the principle of the equality of the parties, or to the principles of justice which are common to all civilized nations.

¹¹⁵ Lauterpacht, ed., *International Law: A Treatise*. By L. Oppenheim, vol. 1, 8th ed., Longmans, Green and Co., Toronto, 1955, p. 29.

¹¹⁶ *Supra*, footnote 113, this chapter, p. 117.

¹¹⁷ (1923) 17 *American Journal of International Law*, 362.

In 1949 the International Court of Justice decided the **Corfou Channel** case.¹¹⁸ In the course of discussing “general principles of law”, the Court referred to “elementary considerations of humanity, even more exacting in peace than in war” (p. 22).

In 1958, Professor Grigory I. Tunkin, President of the Soviet Association of International Law and member of the International Law Commission, gave a lecture at the Hague Academy of International Law on “Co-existence in International Law”.¹¹⁹ He discussed at some length “the problem of general principles of law”. For some authors, those are principles expressed in national legal systems; they should be distinguished from general principles of international law. For others, quite to the contrary, those principles are “first of all” general principles of international law. Yet others hold the view that the Statute of the International Court of Justice refers to “those principles of national legal systems which have entered international law by way of custom or treaty”. Professor Tunkin then proceeded to demonstrate that, in his opinion, “general principles of law can only be principles of international law” (p. 26).

The Commission has not been convinced by the curt statement of the Supreme Court of Canada that the expression “the general principles of law recognized by civilized nations” — or in a more modern way, “by the community of nations” — “refers to principles of municipal law”. At the very least, it refers to such principles as are common to all legal systems and have been elevated to the level of international norms. Indeed, such must be the noble interpretation of an expression which, through art. 7 of the European Convention on Human Rights and art. 11 of the International Covenant on Civil and Political Rights, has found its way in 1982 into art. 11 (g) of the *Canadian Charter of Rights and Freedoms*:

11: Any person charged with an offence has the right

(g) - not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

The Commission will study in depth, in the next part of this chapter, the origin, history and meaning of this provision. For the moment, what is important is to notice and remember simply its existence in the Charter; for it is thus part of “the supreme law of Canada”¹²⁰ and supercedes any inconsistent legislation which it renders *pro tanto* “of no force or effect”.

Now, no lengthy demonstration is needed to show the abhorrence of the community of nations for war crimes: the Commission refers to its chapter on “The Concept of War Criminals”. Murder (individual or *en masse*), rape and

¹¹⁸ *Recueil C.I.J.* 1949, p. 4.

¹¹⁹ 1958 *Recueil des cours*, vol. 95, p. 5.

¹²⁰ *Canada Act 1982*, (1982) U.K. c. 11, s. 52.

plunder, to name but a few, are crimes known to all nations and punished by all; when committed in times of war, they reach a specially high degree of reprobation and nobody will dare deny that they are universally banned, and their authors are liable to be condemned by virtue of "the general principles of law recognized by the community of nations". As the U.S. Military Tribunal has held at Nürnberg in the **Einsatzgruppen** case:¹²¹ ". . . all nations have held themselves bound to the rules or laws of war which came into being through common recognition and acknowledgment".

In Canada, a person charged with an offence has henceforth no right to an acquittal if the act, when committed, was criminal according to the general principles of law recognized by the community of nations. In entrenching that provision in its Constitution, Canada could not have more clearly acknowledged its respect for international law; it could not have bowed more reverently to the universal belief in a basic law common to all mankind; it could not have more eloquently adopted that law into its own legal system.

It follows that, due to this adoption of "customary" international law *lato sensu* into Canadian law through art. 11(g) of the *Canadian Charter of Rights and Freedoms*, war crimes can now form the basis of a criminal prosecution in Canada, notwithstanding the lack of any domestic law, or even any domestic law to the contrary. More particularly, s. 8 of the *Criminal Code* could not be raised as a bar to such prosecution.

Before any superior court of criminal jurisdiction in this country (s. 426, Cr. C.), a prosecution can therefore be launched against a war criminal on the basis of a violation of "the general principles of law recognized by the community of nations".

The Commission accordingly *FINDS* that:

- 20- Neither conventional international law nor customary international law *stricto sensu* can support the prosecution of war criminals in Canada.**
- 21- Prosecution of war criminals can, however, be launched on the basis of customary international law *lato sensu* inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which art. 11 (g) of the *Canadian Charter of Rights and Freedoms* has enshrined in the Constitution of Canada.**

¹²¹ *In re Ohlendorf and others, Annual Digest and Reports of Public International Law Cases, 1948, p. 656.*

b) Under amendments to the law

Thus we are naturally brought to search for new remedies to a situation which is fraught with innumerable difficulties. Assuming, for purposes of discussion, that in a given case:

- 1) No request for extradition is forthcoming from any country;
- 2) No prosecution is possible under
 - i) The *Criminal Code*;
 - ii) The *War Crimes Act*;
 - iii) The *Geneva Conventions Act*;
- 3) A prosecution under international law appears too esoteric: then what new means of action can be put in place? What new tools can be offered to the public prosecutors?

That is the question which the government has asked this Commission to consider: “. . . 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.”

Of course, this immediately brings to the surface two questions which are inextricably linked with the prosecution of suspected war criminals more than 40 years after the facts:

- i) Retroactivity of legislation;
- ii) Undue delay in prosecuting.

The Commission will first consider those two questions; it will then examine the possibility of amending Canadian laws to meet the challenge of war crimes.

1. *Retroactivity of legislation*

In legal and, more broadly, in human rights circles, the mere uttering of the word “retroactivity” raises suspicions. In the matter of **Rauca**¹²² the Chief Justice of the High Court of Ontario expressed them tersely:¹²³

The submission that legislation be enacted to apply retroactively is foreign to our concept of justice. Retrospective legislation is rightfully viewed with suspicion and when it invades the field of criminal law, it is especially repugnant. I do not consider these to be viable alternatives.

¹²² See footnote 10, this chapter.

¹²³ *Ibid.*, p. 717.

That was written on 4 November 1982. Yet a little over six months earlier, the *Canadian Charter of Rights and Freedoms*¹²⁴ had entered into force and it proclaimed, in art. 11, paragraph (g):

11. Any person charged with an offence has the right

(...)

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

This article was obviously tailored especially to fit the war crimes specifications. The question of retroactivity must therefore be given a fresh approach in the field of war crimes, in light of that specific provision. Yet, it did not spring like Athena, full-armoured from the head of Zeus. To discover its true meaning and intent, its history must be scrutinized.

Furthermore, not only are we governed by art. 11 (g) of the Canadian Charter, but it is clear beyond discussion that this article was in turn inspired by similar provisions in two well-known international instruments: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *International Covenant on Civil and Political Rights*. Those texts, and the debates which led to their adoption, are crucial to a correct modern understanding of the situation in Canada: the Commission plans to use them and their background in order to buttress its interpretation of the Canadian legal situation.

Of course, the Commission is aware of the traditional attitude of the courts which is adverse to taking into consideration extrinsic material and, more particularly, parliamentary debates for purposes of construction of statutes. But several reasons militate in favour of a relaxation of the rule and a more open approach to the question:

- a) The Charter is a part of that special brand of statute which is called a constitution; it must be construed with full consideration for the circumstances of the country and the people for whom and by whom it was adopted (the stamp of approval of the British Parliament being no more, for this purpose, than a mere formality);
- b) This body is a commission of inquiry, not a court; and it is not bound by rules of judicial interpretation though, of course, its conclusions must stand to reason;
- c) This document is the report of a commission, not the judgment of a judicial tribunal;
- d) It is a common feature of the jurisprudence of the European Commission and of the European Court of Human Rights that the

¹²⁴ *Canada Act, 1982, (1982) U.K., c. 11, schedule B, Part I.*

Travaux préparatoires are taken in consideration for the purposes of construing the European Convention and assessing its desired impact;

- e) Even the judicial rules of statutory construction have been broadened in recent years in Canada.

In this last connection, the rule had been strictly laid down by the Supreme Court of Canada 25 years ago in **Attorney General of Canada v. the Reader's Digest Association (Canada) Ltd., et al.**¹²⁵ The Chief Justice wrote (p. 782):

The dictum of Locke J., speaking for all the Members of this Court, in **Texada Mines v. Attorney General of British Columbia**, (1960 S.C.R., 713) referring to certain statements purporting to have been made by the Premier of British Columbia and the Minister of Mines, that had the evidence been tendered it would have been rejected as inadmissible, should now be declared to be a correct statement of the law. This conclusion is sufficient to dispose of the matter.

But with the passing of time the Supreme Court of Canada opened the door to a broader approach in the reference *Anti-Inflation Act*;¹²⁶ true, the emphasis there was less on the construction itself of the Act than on the circumstances which surrounded its adoption and which might help to assess its constitutional validity. Even then the case is a close relative to the matter here under consideration. The Supreme Court — both majority and minority — did not hesitate to consider a wealth of extrinsic material, including parliamentary debates: see Laskin, C.J., p. 391; Ritchie, J., p. 438; Beetz, J., p. 470.

The question arose again in **Société Asbestos Limitée v. Société nationale de l'Amiante et al.** The Court had to find the true impact of the legislation so as to determine its constitutional validity. In the Superior Court,¹²⁷ counsel for Asbestos acknowledged that he could not file certain ministerial declarations made in the National Assembly, in view of the judgment of the Supreme Court of Canada in **Reader's Digest** (supra). He established, however, other extra-parliamentary ministerial statements, and the Court came to the conclusion that such were admissible (p. 344).

The Court of Appeal confirmed the trial judge on the merits.¹²⁸ However, on the question of admissibility of evidence, the matter took a strange turn. Apparently Asbestos' counsel had a change of heart and he argued that the parliamentary declarations — to which he had renounced during the trial — should be admitted into the record. The Court of Appeal agreed by a majority of three to two. Leave to appeal was refused by the Supreme Court of Canada.¹²⁹

¹²⁵ (1961) S.C.R. 775.

¹²⁶ (1976) 2 S.C.R. p. 373.

¹²⁷ (1980) C.S. p. 331.

¹²⁸ (1981) C.A. p. 43.

¹²⁹ (1981) 1 S.C.R., p. v.

Still more recently, the Ontario Court of Appeal did not shy away, in **Rauca**,¹³⁰ from quoting from the parliamentary debates (p. 244):

It is clear from the proceedings of the Joint Committee on the Constitution of Canada that the present problem was not absent from their consideration.

And the Court went on to quote from the testimony of the Deputy Minister of Justice and the reply of a member of the Joint Committee.

Finally on 12 February 1986, former Chief Justice Sinclair of Alberta, decided the matter of **Paquette v R. no. 2**¹³¹ which involved the linguistic rights of the petitioner. Mr. Justice Sinclair relied abundantly on the parliamentary debates of 1978 on a proposed amendment to the *Criminal Code*¹³² as well as on the debates of 1980 on the proposed *Charter of Rights and Freedoms*.¹³³

It is no doubt in light of that recent evolution in Canada that Professor Robin Elliot wrote recently:¹³⁴

These three decisions, in my view, provide strong support for the argument that our courts should be permitted to have recourse to the earlier versions of the Charter as an aid to the interpretation of its provisions. The fact that in *Blaikie* and *The Senate Reference*, the legislative history of the B.N.A. Act was used as an aid in determining the constitutional status of particular provisions rather than their scope and meaning, as in *Jones*, is surely of no importance. In a sense, even the latter two cases involved problems of interpretation — the difference is that, in them, the B.N.A. Act as a whole was being interpreted rather than particular provisions thereof. Moreover, whatever arguments one could use to support a rule precluding the use of such extrinsic evidence to assist in interpreting particular provisions could, it would seem, be equally well used to suggest a similar rule in respect of the use of such evidence to assist in determining the constitutional status of other provisions. The decisions in *Blaikie* and *The Senate Reference* suggest, therefore, no less than the decision in *Jones*, that, in the constitutional sphere at least, those arguments have been rejected.

Even from a strictly judicial point of view, the Commission therefore feels justified in referring to the legislative history of s. 11(g) of the Canadian Charter and of the provisions of the international instruments which have inspired it; but this only bolsters the decision to do so which it had already reached for the extrajudicial reasons mentioned earlier.

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly called *European Convention on Human Rights* and adopted on 4 November 1950, provides as follows in its full art. 7:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

¹³⁰ See footnote 10, this chapter.

¹³¹ Court of Queen's Bench of Alberta, District of Edmonton, 12 February 1986.

¹³² Judgment, (pp. 12 to 20).

¹³³ *Ibid.*, (pp. 43 and 44).

¹³⁴ Elliot, "Interpreting the Charter — use of the earlier versions as an aid", *U.B.C. Law Review* (Charter ed.) 10, 1982, p. 20.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

But for the difference between “civilised nations” and “the community of nations” — a difference which we will encounter elsewhere and which marks the recent evolution of world society — one finds a striking similarity between that art. 7 and art. 11 (g) of the Canadian Charter. Now the *Travaux préparatoires*, which show the convoluted history of the European Convention, present some interesting features concerning art. 7.

In September 1949, the Consultative Assembly of the Council of Europe met in Strasbourg to examine the Report of the Committee on Legal and Administrative Questions.¹³⁵ This report proposed the general orientations of a future Convention on Human Rights. More particularly it contained art. 2 (3) as follows:¹³⁶

Art. 2. In this Convention, the Member States shall undertake to ensure to all persons residing within their territories;

(...)

- 3) Freedom from arbitrary arrest, detention, exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations Declaration.

This article was adopted unanimously¹³⁷ and the report was sent to the Committee of Ministers on 8 September 1949.¹³⁸

Two months later, the Committee of Ministers decided to refer the draft to a Committee of Experts.¹³⁹ This committee met in February and March, 1950¹⁴⁰ and considered various amendments. One of those was bearing directly on art. 2 (3) and was proposed by the expert of Luxembourg. The whole argument in support of the amendment should be quoted:¹⁴¹

- b) By reference to Article 11, paragraph 2, of the United Nations Declaration, Article 2, paragraph 3, enunciates a double principle; firstly, that penal laws shall not be retrospective and, secondly, the principle of the legality of punishment.

From the combination of these two rules it would seem logical that the Declaration and, as a result, the draft Convention, appear absolutely to exclude the retrospective application of penal laws, whether they are laws defining crimes or laws governing punishment.

Conceived in this way, the prohibition appears to be too absolute.

Some leading opinions consider that, in international law, the principle that penal law cannot be retrospective does not apply. After the 1939-1945 war, many texts of

¹³⁵ Council of Europe, *Collected Edition of the “Travaux préparatoires” of the European Convention on Human Rights*, vol. II, Martinus Nijhoff, The Hague, 1949, p. 3.

¹³⁶ *Ibid.*, p. 276.

¹³⁷ *Ibid.*, pp. 5 and 46.

¹³⁸ *Ibid.*, p. 274.

¹³⁹ *Ibid.*, p. 296.

¹⁴⁰ *Ibid.*, vol. III, p. 180.

¹⁴¹ *Ibid.*, p. 192.

international and municipal law rejected not only the principle of *nulla poena sine lege* but also the rule *nullum crimen sine lege*.

Even in municipal law, the principle that penal law cannot be retrospective is undoubtedly a general principle admitted by all civilized nations. It is, however, not universally admitted that there are no possible exceptions to this rule. Situations may arise in which the law-maker is forced to have recourse to a penal law which operates retrospectively. Such was indeed the case in several European States during and after the 1939-1945 war.

Some might consider that the incorporation of the text of the United Nations Declaration in the proposed Convention could be considered as a moral condemnation of these laws.

It is therefore suggested that the formula contained in the Declaration should be attenuated by eliminating the second sentence of paragraph 2 of Article 11 of the Declaration, and by adopting a more supple phraseology. The following text is suggested as a basis for discussion:

“No one shall be held guilty of any act or omission which, at the time when it was committed, did not constitute a delinquent act, either under national or international law, nor according to the general principles of law as recognised by civilized nations.”

This is the first time that one can read a reference to “the general principles of law as recognized by civilized nations”.

This amendment was referred to a sub-committee which reported¹⁴² “that it was not desirable to amend the text of paragraph 3 of article 2” and added, dealing with our specific topic:

As regards the second part of the amendment, the Sub-Committee considered that the problem raised by Mr. Welter could be solved by indicating clearly in the statement of reasons, that the Convention applied only to the future.

The Committee of Experts then discussed numerous drafts of art 2(3). Finally, in early 1950, the Committee of Experts reported to the Committee of Ministers and produced a draft convention.¹⁴³ Article 2, paragraph 3 (d) of the draft (p. 52) would later become the first paragraph of art. 7 of the Convention. The second paragraph of art. 7 did not yet exist. However, the Committee of Experts wrote (p. 22):

With regard to the principles that penal laws should not be retrospective (Art. 2 para. 3 (d)) the Committee stressed that this test did not affect laws which, under the very exceptional circumstances at the end of the second world war, were passed in order to suppress war crimes, treason and collaboration with the enemy, and did not aim at any legal or moral condemnation of these laws.

This draft convention was in turn referred to the Conference of Senior Officials which met in June 1950.¹⁴⁴ During this meeting, more precisely on 14 June, “[n]ew draft alternatives” were produced (p. 182). Article 9 reproduced

¹⁴² *Ibid.*, p. 208.

¹⁴³ *Ibid.*, vol. IV, pp. 2 and 50.

¹⁴⁴ *Ibid.*, p. 100.

in its first paragraph art. 2.3. (d) of the previous draft; but it contained a new second paragraph which read as follows (p. 188):

- 2) Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

This was the first time that this provision appeared; it had been quite likely inspired by the previously-quoted comment of the Committee of Experts.

In its final report to the Committee of Ministers (p. 242), the Conference of Senior Officials made no comments on that new provision; but it appeared in the draft convention annexed to that report (p. 274) as art. 7 (2).

With minor alterations this article re-appeared in the draft convention adopted by the Sub-Committee of the Committee of Ministers;¹⁴⁵ and subsequently in the draft convention adopted by the Committee of Ministers (p. 120) and sent to the Consultative Assembly (p. 144). Article 7 was not specifically discussed by the Assembly (pp. 210 to 350).

It is, therefore, reasonable to assume that paragraph 2 was inserted into art. 7 of the European Convention in order to render explicit what had been taken to go without saying in the original draft, namely that the provision against retroactivity "did not affect laws which . . . were passed in order to suppress war crimes, treason and collaboration with the enemy . . .".¹⁴⁶

The European Commission on Human Rights was called upon on at least three occasions to interpret art. 7, especially its paragraph 2, in connection with post-war legislation on war crimes in Belgium. In the matter of **X v. Belgium**,¹⁴⁷ the applicant was complaining about the retroactivity of a law of 1948 which deprived him of a pension to which he had become entitled before the war, but which was annulled after his condemnation to life imprisonment for collaboration with the enemy. The European Commission upheld the validity of the law of 1948 and declared the application inadmissible, in the following terms (p. 240):

Considering, in particular, with respect to the alleged violation of the principle of the legality of offences and punishments and its corollary, the principle of non-retroactivity of criminal law, as recognized in art. 7 of the Convention, that under its paragraph 2 this article does not affect the conviction and punishment of a person guilty of an act or omission that, at the time of its commission, was criminal in nature according to the general principles of law recognized by civilized nations; that it emerges from the work preparatory to the Convention that the above-mentioned paragraph 2 of art. 7 is intended to specify that this article does not affect the laws that, under the highly exceptional circumstances that arose following World War II, were passed to punish those committing war crimes or acts of treason or collaboration with the enemy, and does not seek to impose any legal or moral condemnation of those laws.

¹⁴⁵ Council of Europe, *Collected Edition of the "Travaux préparatoires" of the European Convention on Human Rights*, vol. V, Martinus Nijhoff, The Hague, 1979, p. 80.

¹⁴⁶ *Ibid.*, vol. IV, p. 22.

¹⁴⁷ *1 Yearbook of the European Convention on Human Rights*, Martinus Nijhoff, The Hague, 1957, p. 239, application 268/57 decided 20 July 1957.

The report notes that a similar decision was rendered at the same time in another application.

In de Becker v. Belgium ¹⁴⁸ the applicant had been sentenced to death for collaboration; his sentence was commuted to life imprisonment, then to 17 years in prison, then to exile. He was living in France and, under the Belgian Penal Code, he was prohibited from exercising his profession of journalist. He complained against the exile and the prohibition; only the latter complaint is relevant here. The European Commission dismissed it as follows (p. 226):

[Official translation]

Whereas the applicant contends that Article 123 *sexies* of the Belgian Penal Code, in virtue of which he is deprived of his right to exercise his profession, is a provision of criminal law and that its application to his case was a violation of Article 7 of the Convention;

Whereas Article 7 (2) of the Convention expressly states that this article shall not prejudice the trial and punishment of a person guilty of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations;

Whereas the offence committed by the applicant falls within the terms of this exception, as the preliminary work of Article 7 of the Convention clearly confirms;

Whereas it follows that the applicant's complaint concerning the deprivation of his right to exercise the profession of a journalist, insofar as it is based on an alleged breach of Article 7 of the Convention, is incompatible with the terms of the said article and, consequently, inadmissible under Article 27 (2) of the Convention.

In X. v. Belgium, ¹⁴⁹ the applicant had been fined in France for illicit profits. Upon his return to Belgium, he was imprisoned, deprived of his public office, condemned to confiscation of property and payment of damages and, finally, to automatic and perpetual forfeiture of a long series of rights. After his release from jail, the applicant complained against the retroactive deprivation of his civil rights, admittedly under a law of 1948; again the application was dismissed (p. 334):

Whereas, firstly, as regards the alleged violation of the principle that offences and penalties must be recognised as such by law, and of its corollary, the principle of the non-retroactivity of criminal law, both of which rules are enshrined in Article 7 of the Convention, it should be noted that paragraph 2 of this Article does not affect the conviction and punishment of a person guilty of an act or omission which, at the time when it was committed, was of a criminal nature according to the general principles of law recognised by civilised nations; whereas the "travaux préparatoires" on the Convention shows that the purpose of this text is to make it clear that Article 7 does not affect laws which, under the very exceptional circumstances at the end of the second world war, were passed in order to suppress war crimes, treason and collaboration with the enemy, and do not aim at any legal or moral condemnation of these laws.

¹⁴⁸ 2 *Yearbook of the European Convention on Human Rights*, Martinus Nijhoff, The Hague, 1958-59, p. 214, application 214/56 decided 9 June 1958.

¹⁴⁹ 4 *Yearbook of the European Convention on Human Rights*, Martinus Nijhoff, The Hague, 1961, p. 324, application 1028/61 decided 18 September 1961.

Both the *Travaux préparatoires* and the jurisprudence of the European Commission on Human Rights clearly show the purpose and the scope of the second paragraph of art. 7 of the European Convention: it stands as an exception to the principle of non-retroactivity of penal laws enshrined in paragraph 1 and opens the way to the prosecution and punishment of those guilty of crimes committed during World War II.

The *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations on 16 December 1966, contains in its art. 15 provisions very similar to those of art. 7 of the European Convention. Article 15 of the Covenant proclaims:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Here again the history of this article will help to grasp its meaning and purpose.

Article 15 of the Draft Covenant was debated in the Third Committee of the General Assembly of the United Nations during eight meetings in October and November 1960.¹⁵⁰ No less than 48 states took part in the discussion, but Canada kept silent. The debate centered on two Argentinian amendments: the first amendment would have replaced, in the first sentence of the first paragraph of art. 15, the words “national or international law” by the words “applicable law”; the second amendment would have deleted the second paragraph of art. 15 altogether. The two amendments were closely interrelated.

Several arguments were submitted; dealing essentially with the second paragraph, they can be summarized as follows:

To delete the second paragraph

- a) “The general principles of law recognized by the community of nations” are not a source of international law;
- b) The expression is too vague and nebulous;
- c) The expression would include religious or philosophical principles;
- d) The expression has known three meanings in the course of history, but never a precise content;

¹⁵⁰ United Nations General Assembly, 15th Session, 1960, Third Committee, 1007th to 1014th meetings, New York, A/C.3/S.R. pp. 129-166.

- e) Criminal acts cannot be defined by a reference to principles;
- f) Principles cannot be used by a judge of a criminal court within a national jurisdiction;
- g) The expression would introduce a new notion allowing judges to go outside explicitly fixed limits of law in criminal matters;
- h) The provision is illusory since no court is specified;
- i) The provision offers no protection since there is no means to implement it.

To retain the second paragraph

- a) There exists a body of “general principles of international law”;
- b) Because international law is in constant development does not mean that it does not exist;
- c) The Covenant is more than a legal text: it is the proclamation of a moral and ideological ideal;
- d) The Covenant is concerned with standards, not specific provisions;
- e) It is preferable to use “community of nations” than “civilized nations”;
- f) The provision is designed to avoid doubts about the Nürnberg and Tokyo trials;
- g) All nations are agreed that murder and torture are criminal acts;
- h) There are still many war criminals to be punished;
- i) The provision would prevent war criminals from escaping justice because their offences were not provided for under domestic or international law;
- j) The amendment would absolve persons guilty under international law;
- k) Even if the provision is vague, it is important for developing countries which have been victims of equally horrible crimes.

It clearly appears that two conceptions of the Covenant were clashing. Those who supported the Argentinian amendment took a technical approach to the draft at the same time as a rather negative attitude towards international law. Those who opposed the amendment defended the draft in the name of an ideal as well as of an explicit desire that war criminals be brought to justice. The Yugoslav delegate expressed this view best:¹⁵¹

¹⁵¹ *Ibid.*, 1013th meeting, p. 160.

The question the Committee should ask itself was whether it wished war criminals to be punished. If as he was sure it did, there could be no objection to inserting in the draft Covenants a provision which would ensure that that would be done.

Six votes in all were taken; the position of Canada was not very glorious:¹⁵²

- 1) On Argentinian amendment to delete the reference to international law in the first paragraph: rejected 47 to 23 and 10 abstentions (Canada voted in favour);
- 2) On United Kingdom amendment concerning penalties: rejected 34 to 28 and 18 abstentions (Canada voted in favour);
- 3) On paragraph 1 as drafted: adopted 56 to 0 and 24 abstentions (Canada abstained);
- 4) On Argentinian amendment to delete paragraph 2: rejected 51 to 19 and 10 abstentions (Canada abstained);
- 5) On paragraph 2 as drafted: adopted 53 to 4 and 22 abstentions (Canada abstained);
- 6) On art. 15 as a whole: adopted 56 to 0 and 23 abstentions (Canada abstained).

At the next meeting, the Canadian delegate explained her vote:¹⁵³

However, the fundamental question to be dealt with by the Committee was that of the future application of paragraph 2. (. . .)

It [the Covenant] must be drafted in clear terms to prevent it from being arbitrarily interpreted. Her delegation feared that by adopting such a paragraph simply to justify the trials of war criminals of the past, the Committee might open the way to arbitrary actions violating the very rights which the Covenant was intended to protect. She had however abstained during the vote on the second Argentine amendment, even though she was convinced of its logic and humanitarian aims, because the majority of the Committee members seemed to wish to retain the paragraph.

This was indeed a very narrow view of the question; furthermore it certainly did not elicit a deep desire on the part of Canada to pursue the fight against war criminals. It is true that some delegations had expressed a deep concern for the protection of the past: see, for instance, Sir Samuel Hoare, speaking for the United Kingdom.¹⁵⁴ But many more had taken into consideration both the past and the future.

In any event, it is clear from the debates and the votes in the Third Committee that art. 15 of the Covenant was designed, especially in its paragraph 2, to assure the success of the pursuit of war criminals and to remove impediments to their prosecution before the national courts of the countries involved.

¹⁵² *Ibid.*, pp. 162 to 164.

¹⁵³ *Ibid.*, 1014th meeting, p. 165.

¹⁵⁴ *Ibid.*, 1009th meeting, p. 141.

Coming closer to home, it is in light of those international precedents that Canadian history should now be recalled. Stripped of its accessories, the main episode started with the original government proposal before the House (2 October 1980) which was couched, in its relevant part, as follows:

11. Any one charged with an offence has the right

e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence.

The proposal was referred to a Special Joint Committee of the Senate and of the House of Commons which heard a considerable number of witnesses and received submissions from all horizons. In November 1980, briefs were submitted more especially by the Canadian Jewish Congress and the North American Jewish Students' Network – Canada. The concern which they voiced found a favourable echo in government circles. On 12 January 1981, the Minister of Justice, the Honourable Jean Chrétien, testified as follows before the Special Joint Committee:¹⁵⁵

Representations have been made by the Canadian Jewish Congress and the North American Jewish Students Association and by members of the Committee to ensure that Section 11(e) and (f) [as they were then numbered] do not preclude the possibility of prosecuting those who are alleged to have committed crimes recognized under international law. The International Covenant on Civil and Political Rights recognizes the right of a country to try to punish a person for an offence that was, at the time of its commission, recognized as such under international law even if not so recognized at the time under domestic law. The Covenant also permits the trial and punishment of a person for an offence for which he has not been tried and punished in another country.

To reflect these principles in the Charter the government is prepared to accept an amendment so as to provide that:

Anyone charged with an offence has the right not to be guilty on account of any act or omission that at the time of the act or omission did not constitute an offence under Canadian or international law.

(The balance of the amendment is irrelevant here)

Further concern was then expressed that this amendment did not go far enough. At the Committee's session of 20 January 1981, Mr. Jake Epp, speaking on behalf of the Conservative opposition, declared:¹⁵⁶

The Canadian Jewish Community has expressed some concerns that the wording of this Section would prevent the bringing to justice of war criminals. The government's amendment does not fully address these concerns even though the government, and I want to point this out, has gone some distance, we believe, in trying to address those concerns. We propose the following amendment to make sure that the concern is in fact dealt with:

11(g) Not to be found guilty on account of an act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law.

And we are adding the following words:

¹⁵⁵ Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue no. 36, p. 36:12.

¹⁵⁶ *Ibid.*, no 41, p. 47:99.

Or was criminal according to the principles of law recognized by the community of nations.

Then at the session of 28 January 1981,¹⁵⁷ both the government and the opposition formally introduced an amendment which further refined the wording of the clause:

Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

Various interventions then made clear the intention of the members of the Committee.

The amendment had been formerly put forward by the Conservative opposition. On behalf of the government, the Minister of Justice stated (*ibid.*):

If I may say so, in order to save time, this motion was presented by the government too. We, too, support it, and we have our own amendment. As a matter of convenience, we would be happy to accept the amendment of Mr. Crombie. It is exactly the same as ours.

Speaking for the Conservative Party, Mr. Epp declared (*ibid.*):

All of us have been concerned that our Bill of Rights would reflect not only Canadian practice and Canadian heritage, but as well our obligations to the international community and specifically as it related to war criminals.

I know the Jewish Students Association and the Canadian Jewish Congress have put forward amendments along these lines. I think it is a better reflection, not only on our Canadian traditions, but also on our obligations internationally and I commend, obviously, the amendment to all members.

Then speaking for the New Democratic Party, Mr. Robinson stated:¹⁵⁸

Mr. Chairman, I just wanted to very briefly associate myself with the remarks of Mr. Epp and to indicate that we fully support this amendment, that we would certainly have moved a similar amendment ourselves had we not recognized that it was being proposed by the Conservative Party. We are pleased to endorse it.

(...)

... that this Committee will recognize that Nazi war criminals must be brought to justice wherever they live, including in Canada. So we strongly support the amendment which is brought forward.

The whole matter was then summed up by the Parliamentary Secretary to the Minister of Justice, in the last seconds before the vote agreeing to the amendment (*ibid.*):

Mr. Irwin: So there is no misconception on this, Mr. Chairman, the clause does not prevent the prosecution of war criminals. By itself it does not do that. It does not stand in the way of the prosecution, but by itself it does not allow the prosecution. What it does is allow enabling legislation if the Parliament sees fit, so I think that should be clear.

¹⁵⁷ *Ibid.*, p. 47:58.

¹⁵⁸ *Ibid.*, p. 47:59.

These remarks have led Mr. Richard B. Wagner to conclude:¹⁵⁹

This last statement confirms that s. 11(g) of the Charter was specifically amended to provide for the constitutional validity of “enabling legislation” for the prosecution of Nazi War Criminals.

One can, therefore, see a clear and continuous line of thought through art. 7 of the European Convention, art. 15 of the International Covenant and art. 11(g) of the Canadian Charter; and it is this line of thought which has been captured and expressed by the learned authors who have written on the subject.

Halsbury's, dealing with paragraph 2 of art. 7 of the European Convention has put it very succinctly:¹⁶⁰ “This exception is primarily intended to permit the application of retroactive provisions of the criminal law with respect to war crimes.”

In Canada, the effect of art. 11 (g) of the Charter has been studied by various professors who have all come to the same conclusion.

Professor François Chevette, in 1982:¹⁶¹

However if, following the example of art. 15(2) of the Covenant on Civil and Political Rights and art. 7(2) of the European Convention on Human Rights, s. 11(g) of the Charter refers to these principles in specific fashion, the purpose is to indicate as clearly as possible that the constitutional protection against the retrospective application of penal law may not be relied on to preclude convictions such as those obtained against Nazi criminals in the aftermath of the last world war. As pointed out during the debates of the Joint Committee on the Constitution, s. 11(g) does not exclude the necessity for an empowering statutory provision before Canada can prosecute war criminals. Its effect is simply to remove any constitutional impediment to the enactment of the necessary provision, provided that the act or omission in question was at the relevant time prohibited by the municipal law of Canada, by international law or by generally recognized principles of law.

Professor Gisèle Côté-Harper, in 1982-1983:¹⁶²

[Translation]

The reference to offences under international law and general principles of law recognized by the community of nations, aims at curbing criminal acts like crimes against peace or humanity, genocide and, of course, war crimes. Those kinds of offences do not always form an integral part of the domestic criminal law and this Article 11 (g) is so construed as to allow the passing of retroactive legislation in order for the country to render criminal acts which, when they were committed, were considered criminal by the international community.

¹⁵⁹ Wagner, “The Passing of Legislation Allowing for Trial of Those Accused of War Crimes and Crimes Against Humanity”, in *The Windsor Yearbook of Access to Justice*, vol. 4, 1984, 143, pp. 150-1.

¹⁶⁰ *Halsbury's Laws of England*, (4th ed.), vol. 18, Butterworths, London, 1983, p. 874, footnote 2.

¹⁶¹ Tarnopolsky and Beaudoin, eds, *Canadian Charter of Rights and Freedoms: Commentary*, Toronto, Carswell, 1982, pp. 322-323.

¹⁶² Côté-Harper, “Les garanties juridiques et la charte”, *Formation Permanente*, vol. 72, Barreau du Québec, Montréal, 1983, pp. 174-175.

Under this provision, a law may be adopted for the prosecution of Nazi war criminals for the crimes which they committed at that time, even though such crimes be anterior to that law and extraterritorial.

Professor Maxwell Cohen, in 1985:¹⁶³

Let me make it clear that while I state there that there would be some difficulty in applying the War Crimes Act of 1946 to Canadians in Canada, for procedural and possibly other reasons, the retroactivity question was not one of them since the Charter specifically excludes crimes by the Law of Nations from its prohibitions against retroactivity.

However enlightening those debates and strong those learned comments, some may find actual political action more persuasive. Now other countries have acted on the basis of those principles, so as to assure that war crimes would not go unpunished, especially because of the mere passage of time. The Commission will refer briefly to four instances of such retroactive legislation.

We have adverted earlier to the 1948 Belgian legislation.¹⁶⁴

In 1964 France lifted prescription in the field of crimes against humanity.¹⁶⁵

In 1978 the U.S.A. adopted the so-called Holtzman amendment to its Immigration and Nationality Law,¹⁶⁶ which allowed for deportation in case of participation in Nazi persecution.

In 1979 the Federal Republic of Germany abolished the 30-year limitation for murder in its *Criminal Code*.¹⁶⁷

There exists an eloquent panoply of statutory precedents aiming at the retroactive punishment of war crimes.

It is, therefore, abundantly clear:

- from international instruments;
- from the works and the debates which led to their adoption;
- from international jurisprudence;
- from parliamentary debates in Canada;

¹⁶³ Cohen, in a letter to the Commission, exhibit P-87, 20 August 1985, p. 2.

¹⁶⁴ See footnotes 147, 148 and 149, this chapter.

¹⁶⁵ Law no. 64-1326 of 26 December 1964 in Dalloz, *Code pénal* 1970-1971, p. 767.

¹⁶⁶ 8 U.S.C. para. 1251 (a)(19).

¹⁶⁷ Amendment of 16 July 1979 to art. 78(2) of St.Gb. See also Clausnitzer: "The Statute of Limitations for Murder in the Federal Republic of Germany", *I.C.L.Q.* 29, 1980, 473.

- from opinions of jurists here and abroad;
- and from foreign legislation:

that art. 11 (g) of the Canadian Charter, far from being an empty shell, carries a fateful meaning for war criminals. When it adopted the article, Canada was acting in harmony with its international commitments; and it has reason to feel the more secure that art. 38(c) of the Statute of the International Court of Justice requires the court to apply, among other sources of law, the “general principles of law recognized by civilized nations”.

The time has now come for Canada to realize the concrete implications of the lofty ideals which were given expression by its elected representatives whilst the *Canadian Charter of Rights and Freedoms* was in gestation. Article 11 (g) has removed the traditional barrier of non-retroactivity as against those who have shamelessly violated “the general principles of law recognized by the community of nations”. Canadians should not renege now on that solemn undertaking. Indeed a precedent had already been set in 1946 on the occasion of the passage of the *War Crimes Act*.¹⁶⁸ The Right Honourable John Diefenbaker, then Leader of the Opposition, said:

I think this is an important measure for two reasons: First, it will close the doors to the possibility of any war criminal, and Kurt Meyer in particular, being able to raise a defence now or hereafter that an illegal sentence has been imposed upon him;

(. . .)

Usually I am opposed to retroactive legislation. However, I am sure that members on all sides of the house will accept this measure which ratifies what has been done and which assures that international wrongdoing shall not go unpunished.

The Commission accordingly *FINDS* that:

- 22- By virtue of art. 11 (g) of the *Canadian Charter of Rights and Freedoms*, Parliament can pass enabling legislation, even of a retroactive character, to permit the prosecution and punishment of war criminals.**

2. *Undue delay in prosecuting*

The brutal fact remains however that, should charges be laid against a war criminal, such prosecution would be launched some 45 years after the event. Is this not a case where the court, acting on the theory of abuse of process, might stay the proceedings in view of the extraordinarily long delay?

The question must of course be put; we will see whether it should be answered here.

¹⁶⁸ *Hansard*, Debates of the House of Commons, 1946, vol. IV, 6 August 1946, p. 4383.

Article 11 (b) of the Canadian Charter provides: "Any person charged with an offence has the right (b) to be tried within a reasonable time."

This provision is designed to assure the smooth functioning of the courts; it applies once a person has been charged with an offence or, as the French version puts it, where there is an *inculpé*. Article 11 (b) does not apply before a charge is laid, which is the situation with which we are concerned.

One might thus look to art. 7 of the Charter:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Would the 45-year delay before prosecuting offend "the principles of fundamental justice" and justify a stay of proceedings?

That the courts could order such a stay admits now of no doubt: the Supreme Court of Canada has laid this quarrel to rest in 1985.

Let it be recalled that, in 1977, when many thought that the majority opinion in the Supreme Court of Canada in *Rourke v. R.*¹⁶⁹ had buried this theory, yet it had approved the following restriction as worded by Viscount Dilhorne:¹⁷⁰

If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.

Thus there remained an ambiguity which gave rise to considerable differences of opinion between several courts of appeal across the country. But for reasons which will shortly be apparent, attention ought to focus on the judgment of the Court of Appeal of Ontario in 1984 in *R. v. Young*.¹⁷¹ After a painstaking analysis of the relevant pronouncements, Mr. Justice Dubin, writing for the Court of Appeal, concluded (p. 340):

I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

Now those conclusions were approved and adopted word-for-word by the Supreme Court of Canada in a unanimous judgment rendered by a bench of seven judges and written by the Chief Justice: *R. v. Jewitt*, on 19 September 1985.¹⁷² The Court said (p. 136):

¹⁶⁹ *Rourke v. R.*, (1977) 35 C.C.C. (2d) p. 129.

¹⁷⁰ *Ibid.*, p. 149.

¹⁷¹ *R. v. Young*, (1984) 10 C.R.R. p. 307.

¹⁷² (1985) 2 S.C.R. 128.

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young, supra* and affirm that “there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive or vexatious proceedings”. I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the “clearest of cases”.

From now on, the situation is therefore plain: the power exists for the courts to order, in clear cases, a stay of proceedings due to a violation of fundamental principles of justice or to the abuse of the court’s process.

Whether the long delay before laying charges against war criminals would bring the courts to exercise that power is quite another question; and indeed a question which this Commission should not embark upon trying to answer. For in doing so, it would trench upon the prerogatives of both the Executive and the Judiciary: the Executive, which will have to consider the situation of fact and of law in light of the Commission’s individual recommendations concerning various suspects, and must then decide whether prosecutions are warranted; and the Judiciary which may have to rule on the question in light of the facts and circumstances which will then be established. In both cases, it would not behove this Commission to preempt a decision by the proper authority.

For purposes of this report, it will suffice that the question has been raised.

The Commission accordingly *FINDS* that:

- 23- Should prosecutions be launched against war criminals, a delay of some 45 years will have elapsed between the alleged crimes and the laying of the charges. It shall belong to the Executive and, eventually, to the Judiciary to assess the effect, if any, of this delay on the prosecutions.**

3. *Amendments to Canadian legislation*

Once the question of retroactivity has been settled affirmatively and that of delay has been left for further consideration by the competent authorities, the way is now opened for a discussion of possible amendments to Canadian legislation in order to permit the prosecution of war criminals in this country. Indeed, the relevancy of the task had already been stressed on 13 January 1942 when the *St. James’s Declaration* was signed. In the opinion of Lord Wright, Chairman of the United Nations War Crimes Commission:¹⁷³

¹⁷³ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission*, London, Her Majesty’s Stationery Office, 1948, p. 91.

It was Monsieur Joseph Bech, Minister of Foreign Affairs of Luxembourg, who combined the sentiments of all the other delegates when he declared:

(...)

“The application of the principles laid down in the Declaration submitted for our signature, will prevent the war criminals from evading their just punishment.

(...)

If need be, *our national legislative systems must be adapted* to the aims laid down in our common Declaration”...

(emphasis added)

This, however, should not be done indiscriminately. The goal must be kept in sight and the method which is sought must be simple: we cannot afford at this time the luxury of complication-mania or, as the French would say, *avocasseries*.

There are certain basic requirements which any amendment must satisfy. An amendment must:

- 1) cover specifically war crimes and crimes against humanity;
- 2) cover all such crimes, whether committed in peacetime or in wartime, and whether Canada was engaged or not in that war;
- 3) provide for prosecution:
 - i) whether the victim be Canadian or not;
 - ii) whether the offender be Canadian or not;
 - iii) whether the victim or the offender be civilian or military;
 - iv) wherever and whenever the crime may have been committed;
- 4) provide for or, at least, not prohibit civilian trials by jury;
- 5) provide as a basis for jurisdiction that the offender be found in Canada;
- 6) contain an express grant of jurisdiction to specific Canadian courts;
- 7) be couched in words falling clearly within the ambit of art. 11 (g) of the Charter.

Some of those conditions (nos. 1, 4, 7) are self-explanatory: others may benefit of a short comment.

Condition 2: to cover all crimes, not only those “related to the activities of Nazi Germany during World War II” or those committed during a war “in which Canada may be engaged”; otherwise the legislation might be attacked as discriminatory and repugnant to the principles of fundamental justice prevailing in Canada and guaranteed under art. 7 of the Charter.

Conditions 3 and 5: extraterritorial jurisdiction of Canadian courts. In 1931 the *Statute of Westminster*¹⁷⁴ acknowledged “that the Parliament of a Dominion [e.g., Canada] has full power to make laws having extraterritorial operation.” (s. 3). This provision is now part of the Constitution of Canada.¹⁷⁵ Whilst proclaiming the territoriality principle in s. 5 (2) of the *Criminal Code*, Canada has opened the door to extraterritorial legislation, under circumstances to be assessed by Parliament:

5 (2) Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

The Canadian Parliament has made repeated use of this power in the *Criminal Code* itself and in several other Statutes, e.g.,

Criminal Code:

- s. 6 (1.1): Highjacking;
- s. 6 (1.2): Attack against internationally-protected persons;
- s. 6 (2): Offences abroad by public service employees;
- s. 46 (3): Treasonable acts committed outside Canada;
- s. 58: Offences abroad connected with forged passports;
- s. 59: Offences abroad connected with fraudulent usage of certificate of citizenship or of naturalization;
- s. 75: Piracy;
- s. 254 (1) (b): Bigamy.

War Crimes Act:

Regulation 6 (1) gives a power of arrest to a convening officer if a person “has *at any place* committed a war crime”

(emphasis added).

Geneva Conventions Act:

Under s. 3 (1) and (2) of the Act, offences against the *Geneva Conventions* committed outside of Canada can be prosecuted in Canada at the place in Canada where the offender is found.

*Immigration Act:*¹⁷⁶

¹⁷⁴ 22 George V, c. 4 (U.K.).

¹⁷⁵ *Canada Act 1982*, s. 52 and schedule, item 17.

¹⁷⁶ (1976-1977) S.C. c. 52, s. 101 and s. 102.

Any act that is an offence against immigration law, if committed in Canada, is also an offence if committed outside Canada and may be tried and punished in Canada.

There is, therefore, no lack of precedent for the use of the power to legislate extraterritorially.

Condition 6: express grant of jurisdiction. This condition aims at avoiding the risk of a technical objection which, in its 1984 working paper on "Extraterritorial Jurisdiction",¹⁷⁷ the Law Reform Commission of Canada has underlined as follows:

... it is important, in considering the extraterritoriality of our criminal law, to bear in mind the difference between the "applicability of law" on the one hand, and "jurisdiction of courts" on the other, because both must be provided for in our legislation if criminal conduct outside Canada is to be punishable by a court in Canada.

There is yet another condition which has been proposed for sympathetic consideration in the course of amending Canadian laws: that a relaxation of the rules of evidence be sanctioned by law in the field of war crimes.

Commenting on the Eichmann trial in the *Tulane Law Review* nearly 25 years ago,¹⁷⁸ Professor L.C. Green advocated such a relaxation on the grounds that:

To have insisted on verbal evidence only, would have meant that in many cases no evidence of any kind was possible. In others, it would have meant unnecessary reopening of old wounds and torture of the survivors.

Professor Green added:¹⁷⁹

... it may well be said that there is now a generally recognized principle that in such trials any evidence may be admitted that is likely to assist the court in ascertaining the truth.

Mr. David Matas has taken the same position before the Commission:¹⁸⁰

The present War Crimes Act provides for a relaxation of the strict rules of evidence that would normally apply in criminal proceedings. Whether prosecution proceeds under the War Crimes Act or under new legislation, the present rules of evidence for war crimes should be retained. Those rules, for prosecution of war crimes and crimes against humanity, do not violate the Bill of Rights. Nor do they violate the Charter of Rights and Freedoms.

The Nuremberg Tribunal and the court that tried Eichmann in Jerusalem, British war crimes courts and American war crimes courts all had rules of evidence similar to those of our War Crimes Act. They are indeed virtually essential in war crimes trials.

¹⁷⁷ Law Reform Commission, "Extraterritorial Jurisdiction", Working Paper 37, Ottawa, Ministry of Supply and Services, 1984, p. 3.

¹⁷⁸ Green, "Legal Issues of the Eichmann Trial", *37 Tulane Law Review*, 1962-1963, p. 641, at 657.

¹⁷⁹ *Ibid.*, at 658.

¹⁸⁰ Exhibit P-69, p. 98.

Professor Irwin Cotler took a different approach when he was giving evidence on 21 May 1985 before the Justice and Legal Affairs Standing Committee of the House of Commons.¹⁸¹ Mr. Speyer was questioning Professor Cotler:

What is the quality of proof about people whom we might prosecute in Canada — let us make the assumption that they can be tried here in Canada — that you know of, as a result of your own investigations?

Number one, every suspected Nazi war criminal is entitled to the defence that any other accused would have in a court of law. I think when we say, bring suspected Nazi war criminals to justice, that is precisely what we mean: in accordance with the rule of law.

In *Khawaja*¹⁸² the House of Lords considered a similar difficulty in the field of immigration, and it chose to maintain the rule. Lord Bridge wrote more particularly (p. 356), with the express concurrence of Lord Scarman (p. 346):

I would add that the inherent difficulties of discovering and proving the true facts in many immigration cases can afford no valid ground for lowering or relaxing the standard of proof required.

It is a matter for parliamentary wisdom to decide that military justice should be meted out on the basis of less exacting rules of evidence than civil justice. What we are now searching for, however, is not another form of military justice. The regular justice system of the land should apply itself to the task of trying war criminals. These are entitled to the same quality of justice as any other person against whom criminal charges are preferred: however heinous the offences alleged, we must not be swayed in our faith in the rule of law nor must we let the rule be bent to accommodate some particular evidentiary difficulties. Experience shows that, if the need arises, Canadian prosecutors will be more than competent to overcome those obstacles. In the opinion of the Commission, the matter should be governed by the standard rules of evidence: no more, but no less.

The Commission is glad to find that the conditions for new legislation, which it has just outlined, fall well in line with a resolution adopted by the Canadian Bar Association at its Annual Meeting in Vancouver on 3 September 1981.¹⁸³ The operative part of the resolution reads as follows:

BE IT RESOLVED THAT legislation be passed

- a) to allow for civilian trials of those accused of war crimes against humanity;
- b) to allow for prosecution for war crimes and crimes against humanity whether or not committed during any war in which Canada has been or may be engaged;
- c) to make clear that Canadian legislation applies to war crimes and crimes against humanity committed against civilians, provided the accused is found in Canada.

¹⁸¹ Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, 21 May 1985, Issue no. 30, p. 30:31.

¹⁸² (1983) *W.L.R.* 321.

¹⁸³ Resolution on war crimes and crimes against humanity, Vancouver, 3 September 1981, quoted as Appendix II in brief P-69.

The Commission will now turn to a number of proposals which have been put before it. They imply amendments to:

- i) the *Extradition Act*
- ii) the *Citizenship Act*
- iii) the *Immigration Act*
- iv) the *War Crimes Act*
- v) the *Geneva Conventions Act*
- vi) the *Criminal Code*.

The Commission will deal with these proposals in the same order, save when otherwise indicated.

i) The *Extradition Act*

The Commission has already dealt with this matter. The Commission refers to its recommendations 9 to 16.

ii) The *Citizenship Act*

The Commission will deal in detail with this Act in the next section of this chapter. It is, however, in order to mention here an effort which was attempted in 1978 when Mr. Robert P. Kaplan tabled, as a Private Member's Bill, Bill C-215: "An Act respecting war criminals in Canada".¹⁸⁴ The Bill, which was very short, provided as follows:

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.

At the end of the hour allocated for debate, "the subject matter of the Bill", according to Mr. Kaplan, "... was referred to the Justice Committee but the Bill was never called by the Committee."¹⁸⁵

In any event, the Bill would not have answered the concern of its mover nor indeed of all those who wanted to permit the prosecution of war criminals. As we have seen earlier,¹⁸⁶ the *Geneva Conventions* are not retroactive to World War II, and the Act which has imported them into Canadian legislation does not have that capacity either. So Bill C-215 would have stopped short of achieving the desired end.

¹⁸⁴ Exhibit P-107; first reading of Bill C-215: 30 October 1978.

¹⁸⁵ Evidence, vol. 20, p. 2537.

¹⁸⁶ Pages 123-126 and recommendation 19.

The Commission accordingly *FINDS* that:

- 24- Bill C-215: an Act respecting war criminals in Canada, introduced in 1978 by the Honourable Robert P. Kaplan, would not have achieved the result desired by its mover, especially because of the lack of retroactivity of the *Geneva Conventions*.**
-

iii) *The Immigration Act*

The Commission will deal in detail with this Act in the next section of this chapter.

iv) *The War Crimes Act*

Here is a telling example of a pointless exercise in legal gymnastics. Intent upon getting their way and obtaining the amendment of any law at any cost, the proponents of the amendment of the *War Crimes Act* put the Act under the microscope of legal research in an effort to demonstrate that it is not essentially designed for military trials of suspected war criminals, and generally in a theatre of war. They then suggest that this Act could be amended so as to render it indisputably compatible with civil — as opposed to military — trials of war criminals in Canada.

The Commission neither shares that view nor does it favour the suggestion to amend the Act, for the following reasons:

- 1) It is apparent that the *War Crimes Act* cannot be conveniently amended to suit civil trials and retain at the same time its military character; the whole fabric of the Act or, more conveniently, of the regulations re-enacted by the Act would resist this exercise.
- 2) Indeed the proponents of this solution rather favour the total repeal of the *War Crimes Act* and its replacement by a completely new Act including all Nürnberg crimes, the right to trial by jury and extraterritorial jurisdiction of Canadian courts while also retaining its main military features: hardly a viable marriage, still less commendable legislation!
- 3) The Commission would rather leave the *War Crimes Act* on the Statute Book as is. One fervently hopes that it will never be needed again, but who knows? Then, at least, it could be used without ambiguity.
- 4) As will be seen below, there exist simpler means of achieving the desired end.

The Commission accordingly *FINDS* that;

25- In view of its essential features, the *War Crimes Act* cannot be conveniently amended in order to deal with war criminals in Canada.

v) *The Geneva Conventions Act*

The whole argument concerning the possibility of usefully amending the *Geneva Conventions Act* revolves around its retroactive (or not) feature.

The Interdepartmental Committee, chaired by Mr. Martin Low, expressed the view that amending the Act in this fashion "would seem as a matter of principle to be logically and practically beyond contemplation".¹⁸⁷ This statement has drawn the wrath of the holders of the opposite view: Mr. Narvey has referred, on this very issue, to "the thorough-going error-proneness of Martin Low's discussion paper".¹⁸⁸

The Commission will not allow itself to be drawn into a personality contest. But, staying at the level of principles, the Commission is bound to recall for the third time that the *Geneva Conventions* and the *Geneva Conventions Act* may not have had effect in Canada before 1965, surely are not retroactive before 1949 and definitely have no application to crimes committed during World War II.

This conclusion disposes of the contention that the *Geneva Conventions Act* could be amended so that Canadian courts could deal with Nazi war crimes.

The Commission accordingly *FINDS* that:

26- The contention that the *Geneva Conventions Act* could be amended in order to deal with Nazi war crimes is not tenable.

vi) *The Criminal Code*

Canada has not hesitated to fulfill several international obligations by introducing suitable amendments to its *Criminal Code*; and more often than not, those amendments reflect the growing tendency in conventional international law to recognize the principle of universal jurisdiction of national courts over international crimes. But the discussion of the suitability of amending the *Criminal Code* to extend Canadian jurisdiction over war crimes must be prefaced by the reminder of a most unfortunate coincidence.

¹⁸⁷ Exhibit P-77, p. 27, no. 41.

¹⁸⁸ Exhibit P-86, p. 61.

In the course of its analysis, the Interdepartmental Committee wrote:¹⁸⁹

The jurisdiction to try these offences in Canada would have to be on an extra-territorial basis, and it would have to be established retroactively. It might run counter to the principle of non-retroactivity of penal law, a rule which is found in Article 15 of the UN International Covenant on Civil and Political Rights [to which Canada is a party] which will be incorporated in s.11(g) of the proposed *Canadian Charter of Rights and Freedoms*.

The objection was admittedly formidable.

According to Mr. Low, the Committee's memorandum was finished in December 1980.¹⁹⁰ It was approved for "submission into the Cabinet process" towards the end of December 1980 or the beginning of January 1981.¹⁹¹ It was considered by the Social Affairs Committee of Cabinet on 11 February 1981.¹⁹²

Now, it happened exactly in the interval between the beginning of January and 11 February that two consecutive amendments were brought in order to introduce into art. 11 (g) of the Draft Charter of Rights the provisions allowing for retroactive legislation in the name of international law and of the general principles of law recognized by the community of nations. This was agreed, as we have seen earlier, on 12, 20 and 28 January 1981.

The memorandum had just been approved with its caveat against retroactivity. The new provisions in art. 11 (g) of the Charter do not appear to have been brought to the attention of the Committee of the Cabinet, nor the conclusions that must flow therefrom. Indeed, the memorandum was never amended.

To what extent this coincidence influenced the political decisions will never be known, but, for certain, the legal theory on this particular point must be rectified in light of art. 11 (g) of the Charter. To paraphrase and correct the memorandum, exhibit P-77: "the retroactive establishment of jurisdiction to try war criminals would not run counter to the principles of penal law: see art. 11 (g) of the Charter."

Need it be stressed again: we are not aiming to make acts, which were deemed innocent when committed, criminal now; such would be unacceptable retroactivity. But extermination of a civilian population, for instance, was already as much criminal in 1940 as it would be today, under the laws of all so-called civilized nations. We are only trying to establish now in Canada a forum where those suspected of having committed such offences may be tried, if found in Canada. This legislation would be, in essence, prospective since it would relate to the future application of the law; and its retroactive aspect, if

¹⁸⁹ Exhibit P-77, p. 23, no. 35.

¹⁹⁰ Low, evidence, vol. XV, p. 1915.

¹⁹¹ *Ibid.*

¹⁹² Evidence, vol. XV, p. 1935.

any, would surely have been anticipated and covered by art. 11 (g) of the Charter.^{192a}

An effort was made in 1985 to introduce a proper provision into the *Criminal Code*, during the debate in Parliament on Bill C-18: An Act to amend the Criminal Code, to amend an Act to amend the Criminal Code and to amend the Combines Investigation Act, the Customs Act, the Excise Act, the Food and Drugs Act, the Narcotic Control Act, the Parole Act and the Weights and Measures Act, to repeal certain other Acts and to make other consequential amendments. The attempt failed under circumstances which warrant its being revived. A short history of the episode is, however, in order.

The Bill, which was a considerable piece of legislation, dealt, it was said, with over 200 topics.¹⁹³ Among others, it contained provisions concerning attempts against diplomats, air piracy, hostage-taking and nuclear material diversion.¹⁹⁴ The opposition parties moved to amend the Bill by adding provisions relative to war crimes and crimes against humanity.

In order to be fair to Caesar, it must be underscored that the text of the proposed amendments had been polished and provided by Mr. Kenneth Narvey of the North American Jewish Students' Network – Canada. We have already had the occasion of encountering Mr. Narvey when acknowledging his contribution in 1981 to the amended version of art. 11 (g) of the Charter.

This time, Mr. Narvey had prepared five inter-related motions. They were taken up and introduced after second reading — with the joint support, it may be fairly said, of the Liberal Party and the New Democratic Party — before the Standing Committee of the House of Commons on Justice and Legal Affairs. The text of the five motions, designed to amend the *Criminal Code*, should first be reproduced.

Motion A (War crimes and crimes against humanity)

That the following subsection be added to s. 6 of the Criminal Code:

“(1.9) Notwithstanding anything in this Act or any other Act, 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) a war crime, namely a violation of the laws or usages of war committed during any war, whether the Second World War or any previous or subsequent war and whether Canada has or has not participated in that war; or

^{192a}This situation should not be confused with that which the Commission discussed earlier when it discarded the argument that the *Geneva Conventions Act* should be given a retroactive effect. The future amendments to the Criminal Code which the Commission is now considering would receive from art. 11(g) of the *Charter* an imprint which is missing from the *Geneva Conventions Act*.

¹⁹³ Standing Committee on Justice and Legal Affairs, Issue no. 15, 14 March 1985, p. 15:19 and 20, Mrs. Finestone; *Hansard*, House of Commons Debates, 24 April 1985, p. 40:64, Honourable Bob Kaplan.

¹⁹⁴ Now especially ss. 6 (1.2 to 1.8) *Criminal Code*.

(b) a crime against humanity committed in time of peace or war before, during or since the Second World War, namely murder, extermination, enslavement, deportation or other inhumane act committed against any civilian population or persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated,

and 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, or

(ii) a person employed by Canada in a military or civilian capacity; or

(d) the person who has committed the act or omission is, after the act or omission has been committed, present in Canada.“

Motion B (deleting automatic recognition of non-Canadian pardons)

That s. 5 of the Bill be amended by striking out lines 43 and 44, on p. 8, and substituting the following therefor:

“able to plead *autrefois acquit* or *autrefois convict*, he shall be deemed to.”

Motion C (trial abroad *in absentia*)

That the following subsection be added to s. 6:

“(4.1) for greater certainty, the provisions of subsection (4) relating to the plea of *autrefois convict* do not apply in the case of a person tried outside Canada *in absentia* and there found guilty but not yet punished for the offence.”

Motion D (preserving the option of extradition *from* Canada for offences abroad made triable *in* Canada)

That the following subsection be added to s. 6:

“(9) Nothing in this section, or in any other enactment providing for the trial in Canada of an offence committed outside Canada, shall be taken as diminishing

(a) the validity of the principle set out in section 12 of the *Extradition Act* that a fugitive criminal of a foreign state is liable to be dealt with in the manner provided in the said Act whether there is or is not any criminal jurisdiction in any court of Her Majesty’s Realms and Territories over the fugitive in respect of the crime; or

(b) the validity of the principle contained in section 18 of the *Fugitive Offenders Act* that a fugitive from a part of Her Majesty’s Realms and Territories other than Canada is liable to be returned in the manner provided in the said Act whether or not the offence for which his surrender is asked is an offence within Canadian jurisdiction.“

Motion E (coming into force)

That s. 212 of the Bill be amended by adding the following subsection:

(6) Section 5, subsection 39(1), section 40, 55 a d 59 and Schedule I of this Act shall come into force on the day this Act is assented to.

A week before those motions were formally made, the Minister of Justice, the Honourable John C. Crosbie, had stated, in answer to a question by the Committee:¹⁹⁵

I am not taking any position, certainly not until Mr. Justice Deschênes reports. This is an issue we have to think carefully about.

It was on 14 March 1985 that a full debate took place in the Standing Committee, first on the admissibility of the proposed amendments, then on their substance. But before the votes were taken, the Minister had repeated:¹⁹⁶

It is my position, and the position of the government, that these amendments are entirely premature.

In short, the five motions were disposed of as follows (the Minutes of the Debates in the Committee cover 25 pages):

Motion A

The Chair ruled: "... it goes beyond the scope of the clause and the bill under consideration as passed by the whole House in second reading."¹⁹⁷ "[It] is procedurally out of order and therefore unacceptable to the Chair."¹⁹⁸ The ruling was challenged and was sustained by a vote of 8 to 4.¹⁹⁹

Motion B

The Chair ruled the motion inadmissible as "against the principle of the Bill".²⁰⁰

Motion C

The Chair found the motion acceptable.²⁰¹ The motion was then "negatived"; the vote was not recorded.²⁰²

Motion D

(The Minutes say Motion B, by error). The Chairman ruled the motion inadmissible in logical line with his ruling on Motion A.²⁰³

Motion E

Withdrawn.²⁰⁴

¹⁹⁵ Standing Committee, Issue no. 14, 5 March 1985, p. 14:31.

¹⁹⁶ *Ibid.*, Issue no. 15, 15 March 1985, p. 15:21.

¹⁹⁷ *Ibid.*, p. 15:27.

¹⁹⁸ *Ibid.*, p. 15:28.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, p. 15:31.

²⁰¹ *Ibid.*, p. 15:35.

²⁰² *Ibid.*, p. 15:36.

²⁰³ *Ibid.*, p. 15:38.

²⁰⁴ *Ibid.*

In a further effort to get his point across, Mr. Robinson (NDP) moved "... that the Justice committee report to the House of Commons seeking an instruction giving it the authority to amend Bill C-18 in order to extend its provisions over war crimes and crimes against humanity".²⁰⁵ The motion was "negatived" following an unrecorded vote.²⁰⁶

The Bill was later reported to the House and came up for third reading on 24 April 1985.²⁰⁷ The same motions were then renewed, though they were numbered differently:

Motions 1 to 4

(In Committee, Motion A): ruled out-of-order by the Speaker as "go[ing] beyond the original scope of the Bill".²⁰⁸

Motions 5 to 8

(In Committee, Motion C in substance): the Speaker found them in order.²⁰⁹ The question being put, the motions were lost.²¹⁰

Motions 9 to 12

(In Committee, Motion D in substance): the Speaker found them out-of-order for the same reasons as motions 1 to 4.²¹¹

Motions 13 to 16

(In Committee, Motion E): withdrawn.²¹²

The Bill was then passed by the House and referred to the Senate.²¹³

During debate on second reading in the Senate, the Honourable Royce Frith, Deputy Leader of the Opposition, dealt with the question of war crimes and crimes against humanity. When he read into the record the main motion introduced before the Committee of the House (Motion A above), he recalled that the amendments had been ruled out-of-order. He then stated that, in his

²⁰⁵ *Ibid.*, pp. 15:38 to 15:44.

²⁰⁶ *Ibid.*, p. 15:44.

²⁰⁷ *Hansard*, House of Commons Debates, 24 April 1985, p. 40:63.

²⁰⁸ *Ibid.*, p. 40:67.

²⁰⁹ *Ibid.*, pp. 40:63, 40:68 and 40:69.

²¹⁰ *Ibid.*, p. 40:70.

²¹¹ *Ibid.*, pp. 40:67 and 40:68.

²¹² *Ibid.*, p. 40:71.

²¹³ *Ibid.*

opinion, they were in order and announced that the question would be raised again in Committee.²¹⁴

The Minister of Justice appeared before the Standing Senate Committee on Legal and Constitutional Affairs on 30 May 1985. He did not mince his words. When he referred to this Commission, the Minister declared that it would "be sublimely ridiculous not to wait for its report".²¹⁵ The Minister added:²¹⁶

The government does not wish to deal with this matter legislatively at the present time. It would be entirely premature to do so. We have demonstrated that. We have voted against such suggested amendments in the House of Commons Justice Committee, as well as in the House of Commons — amendments moved by people exhibiting what can only be described as a large dose of hypocrisy. Our position has not changed.

The matter was not raised again. The Bill was reported without amendment,²¹⁷ passed²¹⁸ and given royal assent.

Thus, the serious assault which had been mounted on the question of war crimes failed for a reason that had nothing to do with the merits of the proposed amendments. The Government would not move pending the report of this Commission which it had appointed for the very purpose of considering this question. The time has now come to look into the substance of the matter.

Psychologically, there would be an advantage in using the *Criminal Code* as the vehicle for the prosecution of war criminals in Canada. One would at once avoid any image of military courts and wartime procedure; one would discard the prospect of short-circuiting the Canadian legal process or of downplaying the *Canadian Charter of Rights and Freedoms*; one would reassure the faith of the citizenry in the rule of law and would show the international community the respect of Canada for its primacy.

Technically, s. 6 of the *Criminal Code* is a logical place to insert the desired provisions. It appears under the heading "Part I — General". It already deals with extra-territorial offences: hijacking, offences against internationally protected persons, offences at sea, offences by public servants abroad, hostage-taking, nuclear material diversion. It would be consistent to find war crimes in the same chapter.

The Commission accordingly *RECOMMENDS* that

27- The *Criminal Code* should be used as the vehicle for the prosecution of war criminals in Canada.

As the basis of our work, we will use the five motions (A to E) which were

²¹⁴ Debates of the Senate, 2 May 1985, pp. 845 and 846.

²¹⁵ Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue no. 12, 30 May 1985, p. 12:20.

²¹⁶ *Ibid.*, p. 12:21.

²¹⁷ *Ibid.*, p. 14:14.

²¹⁸ Debates of the Senate, 13 June 1985, p. 10:14.

introduced before the Committee of the House and are quoted above. Some refinements may, however, be desirable, as we go along.

We will come back to a detailed analysis of the matter; for the moment, let us begin with a general overview.

Motion A is, of course, the main block of the whole construction.

Motion B was not taken before the House of Commons, and the Commission does not think that the point should be pressed. The question of the validity of foreign pardons raises the impossible problem of the distinction between genuine and sham pardons and is not likely to advance, from a practical point of view, the prosecution of a given war criminal. According to what the Commission has come to learn, the issue has arisen only once (see case number 368) and there is no reason to doubt the genuineness of that particular Ordinance of amnesty.

Motion C was lost on its merits both before the Committee and before the House. It must be recalled that the new ss. 4 of s. 6 of the *Criminal Code* reads as follows (as amended in 1985 by Bill C-18):

(4) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if he had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, he shall be deemed to have been so tried and dealt with in Canada.

Before the House the relevant motion aimed at adding the following:²¹⁹

(4.1) For greater certainty, it is hereby declared that a person who has been found guilty *in absentia* outside Canada, but who has not yet been punished, shall not be entitled to plead *autrefois convict* on account of that finding of guilt.

The concern of the movers of this resolution was understandable and well founded. The fact is however that it was already taken care of by art. 11 (h) of the Charter:

11 Any person charged with an offence has the right

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

The plea is therefore opened to an accused who has been both "found guilty and punished". The door which the movers of the resolution wanted to close "for greater certainty" had already been authoritatively slammed shut in 1982. This amendment would be useless.

Motion D was ruled out-of-order. Actually this amendment tended only to reaffirm principles already enshrined in Canadian legislation on extradition.

²¹⁹ *Hansard*, House of Commons Debates, 24 April 1985, p. 40:69.

The Commission does not see the use of adding such a provision to the *Criminal Code*.

Motion E was withdrawn. It was a technical provision which had no more interest.

We are therefore left only with Motion A, to which some additional provisions might be conveniently added. The following comments are now in order:

- i) The proposed amendment dealt only with war crimes and crimes against humanity. No reasons have been given anywhere why this text has ignored crimes against peace. At first, the Commission inclined to include crimes against peace in the new provision but, given further reflection, it decided otherwise. The perpetrators of crimes against peace, insofar as World War II is concerned, have most probably all been dealt with a long time ago. Insofar as other wars of the past are concerned, crimes against peace would represent offences new to Canadian law, and the provision would raise, rightly, all of the familiar objections stemming out of the traditional repugnancy of our society for retroactive penal legislation. If one must absolutely turn one's attention to the possibility of future wars, the topic becomes so much more political than legal that the Commission prefers to abstain and to let Parliament, should it so wish, embark upon that kind of an initiative. Indeed, no one raised the point in either chamber of Parliament during the 1985 debate. Crimes against peace shall, therefore, not be encompassed in the amendment which the Commission is considering.
- ii) The proposed amendment gave its own descriptions — not definitions — of war crimes and crimes against humanity. The 1945 *Charter of the International Military Tribunal* which sat at Nürnberg had evolved appropriate definitions. The amendment is at times wider, at times narrower: this technique does not commend itself to the Commission. It would appear better to try and establish straight definitions which, however, would then admit explicitly their origin in the Nürnberg Charter while simultaneously widening their application in time and space. If a construction effort is ever necessary, the courts would thus be directed by the Code itself to look for inspiration to the international jurisprudence.
- iii) The Code must contain an express grant of jurisdiction to the courts in Canada. It had been suggested that the matter be entrusted to the courts of the territorial division in Canada where the suspect is found. However, ss. 6 (3) was replaced in 1985, and the new wording is so wide that it can apply without any change to the new provisions concerning war crimes and crimes against humanity.
- iv) Consideration must be given to the granting of prosecutorial authority to the federal Attorney General only. It is true that,

generally, the authority to prosecute under the *Criminal Code* is allocated to the provinces. In the matter of war crimes, this division of responsibility would likely create great difficulties. Suspects have been found in various parts of the country. Now, this is a highly specialized field of endeavour; it requires, for successful pursuit, a sophisticated degree of expertise which may not be attained by many people. Uniformity in the application of the law must also be sought and achieved. Finally, this is a matter which falls totally into the field of federal competence and entails the constant monitoring of Canada's relations with foreign countries. It should, therefore, be left in the hands of the Attorney General of Canada.

In his brief-letter of 29 July 1986, Mr. Matas objects on the grounds that "justice would be confounded with politics". In its brief of 22 August 1986, Network, (by the pen of Mr. Narvey), expresses the same opinion in different words, (p. 10). The Commission disagrees. Should the government submit to Parliament the various amendments which this report advocates, the Attorney General would become morally and politically bound to give them effect.

Conversely, and again contrary to Messrs. Matas' and Narvey's latest plea, no private prosecution should be authorized. The experience of this Inquiry has shown how high emotions do run and how barely skin-deep feelings are buried. In the matter of war crimes, no private citizen should be allowed to put the wheels of justice in motion on his own initiative.

- v) It has been recommended to the Commission that no prosecution be allowed without the written consent of the Attorney General (whichever he may be). Several observations are here in order:
 - a) If the Commission's recommendation is accepted, that prosecution be placed in the hands of the Attorney General of Canada only, the question is automatically answered: such prosecution implies consent.
 - b) The Commission will recommend essentially an amendment to s. 6 of the *Criminal Code*. This amendment will, therefore, come under the sway of ss. 6 (5) which already provides:

(5) No proceedings shall be instituted under this section without the consent of the Attorney General of Canada if the accused is not a Canadian citizen.
 - c) Now, this Inquiry has found that nearly all suspects who are residing in Canada and have been brought to the Commission's attention had become Canadian citizens over the years. There is, therefore, no harm in leaving the law as it stands: in next to all cases, ss. 6 (5) will have no practical effect; in the odd case "where the accused is not a Canadian citizen", the consent to prosecution will be an integral part of the latter.

- d) Should the prosecution be left in the hands of the provincial authorities, again ss. 6 (5) will have its effect, and that should be satisfactory. Because a provincial Attorney General would be prosecuting, there is no point in asking for consent of the federal Attorney General in all cases: this would only result in duplication of work and effort; delays and possibly frustration where co-operation would be essential.
- vi) It goes without saying that the right of the accused to trial by jury should be protected. It has been argued in some quarters that there is no room for jury trials in the matter of war crimes: the Commission disagrees. As these prosecutions should be heard before ordinary courts following ordinary rules of evidence, in the same vein the traditional right to jury trial should be recognized to the accused. Indeed, this right is enshrined in art. 11 (f) of the Charter.
- vii) In his brief of 22 August 1986, Mr. Narvey argues (pp. 4 and 5) in favour of the addition to his draft Motion A of the following paragraph:

“(e) the person who committed the act or omission became a Canadian citizen after the commission of the act or omission.”

Indeed, as Mr. Narvey has convincingly demonstrated (pp. 21-28):

the laws of France, Finland, Greece, the Netherlands, Sweden and West Germany all provide not only that their citizens may be tried by them for crimes committed abroad, but also that persons who *become* their citizens may be tried by them for crimes committed abroad *before* they became citizens. (p. 4)

The Commission agrees with the principle of this suggestion; this could, however, be more aptly drafted, and the Commission will incorporate it into ss. 6(1.10)(c) which it will recommend below.

On the basis of those considerations, the Commission *RECOMMENDS* that:

28- Section 6 of the *Criminal Code* should be amended by adding thereto the following subsections:

“(1.9) For the purposes of this section, ‘war crime’ and ‘crime against humanity’ mean respectively:

- a) War crime: a violation, committed during any past or future war, of the laws or customs of war as illustrated in paragraph 6 (b) of the *Charter* of the International Military Tribunal which sat in Nürnberg, and irrespective of the participation or not of Canada in that war;
- b) Crime against humanity: an offence committed in time either of peace or of a past or future war, namely murder, extermination, enslavement, deportation or other inhumane act committed against any civilian population or persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated, as illustrated, but without

limitation in time or space, in paragraph 6 (c) of the *Charter of the International Military Tribunal* which sat in Nürnberg.

(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.**

(1.11) No proceedings shall be instituted under ss. 1.9 or 1.10 except by the Attorney General of Canada or counsel instructed by him for the purpose.”

3) Denaturalization and Deportation

a) Introduction

Barring the availability of any other remedy, denaturalization²²⁰ and deportation could finally be used in appropriate cases for ridding Canada of war criminals. Indeed, this is the only means which our neighbours to the south have been using since they started their grand effort with the OSI in 1980. At the moment of writing, only three deportations of alleged war criminals have been completed from the U.S.A.: Hans J. Lipschis was deported to West Germany on 14 April 1983; Feodor Fedorenko was deported to the U.S.S.R. on 21 December 1984; Valerian Trifa was deported to Portugal on 13 August 1984. Two other suspects were recently expelled from the U.S.A., but proceedings in extradition had been started by the foreign countries interested, and it was pursuant to those requests, rather than to their deportation

²²⁰ In this chapter, the Commission will use the word “denaturalization” in lieu of the more correct, but longer, phrase “revocation of citizenship”.

procedures, that the U.S. extradited Andrija Artukovic to Yugoslavia on 12 February 1986, and John Demjanjuk to Israel on 27 February 1986. Similar circumstances prevailed when Hermine Braunsteiner Ryan was returned to West Germany on 6 August 1973.²²¹

Under Canadian law, no Canadian citizen can be deported,²²² and no Canadian-born citizen can have his citizenship revoked.²²³ Suspected war criminals, however, were all born in foreign countries and, but for a few possible exceptions, have been naturalized Canadians over the years. Should there exist suitable evidence that a suspect for example, belonged to a prohibited class and lied on that account, thus illegally immigrating into Canada, there may exist the possibility of stripping him of his Canadian citizenship and then deporting him to another country willing to accept him.

This procedure, however, is cumbersome and raises several intricate questions of law, not to speak of evidentiary difficulties. The Commission will tackle those problems; it does not feel compelled, however, to enter into a broad discussion of all those issues, because they have already been examined in depth, and the relevant studies are available to the Governor-in-Council, to the various interested parties, and to the public at large. The Commission refers more particularly to the following:

YEAR	DATE	DESCRIPTION
1979	11 September	M. Jack Silverstone: <i>War Criminals in Canada - Legislative Options</i> , Library of Parliament, Ottawa
1981	2 January	Maxwell Cohen: Letter to the Honourable David Crombie (exhibit P-87)
1981	January	Discussion Paper of the Interdepartmental Committee on War Criminals, chaired by Mr. Martin Low (exhibit P-77)
1981	29 January	David Matas: Human Rights, War Crimes and the Constitution (exhibit P-62)
1982	May	Canadian Jewish Congress: Report of the Legal Committee on War Crimes (exhibit P-122)
1983	27 May	Christopher A. Amerasinghe: Opinion on Revocation of Citizenship of Nazi War Criminals (exhibit P-101)

²²¹ Ryan, *op. cit.*, pp. 47 to 52.

²²² *Immigration Act, 1976*, 25-26, El. II, c. 52, s. 4(2).

²²³ *Citizenship Act, 23-24-25, El. II, c. 108, Part II*; also Charter, art. 6(1).

1983	1 September	Canadian Jewish Congress: Supplementary Report
1983	8 December	Honourable Mark MacGuigan: Opinion to the Honourable Bob Kaplan (exhibit P-103)
1984	30 April	Honourable Mark MacGuigan: Letter to Kenneth M. Narvey (exhibit P-104)
1985		William Mandell: Nazi Persecutors in the United States: Proposed Consolidation of the Denaturalization and Deportation Procedures (exhibit P-70)
1985	Spring	David Matas: Bringing Nazi War Criminals in Canada to Justice (exhibit P-69)
1985	22 May	Submission of the League for Human Rights of B'nai Brith Canada (exhibits P-60 and P-61)
1985	22 May	David Matas: Submission (exhibit P-59)
1985	10 July	Irwin Cotler: Submissions and Recommendations of the Canadian Jewish Congress (exhibit P-84)
1985	Fall	David Matas: Government Inaction on Nazi War Criminals in Canada (exhibit P-85)
1985	1 September	Sharon A. Williams: Deportation and Denaturalization of War Criminals in Canada
1985	20 September	Kenneth M. Narvey: Some comments on the presently available views of Mr. Martin Low, etc. (exhibit P-86)
1985	3 October	Michel Proulx: Nouvelle législation relative aux crimes de guerre
1985	10 October	Donald P. Bryk: Legal Opinion on Denaturalization and Deportation of War Criminals
1985	3 December	Additional recommendations of the League for Human Rights of B'nai Brith Canada.
1986	5 May	John Sopinka: submission of the Ukrainian Canadian Committee (exhibit P-160).

1986	6 May	Y.R. Botiuk: submission of the Brotherhood of Veterans of the First Division of the Ukrainian National Army (exhibit P-163).
1986	3 June	David Matas: Comments on four opinions received by the Commission.
1986	25 June	Irwin Cotler: Submission of C.J.C. on legal opinions mandated by the Commission.
1986	29 July	Irwin Cotler: Closing submissions and recommendations of C.J.C.
1986	29 July	Irwin Cotler: The duty to disclose.
1986	22 August	Kenneth M. Narvey (Network): Some comments on... the report of the Commission's... legal experts.

Due to the considerable span of time which is covered by the Commission's terms of reference, no less than eight statutes must be examined and their interplay assessed:

1910: *Immigration Act*, 9-10 Ed. VII, c. 27

1914: *Naturalization Act*, 4-5 G. V, c. 44

1927: *Naturalization Act*, 1927 R.S.C., c. 138

1946: *Canadian Citizenship Act*, 10 G. VI, c. 15

1952: *Immigration Act*, 1952 R.S.C., c. 145

1952: *Immigration Act*, 1952 R.S.C., c. 325

1976: *Citizenship Act*, 23-24-25 El. II, c. 108

1977: *Immigration Act*, 1976, 25-26 El. II, c. 52

It may also be necessary to refer to the *Interpretation Act*, 1970, R.S.C., c. I-23.

b) Consolidation of Procedures

By way of preface, and simply to underline the statutory complexities, let it be recalled that denaturalization and deportation are subject to two different sets of rules under the legislation which is currently in force:

denaturalization:

notice by the Minister to the respondent; request by the respondent that the case be referred to the Federal Court, trial division; hearing by the Federal Court; decision by the Court which is final and conclusive and without appeal;²²⁴ report by the Minister to the Governor-in-Council; order of the Governor-in-Council.²²⁵

deportation:

report by an immigration officer to the Deputy Minister; instructions by the Deputy Minister to a senior immigration officer; inquiry ordered by the senior immigration officer; inquiry by an adjudicator in the presence of the respondent; in suitable cases, deportation ordered by the adjudicator;²²⁶ appeal to the Immigration Appeal Board;²²⁷ appeal to the Federal Court of Appeal, by leave, on questions of law;²²⁸ appeal to the Supreme Court of Canada, by leave, on any question.²²⁹

Irrespective of the strictly administrative steps, the whole process therefore comprises:

for denaturalization: a hearing in court and a debate in the Governor-in Council;

for deportation: an inquiry by an adjudicator, followed by three possible appeals.

There is substantial similarity between the Canadian and the American situations. William Mandell has summarized the American process as follows:²³⁰

Denaturalization and deportation involve two separate legal processes within immigration and nationalization (sic) law. In a denaturalization action, the defendant is entitled to an initial trial in federal district court with the right of appeal to a circuit court of appeals and ultimately, if *certiorari* is granted, to the U.S. Supreme Court. A deportation action entails an initial administrative hearing before an immigration judge, an administrative appeal to the Board of Immigration Appeals (BIA), and then a subsequent right to judicial review by a circuit court of appeals and ultimately, if *certiorari* is granted, by the U.S. Supreme Court.

Mandell has added:²³¹

Under current immigration and nationalization (sic) law, it is not possible to combine these two processes. Together, excluding time delays and the actual implementation of the alien's departure, these two procedures can take up to seven years to complete.

²²⁴ *Citizenship Act*, c. 108, s. 17.

²²⁵ *Ibid.*, s. 9.

²²⁶ *Immigration Act*, c. 52, s. 27 - s. 36.

²²⁷ *Ibid.*, s. 72 ff.

²²⁸ *Ibid.*, s. 84.

²²⁹ *Federal Court Act*, 1970, R.S.C. c. 10, (2nd Supp.), s. 31.

²³⁰ Exhibit P-70, *Nazi Persecutors in the United States: Proposed Consolidation of the Denaturalization and Deportation Proceedings*, 1985, Boston College, pp. 2-3.

²³¹ *Ibid.*, p. 3.

Without committing ourselves to a definite time figure, there is no doubt that the Canadian process would also involve a matter of years. Now given the age of the respondents — by definition they cannot be under 60 and several are even in their 80s — the duplication and repetitiveness of evidence, the expense and the delays involved, create a serious impediment to the efficient and fair administration of justice. Indeed, as will be shown in the next chapter of this report, death has overtaken a substantial number of suspected war criminals who had established themselves in Canada.

One way of avoiding such an unfortunate result would be — at least in the case of Nazi war criminals — to consolidate denaturalization and deportation into a single set of procedures. No doubt all kinds of difficulties would arise due to the interplay of administrative and judicial, even political, steps in the present system; but none of those difficulties is insuperable unless each department be adamant in retaining control of its own empire.

Denaturalization begins by a judicial hearing: why could not deportation be elevated to the same process? Then, when this streamlining has been achieved, why not join the two hearings before the same authority, with the proviso that the denaturalization phase proceed first and be decided before the deportation phase is dealt with?

Denaturalization denies any right of judicial appeal: why not apply the same rule to deportation? Of course, this solution may be found too harsh. Because of human frailty, our judicial system provides generally for one and, often, two levels of appeals. In view of the importance of citizenship and the disruption entailed by deportation, an argument can be made that a decision in this field should not be left without some available remedy. Even then, however, delays and expenses should be held to a minimum: a single appeal at most should be countenanced.

The Commission is prepared to leave the details of such amendments to the law officers of the Crown; but it *RECOMMENDS* in principle that:

29- Without eliminating the final role of the Governor-in-Council, the procedures leading to revocation of citizenship (denaturalization) and to deportation — at least in cases of suspected Nazi war criminals — should be streamlined and consolidated;

30- The deportation hearing should be elevated to the level of the judicial process, as in denaturalization; the two hearings should then be joined before the same authority, with two provisos:

- a) that the denaturalization phase should proceed first and be decided before the deportation phase is dealt with;**
- b) that the findings of facts in the first phase should be held as conclusive with respect to the second phase.**

31- Judicial appeals should be denied or, at most, a single appeal should be provided for against denaturalization and deportation orders together.

Such amendments would only bring, in any event, a change in procedure. To assess the rights and obligations of the parties involved, it is to the legislation as it presently exists that we must now turn.

c) Denaturalization

1. Which Act governs?

Under c. 108 of 1976, s. 9, citizenship will be revoked if the person concerned has obtained citizenship *under this Act* by false representation or fraud or by knowingly concealing material circumstances. Section 9 appears in Part II of the Act. Section 6, in the same Part, provides that:

A person who is a citizen shall not cease to be a citizen except in accordance with this Part.

Now s. 9. applies expressly to persons who have obtained citizenship *under this Act*. It does not deal with persons who became citizens under prior legislation (as, undoubtedly, nearly all suspected war criminals have).

Section 36 provides that: "the former Act is repealed". Section 35 contains transitional provisions which have no interest here.

The question therefore arises: can the prior legislation still be used to revoke the citizenship of a person who has obtained it under that prior legislation, i.e., essentially under the Statute of 1946? The question is relevant both as to the merits and as to procedure.

As to the merits:

Section 21 of the 1946 Statute provided for revocation of citizenship in its paragraph (b): if a person "has obtained a certificate of naturalization or of Canadian citizenship by false representation or fraud or by concealment of material circumstances".

The requirements for revocation were, therefore, nearly identical under the 1946 and 1976 Statutes, save for the addition of the word "knowingly" in the latter Act. This addition was probably prompted by the conclusion by the Supreme Court of Canada in 1973, **Minister of Manpower and Immigration v. Brooks**.²³² This case was decided under the *Immigration Act*, but the conclusion reached on this particular point is equally apposite under similar

²³² (1974) S.C.R. 850.

provisions in the citizenship legislation. Rendering the unanimous judgment of the court, Mr. Justice Laskin (as he then was) wrote (pp. 864-865):

The consequences of a falsehood may be harsh, but no dispensing power is given to this Court nor is it entitled, when Parliament has spoken as clearly as it has, to provide its own measure of fatal deficiency.

(...)

... since criminal punishment is not the object of the enforcement of immigration and deportation policies by means of special inquiries, I cannot be persuaded that intentional or wilful deception should be read in as a prerequisite.

As to procedure:

The present legislation provides for a hearing before the Federal Court, trial division, (c. 108, s. 17).

The 1946 Act foresaw a hearing before a judicial commissioner or the superior court of the province, (c. 15, s. 21[3]).

The rest of the process has remained the same throughout: report by the Minister and decision by the Governor-in-Council. But the hearing officer is different.

A decision as to the relevant law is therefore necessary both as to procedure and as to denaturalization itself. With this purpose in mind, we must now turn to the *Interpretation Act*, c. I-23. The relevant provisions are the following:

35. Where an enactment is repealed in whole or in part, the repeal does not

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

(d) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal.

As to substance:

Section 35 clearly preserves, after repeal of the prior legislation, both the right of the Crown to initiate proceedings in revocation of citizenship and the liability of the citizen to suffer such revocation, should the circumstances warrant under the repealed legislation. This conclusion was reached and approved in 1974 by the Federal Court of Appeal in **Bell Canada v. Palmer** ²³³ interpreting ss. 35(c) and (e) of the *Federal Interpretation Act*. Speaking for the unanimous Court of Appeal, Chief Justice Thurlow said (p. 189):

The learned trial judge held that substantial rights had accrued to the complainants under the old Act at the time of its repeal and that section 35, paragraphs (c) and (e) of the Interpretation Act, R.S.C.1970, c. I-23 applied to preserve and continue such rights under that Act notwithstanding the appeal.¹²³⁴ I agree with this view.

The same conclusion had been reached in 1970 by the Ontario Court of Appeal in **R. v. Coles** ²³⁵ dealing with a prosecution commenced under the *Ontario Securities Act* after its repeal. The case dealt with the *Ontario Interpretation Act*, but its provisions were virtually identical to ss. 35(c) and (e) of the *Canadian Interpretation Act*.

This conclusion is borne out both by the text of s. 35 and by the equitable construction that should be put on it.

Stripped of its unnecessary wording for our purposes, s. 35 provides that where an enactment is repealed, the repeal does not affect any right or liability acquired or incurred under the enactment so repealed; does not affect a violation of the provisions of the enactment so repealed or any forfeiture incurred under such enactment; it does not affect any remedy in respect of any such right, liability or forfeiture; and a remedy may be instituted or enforced and the forfeiture may be imposed as if the enactment had not been so repealed.

Once those interpretation principles are applied to our citizenship legislation, the perpetuation through 1976 and up to this day of the right of the Crown and the liability of the citizen to revocation of citizenship under the repealed 1946 Act could not be more clearly stated. So much for the text of the *Citizenship Act*.

No other reasonable conclusion could be reached either, through an effort of equitable construction. The Commission will simply adopt here the reasoning of Mr. Christopher A. Amerasinghe in his opinion of 27 May 1983.²³⁶

I do not think it would be reasonable to assume that Parliament intended that those persons who had obtained citizenship by fraud or false representations or concealment of material facts under prior legislation should be immune from penalties or liabilities such as revocation of citizenship merely because they were not discovered until after the

²³³ (1974) F.C. 186.

²³⁴ This is probably a printing mistake and should read: "repeal".

²³⁵ (1970) 1 O.R. 570.

²³⁶ Exhibit P-101, p. 6, no. 27.

passage of the new legislation, whereas persons who had obtained their citizenship by fraud or false representations or concealment of material facts under the new legislation were to be subject to penalties and revocation of citizenship.

As to procedure:

It is s. 36(d) of the *Interpretation Act* which governs (it is quoted above). In agreement with the generally accepted theory, it provides for the immediate application of laws of procedure to past events and to pending proceedings.

True, in **Eisener v. Minister of Lands and Forests**,²³⁷ the Nova Scotia Court of Appeal took a different view of the impact of ss. 22(3)(d) of the *Interpretation Act of Nova Scotia*²³⁸ which used the same wording as s. 36(d) of the *Canadian Interpretation Act*. It stressed that ss. 22(3)(d) provided for the substitution of the new procedure "as far as it can be adapted" (p. 169). Now the new Nova Scotian Statute provided for "an entirely different type of proceeding before a different tribunal with different rights of appeal" (*ibid.*). But the situation here is vastly different inasmuch as the whole procedure remains the same, and the only change lies in the fact that the hearing is moved from the Superior Court to the Federal Court, an easy "adaptation" to make.

Much closer to our situation were the facts in **Re Martell**.²³⁹ There the courts had to apply ss. 14(2)(c) of the *Interpretation Act* of Ontario.²⁴⁰ This paragraph again used the same wording as s. 36(d) of the *Canadian Interpretation Act*. The situation of fact which formed the basis of the action had actually crystallized before the repeal of the former enactment (as here) and the proceedings had been initiated after that repeal (as they would here): the Court of Appeal of Ontario decided that the new procedure should apply.

The Commission, therefore, *FINDS* that:

- 32- In the matter of denaturalization, the substance of the rights of the Crown and the rights and liabilities of the citizen should be governed by the Act under which they accrued, even if the Act was repealed in the meantime; the procedure should be governed by the Act in force when the legal proceedings are commenced.**

2. Grounds for denaturalization

This question goes, of course, to substance, not only to procedure and must accordingly be governed by the Act of 1946. Subsection 21(1)(b) provided for revocation of citizenship if the latter had been obtained:

²³⁷ (1974) 10 *N.S.R.* (2d) 160.

²³⁸ (1967) *R.S.N.S.*, c. 151.

²³⁹ (1957) 11 *D.L.R.* (2d) 731.

²⁴⁰ (1950) *R.S.O.*, c. 184.

1. by false representation; or
2. by fraud; or
3. by concealment of material circumstances.

The 1976 legislation adopted the same criteria (s.9) but with the following qualifications:

1. the condition “knowingly” was added to the third ground: concealment of material circumstances;
2. a deeming provision was added by ss. 9(2), expressly bridging the gap between immigration and citizenship.

The condition added to the third ground admittedly rendered revocation more difficult; conversely the deeming condition should have made the whole process smoother. Again, however, in view of the period during which most suspects should have acquired Canadian citizenship, it is under the provisions of the 1946 legislation that the question of the grounds for denaturalization should mainly be considered.

The three grounds for revocation are connected in the same section of the Act to the obtaining of Canadian citizenship. They may, therefore, be shown to have matured during the citizenship process, e.g., false representations before the citizenship judge. One, however, must move further: s. 10 of the Act provides in turn that the applicant must “satisfy the [citizenship] court” that:

“(b) he has been lawfully admitted to Canada for permanent residence therein;

(d) he is of good character.”

The revocation authority may, therefore, look back to representations, fraud or concealment at the time of the admission to Canada for permanent residence. This makes necessary an examination of the immigration laws which were in force at the time of the suspects’ admission into the country for permanent residence.

Always because of the dates involved, one must look at the Immigration Acts both of 1910 and 1952; it is only in the odd and exceptional case that the 1976 Act should be considered. Because of intervening amendments and in order to simplify references, we will use the consolidation of 1952: c. 145²⁴¹ and c. 325 also of 1952,²⁴² which abrogated and replaced c. 145. Chapter 145 regulated entry requirements between World War II and 1 June 1953 when c. 325 was proclaimed. Chapter 325 regulated the matter until 1978.

²⁴¹ *Immigration Act*, 1952, R.S.C., c. 145.

²⁴² *Immigration Act*, 1952, R.S.C., c. 325. By its s. 73, c. 145 was repealed.

Our main concern is the determination of prohibited classes of immigrants during the relevant period, especially during the ten years or so after World War II. The answer to this question should outline the probable field of "false representations, fraud or concealment of material circumstances".

Immediately after the war, the prohibited classes relevant to our study were the following (in abbreviated form):²⁴³

- d) persons guilty of crimes involving moral turpitude;
- n) persons advocating the overthrow by force of the Government of Canada or the assassination of public officials;
- o) persons affiliated with organizations which preach such doctrines;
- p) enemy aliens or persons who have been alien enemies and who were or may be interned on or after the 11th day of November 1918;
- q) persons guilty of espionage;
- r) persons guilty of high treason or who assisted His Majesty's enemies in time of war.

As from 1 June 1953, c. 325 listed the following prohibited classes (again in abbreviated form):²⁴⁴

- d) as in (d) above, under reserve of rehabilitation;
- l) as in (o) above;
- m) as in (n) above;
- n) spies, saboteurs;
- q) as in (q) above;
- r) as in (r) above;
- t) persons who cannot comply with the Act.

Those statutory provisions, however, do not tell the whole story. Section 82 of c. 145 gave to the Governor-in-Council the power to:

make such orders and regulations, not inconsistent with this Act, as are considered necessary or expedient for enforcing the provisions of this Act according to the true intent and meaning thereof.

Section 61 of c. 325 continued in force this regulatory power and expanded on it by specifying that such regulations could be made respecting:

- (a) the terms and conditions under which persons who have received financial assistance to enable them to obtain passage to Canada or to assist them in obtaining admission to Canada may be admitted to Canada;

²⁴³ Chapter 145, s. 4.

²⁴⁴ In s. 5.

- (g) the prohibiting or limiting of admission of persons by reason of
- (i) nationality, citizenship, ethnic group, occupation, class or geographical area of origin,
 - (ii) peculiar customs, habits, modes of life or methods of holding property,
 - (iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or other conditions or requirements existing, temporarily or otherwise, in Canada or in the area or country from or through which such persons come to Canada, or
 - (iv) probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their admission.

It appears that this regulatory power was abundantly used by the Governor-in-Council. According to Mr. M.H. Brush, of the Canada Employment and Immigration Commission,²⁴⁵ at the end of the war there was a danger of recession and unemployment, there was a lack of transportation across the Atlantic, there was a considerable shortage of housing: "so the government chose to move very slowly in opening up immigration".²⁴⁶

The following orders should be noted concerning prohibited classes (they are considerably summarized here):

NUMBER	DATE	SUMMARY
2653	14 September 1939	Prohibits, under the <i>War Measures Act</i> , enemy aliens and nationals of any territory now occupied by an enemy country.
3547	21 May 1941	Deletes "nationals, etc.," from previous order, thus leaving prohibition in force against enemy aliens only.
1373	9 April 1946	Replaces two previous orders with similar provisions taken under <i>Immigration Act</i> .
2908	31 July 1947	Removes nationals of Finland, Hungary, Italy and Romania from prohibition of Order-in-Council 1373.
4850	26 November, 1947	Order-in-Council 1373 as amended is revoked. General prohibition against enemy aliens is renewed, except against four above-mentioned countries.
1606	28 March, 1950	Order-in-Council 4850 is revoked. General prohibition against enemy aliens is renewed, with three narrow exceptions.

²⁴⁵ Evidence, vol. II, p. 212 ff.

²⁴⁶ *Ibid.*, p. 218.

- | | | |
|------|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4364 | 14 September 1950 | Order-in-Council 1606 is revoked. Prohibition against nationals of Germany is lifted, but maintained against other enemy aliens (in practice, nationals of Japan). |
| 3689 | 31 July 1952 | Order-in-Council 4364 is revoked. |

Thus, if one were to base a conclusion on those Orders-in-Council only, it would appear that the prohibition against entering Canada was in force against all enemy aliens until 31 July 1947; from that date it was lifted in favour of nationals of Finland, Hungary, Italy and Romania; it remained in force against nationals of Germany until 14 September 1950; it was finally revoked generally on 31 July 1952. But those Orders-in-Council — to which the Immigration Act itself must be added — do not tell the whole story. Other instruments such as Cabinet directives and internal regulations added their own impact. They were rooted, of course, in the Allied Control Council Directive Number 38 of 14 October 1946 (exhibit P-34). Article 1 of Part II of the Directive said:

Groups of Persons Responsible

In order to make a just determination of responsibility and to provide for imposition (except in the case of 5 below) of sanctions the following groupings of persons shall be made.

- 1) Major offenders;
- 2) Offenders (activists, militarists, and profiteers);
- 3) Lesser offenders (probationers);
- 4) Followers;
- 5) Persons exonerated. (Those included in the above categories who can prove themselves not guilty before a tribunal).

Part I of appendix A gave a long list of “major offenders” which, in paragraph O, included “war criminals”.

It is not surprising, therefore, that one would find, in early 1949, a classification which had already been made of the grounds for rejection of immigration applications.²⁴⁷ Among the thirteen grounds therein listed, one finds:

- (b) Member of SS or German Wehrmacht. Found to bear mark of SS Blood Group (Non Germans).
- (c) Member of Nazi party.
- (h) Evasive and untruthful under interrogation.
- (i) Failure to produce recognizable and acceptable documents as to time of entry and residence in Germany.
- (j) False presentation; use of false or fictitious name.

²⁴⁷ Exhibit P-35, document no. 16, Department of Mines and Resources, 7 February 1949.

A few months later, on 28 October 1949, a Cabinet Directive²⁴⁸ was addressed to "All Government Departments and Agencies Concerned" with the rejection of immigrants on security grounds. The Directive gave as examples of applicants to whom a visa is refused, "Communists, members of the Nazi or Fascist Parties or of any revolutionary organization, 'collaborators', and users of false or fictitious names or documents".

Following Order-in-Council 4364 of 14 September 1950, the Department of Citizenship and Immigration issued its official circular No. 72A²⁴⁹ which announced that "German nationals will now be dealt with on the same basis as any other European nationality".

This, in turn, was quickly followed by an internal memorandum of 1 December 1950,²⁵⁰ advising that:

We have received advice from the R.C.M.P. that they have today cabled their Security Officers that membership in the Nazi Party will not in itself be a cause for exclusion. This for your information.

We will now witness the interventions of yet another body: the Security Panel and its own Sub-Panel. A word of explanation appears apropos: it will be taken from the evidence of a retired government security officer, Mr. G.F. Frazer:²⁵¹

The Panel was established just after the war, 1946, I believe, to serve as an advisory body for the government on security policy and procedures, to prepare policy memoranda and suggestions for the consideration of the government, and also to co-ordinate security practices and procedures within the government. It was perceived, I think, at that time that there was a great need for that and that there were discrepancies in procedures, where they existed, and so on. I think those were the main functions of the Panel.

If one refers to the minutes of the first meeting, it is interesting that it was emphasized it was not an executive body; it was purely advisory.

The Panel went on by itself until 1953. At that point the Sub-Panel was established really to assist the Security Panel. It dealt with the same matters, but it had more time, I would say, to deal in greater thoroughness with matters. Also, it could deal with matters of detail that it was deemed should not be brought before the Panel, which was made up of senior officials.

So, the Panel really dealt with the important matters of policy and the Sub-Panel with more detailed and less important matters. The Sub-Panel dealt through the Secretariat in the Privy Council Office with government departments and agencies very closely, particularly with the security officers.

According to Mr. Frazer, the minutes of the Security Panel with "reference to matters of immigration" cover the period of 24 June 1946 to 20

²⁴⁸ Circular no. 14: Rejection of Immigrants on Security Grounds — Privy Council Office.

²⁴⁹ In exhibit P-35, document no. 21.

²⁵⁰ *Ibid.*, document no. 22.

²⁵¹ Evidence, vol. XV, p. 1862, at p. 1869.

October 1952, and those of the Sub-Panel, from 12 May 1953 to June 1962.²⁵²
Mr. Frazer's explanation is the following:²⁵³

If I may speculate a little, I think I could say that, in my view, it probably was deemed unnecessary for the Committees to meet because the great lines of policy had been established in that period and the Security Secretariat could deal with problems that came up within the context of the policy approved, could deal with problems raised by departments. I cannot swear to all that, but I would think that would be the situation.

In view of an upcoming meeting of the Security Panel in the summer of 1951, the Immigration Branch prepared an analysis which contained the following comments concerning rejection grounds (b) and (c): membership in SS or in Nazi Party:²⁵⁴

Category "B"

Approximately 40% of all security rejections have been effected under this category. Of these rejections, approximately 50% have been reviewed and in about 65% of these cases the security rejection has been withdrawn. The reason for the high percentage of favourable reviews is the result from change in policy respecting German Nationals (and Volksdeutsche) as set forth in P.C. 1606, thereby excluding service in the German Army as a reason for security rejection. The number of applications for review covering persons previously rejected for such service is steadily increasing and favourable reviews are being effected in nearly all cases.

The only remaining obstacle under category "B" is service in the Waffen S.S. I believe R.C.M.P. are prepared to give some consideration to cases involving compassionate grounds and when age on enlistment and/or circumstances surrounding enlistment would appear to warrant consideration. In my personal opinion, Waffen S.S. rejections in accordance with present regulations have been based, with some exceptions, on public sentiment in Canada as a result of World War II, rather than the fact the authorities would consider the individual concerned a security risk in Canada at the present time. I believe service in the Waffen S.S. should no longer be a blanket cause for security rejection, provided each case is judged on it's (sic) individual merits and the authorities concerned are satisfied the prospective immigrant would not present a security risk in Canada at the present time and, provided the prospective immigrant's service in the Waffen S.S. was not of an objectionable nature.

Category "C"

Approximately 25% of all security rejections have been affected under the above category. Of these rejections, approximately 35% have been reviewed and in about 95% of the cases reviewed the security rejection has been withdrawn. With very few exceptions, Category "C" is no longer considered a reason for security rejection and all cases which come to our attention may be referred to R.C.M.P. for re-consideration.

The Security Panel met on 5 July 1951, and the Deputy Minister of Citizenship and Immigration issued the following memorandum:²⁵⁵

At the last meeting of the Security Panel on July 5, the rejections on Grounds of "B" for security reasons have been reviewed and the following decisions have been reached:

GROUND OF "B" are to be modified to read:

²⁵² *Ibid.*, p. 1864.

²⁵³ *Ibid.*, p. 1870.

²⁵⁴ Exhibit P-35, document no. 24, 17 May 1951.

²⁵⁵ *Ibid.*, document no. 25.

Non-German members of S.S. found to bear mark of S.S. blood group;

Non-German members of Waffen S.S. who joined this force prior to 1943 and are found to bear marks of S.S. blood group;

Non-German members of Waffen S.S. found to bear marks of S.S. blood group who voluntarily joined after the 1st of January 1943.

(In the case of those who were forced to join or were conscripted after the 1st of January 1943, this will not be an automatic rejection).

During the years which followed, there was considerable activity concerning the rejection criteria: witness the numerous documents in exhibit P-35. Suffice it to say that, generally speaking, membership in the Gestapo, status of a major offender, and service as a concentration camp guard, remained grounds for automatic rejection according to the Security Sub-Panel recommendations of 1955.²⁵⁶

Finally, through the 1960s and early 1970s, the *Immigration Manual* stated under the heading "Criteria for Rejection of Independent Applicants on Security Grounds":

Reason:

(b) Member of SS or German Wehrmacht. When non-German found to bear mark of SS Blood Group.

Interpretation:

Former membership in the German SS, SA and Waffen SS should not be considered cause for automatic rejection whether or not the applicant is sponsored by relatives in Canada; and each case should be studied to ascertain whether or not the individuals joined these organizations voluntarily;

Reason:

(c) Nazi.

Interpretation:

Former membership in the Nazi Party should not be considered an automatic cause for rejection, but former members of the Nazi party who are considered by the R.C.M. Police to constitute a real security risk should continue to be rejected;²⁵⁷

The Commission accordingly, *FINDS THAT*:

33- The grounds for revocation of citizenship are, in most cases, those enumerated in the 1946 *Canadian Citizenship Act*: false representations, fraud, or concealment of material circumstances.

34- Those grounds should be applied both to the citizenship process and to the earlier immigration process.

²⁵⁶ Meetings of 16 June 1955 and 18 October 1955 in exhibit P-76. For a study of the actual application of those recommendations, see report by Mrs. Alti Rodal prepared for the Commission.

²⁵⁷ Exhibit P-35, document P.

35- Those grounds should be tested against the relevant statutes, Orders-in-Council, Cabinet Directives, Immigration, Security and Police regulations.

3. Evidence

The burden of proof, the nature, civil or criminal, of the process and the rule on the probatory value of the evidence: those three principles must be made clear before embarking on a study of the various problems which the question of evidence raises. The courts have settled those three questions abroad, but not so explicitly in Canada. In view of the similarity in the basic foundations of the legal regimes in matters of citizenship and immigration in the United Kingdom, the United States of America and Canada, it is legitimate to look at the solutions which have been retained elsewhere and compare them to our domestic situation.

In the U.S.A., the civil nature of the process leading to revocation of citizenship has never been put in doubt. Indeed, it has recently been restated by the U.S. Court of Appeals for the third circuit in **United States v. Kowalchuk**.²⁵⁸ Nor has it ever been questioned that the burden of proof falls on the prosecuting government. It follows that the government must prove its case in accordance with the rule which avails in civil matters: according to the balance of probabilities. But — as was indeed stated recently in the United Kingdom — this rule must be interpreted and applied with “flexibility”. The Supreme Court of the United States has stretched the rule to the extreme when it decided in **Schneiderman v. United States**²⁵⁹ that “the evidence must be clear, unequivocal and convincing”, and that the revocation of the grant of citizenship “cannot be done upon a bare preponderance of evidence which leaves the issue in doubt”. Indeed the distinction is quite fine between the criminal rule that proof of guilt must be made “beyond a reasonable doubt” and a civil rule that proof must be adduced so as “not to leave the issue in doubt”!

Be that as it may, the U.S. Supreme Court has reaffirmed that doctrine in **Fedorenko v. U.S.**,²⁶⁰ a war criminal case. It referred to the “heavy burden of proof” resting on the government and added: “[a]ny less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding”.

In the United Kingdom, the House of Lords discussed at length those issues in **Khawaja v. Secretary of State for the Home Department**.²⁶¹ The case involved the deportation of an allegedly illegal immigrant. The House affirmed

²⁵⁸ 744 F.(2d) 301, 11 September 1984.

²⁵⁹ (1943) 320 U.S. 118, at p. 125.

²⁶⁰ 449 U.S. 490, at p. 505.

²⁶¹ (1983) 1 *All E.R.* p. 765.

the civil nature of the case and the government's obligation to establish its case. It naturally followed by adopting the civil standard of a "preponderance of probability". There, however, intervened a new factor: flexibility. Lord Scarman put it as follows:²⁶²

My Lords, I would adopt as appropriate to cases of restraint put by the executive on the liberty of the individual the civil standard flexibly applied in the way set forth in the cases cited; and I would direct particular attention to the words of Morris LJ already quoted.

Those words went as follows:²⁶³

[N]o real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. . . the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.

Lord Fraser of Tullybelton added:²⁶⁴

With regard to the standard of proof, I agree with my noble and learned friend Lord Scarman that, for the reasons explained by him, the appropriate standard is that which applies generally in civil proceedings, namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be high.

Lord Bridge wrote:²⁶⁵

The question about which I have felt most difficulty concerns the standard of proof required to discharge that onus. I was at first inclined to regard the judgment of Lord Parker CJ in "Ahson's" case as sufficient authority for the proposition that proof is required beyond reasonable doubt. But I have been persuaded by the reasoning on this point in the speech of my noble and learned friend Lord Scarman and by the authorities which he cites that that proposition cannot be sustained. These have led me to the conclusion that the civil standard of proof by a preponderance of probability will suffice, always provided that, in view of the gravity of the charge of fraud which has to be made out and of the consequences which will follow if it is, the court should not be satisfied with anything less than probability of a high degree.

Finally Lord Templeman said:²⁶⁶

I agree with my noble and learned friend Lord Scarman that the burden of proving that leave to enter was obtained by fraud and that consequently the entrant is an illegal entrant liable to arrest and expulsion can only be discharged by the immigration authorities manifesting to the satisfaction of the court a high degree of probability.

The British standard, a probability of a high degree, is very demanding; yet it appears to fall somewhat short of the American rule: clear, unequivocal and convincing. . . not leaving the issue in doubt, which is tantamount to adopting the criminal law standard. Lord Scarman expressed it best when he wrote:²⁶⁷

²⁶² *Ibid.*, p. 784.

²⁶³ *Ibid.*, p. 783.

²⁶⁴ *Ibid.*, p. 772.

²⁶⁵ *Ibid.*, p. 792.

²⁶⁶ *Ibid.*, p. 794.

²⁶⁷ *Ibid.*, p. 783.

My Lords, I have come to the conclusion that the choice between the two standards [civil or criminal] is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula used for the guidance of juries in criminal cases. The civil standard as interpreted and applied by the civil courts will meet the ends of justice.

In Canada, only a few months ago the Supreme Court, without actually using the expression, has acknowledged the existence of the “flexibility principle” in applying the probability standard to civil matters.²⁶⁸ Chief Justice Dickson, writing for the Court, said (p. 39):

Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case.

The Commission has, however, been unable to find any case where all three previously mentioned questions would have been given full consideration. Indeed, there is a dearth of authorities dealing with revocation of citizenship, if one excepts the matter of **Re Gray and Mooney**²⁶⁹ where, dealing with the power of the Secretary of State to declare that a person has ceased to be a Canadian citizen, the Court stated that the exercise of such a power “leads to serious consequences” (p. 185).

But, as we have already seen, citizenship and immigration are, under certain aspects, intimately linked, and there exists a substantial jurisprudence in the field of immigration. The civil nature of those proceedings has never been questioned²⁷⁰ (unless a prosecution be based on an obviously penal section of the Act). The civil rule of balance of probabilities has also been accepted. In **Jolly v. Minister of Manpower and Immigration**,²⁷¹ Chief Justice Thurlow, rendering the judgment of the Federal Court of Appeal, expressed himself as follows (p. 282):

Conversely, a finding that, on the evidence before the Board, *on balance of probabilities* the Black Panther Party was not an organization that at the material times advocated subversion by force, etc., in my opinion, implies that *on balance* there are not reasonable grounds for believing the Party to have been such an organization.

(emphasis added)

In **Alemao v. Minister of Manpower and Immigration**,²⁷² Mr. Justice Pratte, rendering the judgment of the Federal Court of Appeal, wrote (p. 186):

The Special Inquiry Officer cannot be said to have failed to apply and follow *the normal rules of evidence*; in so doing, he was acting in accordance with s. 26(3).

(emphasis added)

²⁶⁸ **The Queen v. Oakes**, S.C.C., 28 February 1986.

²⁶⁹ (1976) 67 D.L.R. (3d) 182, Federal Court, Trial Division, (Addy, J.)

²⁷⁰ See: **De Bernonville v. Langlais**, (1951) C.S. 277, p. 279; **Minister of Manpower and Immigration v. Brooks**, (1974) S.C.R. 850, p. 854; **Jolly v. Minister of Manpower and Immigration**, (1976) 7 N.R. 270, p. 284, Federal Court of Appeal.

²⁷¹ See footnote 270.

²⁷² (1977) 12 N.R. 184.

In **Dilday v. Minister of Manpower and Immigration**,²⁷³ the Chairman referred, (p. 345), to the “burden being in accordance with the ordinary standards of civil proof”.

In **Cheung v. Minister of Employment and Immigration**,²⁷⁴ Mr. Justice Urie, while sharing the views of his two colleagues of the Federal Court of Appeal, added the personal observation that, in the administration of the *Immigration Act*, (p. 772):

as a first principle, it seems to me that it is incumbent upon the Adjudicator to be sure that he bases his decision on the best evidence that the nature of the case will allow.

Given those basic ingredients, one finds no explicit pronouncement in Canada similar to those found in **Schneiderman** in the U.S.A. or **Khawaja** in the United Kingdom relative to the quality of the evidence necessary to lead to denaturalization or deportation. Those foreign pronouncements commend themselves, however, to this Commission; they flow from principles with which our legal system is familiar, and they supply the answer to the concern expressed by the Canadian courts over “the serious consequences” arising out of such proceedings, either for the citizen or for the immigrant.

Pursuing the matter a step further, the Commission is of the view, with all due respect for the U.S. Supreme Court, that the British approach is more consistent with the civil nature of the process and the consequent choice of the civil standard of evidence: the courts should not be satisfied with less, but should not look for more than a probability of a high degree. This is also the position adopted by Professor S.A. Williams in her brief to this Commission.²⁷⁵

The Commission, accordingly *FINDS* that:

- 36- Proceedings in denaturalization are civil in nature; the burden of proof lies on the government.**
- 37- In their assessment of the evidence, the courts should not be satisfied with less, but should not look for more, than a probability of a high degree.**

Now, each case stands to be determined on its own set of facts, but it is probable that, generally, such cases against war criminals will raise some of the following issues:

²⁷³ (1971) 2 I.A.C. 340.

²⁷⁴ (1981) 2 F.C. 764.

²⁷⁵ Williams, study prepared for the Commission, “Deportation and Denaturalization of War Criminals in Canada”, 1 September 1985, p. 30.

if based on the citizenship process:

false representations, etc., with respect to lawful admission to Canada or to good character;

if based on the immigration process:

false representations, etc., with respect to prohibited classes of immigrants.

In either case, the issue will revolve around the activities of the suspect during World War II and his declarations, or lack of them, to Canadian authorities in this respect. The following problems must then be solved:

- i) What was the extent of the duty of the applicant?
- ii) Is the relevant evidence available?
- iii) Is there a presumption of fact against the applicant?

The Commission will examine those questions in the same order.

i) *What was the extent of the duty of the applicant?*

Under the 1946 *Canadian Citizenship Act*, the applicant had to "satisfy the court" of his lawful admission to Canada and of his good character: ss. 10.(1)(b) and (d). For that purpose s. 34 provided that the applicant

shall produce to the Court such evidence as the Court may require that he is qualified and fit to be granted a certificate under the provisions of this Act.

Under the *Immigration Act*, c. 145, the applicant "shall first appear before and make application to an immigration officer at a port of entry for permission to enter or land in Canada and shall be detained for examination" and "shall answer truly all questions put to him by any officer when examined under the authority of this Act", ss. 34(1 and 2).

A substantially similar provision is found in ss. 20(1) and (2) of the *Immigration Act*, c. 325.

The question is whether there is on the applicant a "duty of candour" by the force of which he should volunteer information which may harm him.

The position does not appear to be different in citizenship and in immigration. In citizenship, the burden falls on the applicant to produce such evidence as the court may require. In immigration, his duty is to answer truly (or truthfully) all questions put to him. In both circumstances the law foresees that the applicant waits for the questions and ought to answer them truthfully; but the statutes impose on him no further obligation.

Whether this system implies an additional duty of candour on the part of the applicant is a question which has been considered in various quarters; contradictory answers have been given by at least one experienced public servant, lawyers and academics, law officers of the Crown, and Canadian and British courts.

Public Service

Ms. Lois Gile is Senior Nationality Law Advisor for Citizenship Registration of Secretary of State. She has worked in Citizenship Registration since 1963.²⁷⁶ Considering the question from the point of view of citizenship, she answered as follows a question put by Mr. Matas:²⁷⁷

Q. Another question I have is: Was there a duty to disclose, on behalf of an applicant, all relevant information?

A. You mean by the applicant?

Q. By the applicant.

A. Not that I am aware.

Q. You are not aware one way or the other on that?

A. I am aware that he was required to answer the questions provided on the application form and that he was required to answer the questions put to him by the presiding judge. Other than that, I am no (sic) aware of any necessity to do anything.

Lawyers and Academics

Mr. Matas, in his brief (exhibit P-69) argues forcefully in favour of the existence of such a duty (pp. 58-61).

So does Ms. Williams in her opinion to the Commission:

The caselaw in Canada indicates that an immigrant is under a duty to disclose fully all material facts. The controversial question is whether this duty extends to matters about which the immigrant is not questioned specifically. It is submitted that the duty does extend that far when the information is material to landing.

Mr. Bryk, in his opinion to the Commission, appears to take the opposite view (p. 7).

Law Officers of the Crown

The Right Honourable Pierre E. Trudeau, when he was Minister of Justice, rendered an opinion on 6 November 1967 with respect to the *Citizenship Act* in which he wrote:²⁷⁸

There is nothing in the Act to indicate that an application for Canadian citizenship is in the nature of a confessional requiring the applicant to disclose all prior conduct, whether public or private, on his part which he knows or ought to know to be a "material circumstance" within the meaning of s. 19(1)(b).

After summarizing that opinion, the interdepartmental committee wrote in its 1981 memorandum:²⁷⁹

²⁷⁶ Evidence, vol. XIV, pp. 1761-1762.

²⁷⁷ *Ibid.*, p. 1784.

²⁷⁸ Quoted by the Honourable Mark MacGuigan in his opinion of 8 December 1983, exhibit P-103, p. 3.

²⁷⁹ Exhibit P-77, p. 15, no. 19.

there is no reason to question the soundness of the legal opinion interpreting that section.

The Honourable Mark MacGuigan, then Attorney General of Canada, wrote on 8 December 1983:²⁸⁰

My predecessors have consistently expressed the view, *with which I agree*, that there is no "duty of candour" placed on applicants for immigration or citizenship.

(emphasis added)

Canadian and British Courts

Six modern judgments ought to be considered. They were all rendered under immigration legislation but, as was said earlier, provisions relating to citizenship are, in respect of the question we are considering, very similar and proceeding from the same philosophy.

The first judgment was rendered in 1973 by the Supreme Court of Canada in **Minister of Manpower and Immigration v. Brooks**.²⁸¹ For reasons expressed at length by the late Mr. Justice Laskin, the Court reversed the Board of Immigration appeal on three questions (which are foreign to the present issue), but confirmed the Board on the point which is being discussed here. The Board had said in part, (quoted at p. 869):

The lack of full, complete and detailed questioning by the immigration officers concerned, the failure to make any background check on Brooks, the haste in landing him, cannot affect his duty to disclose, if the fact is material to the question of landing or no landing.

(emphasis added)

The Supreme Court had granted leave to appeal on five questions of law; question number five is the only relevant one here:

5. Did the Immigration Appeal Board err in law in deciding that the Respondent could not be deported under s. 19(1)(e)(viii) because it had not been proved that he was, at the time of his admission to Canada, in a prohibited class?

It may not be out of order to quote here Professor C.J. Wydrzynski, who stated in 1983²⁸² that that judgment "is particularly complex and obscure". This opinion is borne out by the convoluted analysis of the judgment which Mr. Matas has been obliged to make in his brief under the caption "a duty to disclose".²⁸³ Be that as it may, the fact remains: the Court did not express its view as clearly as the Board had done. Mr. Justice Laskin wrote (p. 870):

In my opinion, if the materiality of matters on which no questions are asked is cognizable under s. 19(1)(e)(viii), it would be under the words "other fraudulent or improper

²⁸⁰ Exhibit P-103, p. 2.

²⁸¹ See footnote 232, this chapter.

²⁸² Wydrzynski, *Canadian Immigration Law and Procedure*, Canada Law Book, Aurora, 1983, p. 187.

²⁸³ Exhibit P-69, pp. 57-61.

means". They are broad enough to embrace non-disclosure of facts which would be material to admission or non-admission if known.

(p. 872)

I do not agree that the Board erred in refusing to find s. 19(1)(e)(viii) applicable whenever a false or misleading answer was given to a question, irrespective of whether it was or was not material to admission.

If the Commission is allowed so to say, the Court did not make the task of its readers easier when it gave to the fifth question the following answer (p. 874): "Q. 5: No, as this question was elaborated in argument."

In any event, one may conclude that the Supreme Court upheld the existence of a duty to disclose facts which are material to admission.

The second judgment to be considered was rendered by the House of Lords in 1980: **Zamir v. Secretary of State for the Home Department**.²⁸⁴ The appellant, a citizen of Pakistan, had failed to disclose his marriage after obtaining a visa but before entering the United Kingdom: "he had been asked no question" was his explanation. An order of deportation was issued, against which he sought a writ of habeas corpus. His main argument was put, in short, as follows by the House of Lords (p. 949):

The appellant's first contention is based upon this paragraph [paragraph 4 of schedule 2 of the *Immigration Act 1971*]: the immigration officer, he says, could have asked him if he was married, or if his circumstances had changed, but he did not. The appellant's only duty was to answer, if asked: he was under no duty to volunteer information.

The House rejected this interpretation. Lord Wilberforce wrote in particular (p. 950):

I do not accept this contention: indeed, it cannot be too strongly repudiated. At the very lowest, an intending entrant must not practise a deception; (. . .) It can be no answer to a claim that such deception has occurred to say that no question was asked: paragraph 4 above merely confers a power, which carries a sanction if not complied with, and in no way derogates from a general duty not to deceive. I would, indeed, go further than this — a point so far left open in the Court of Appeal. In my opinion an alien seeking entry to the United Kingdom owes a positive duty of candour on all material facts which denote a change of circumstances since the issue of the entry clearance. He is seeking a privilege; he alone is, as to most such matters, aware of the facts: the decision to allow him to enter, and he knows this, is based upon a broad appreciation by immigration officers of a complex of considerations, and this appreciation can only be made fairly and humanely if, on his side, the entrant acts with openness and frankness.

The four colleagues of Lord Wilberforce agreed expressly with his reasons. Viscount Dilhorne added that he agreed (p. 951), "especially with his observations as to the duty of candour owed by aliens seeking entry to this country."

The third judgment was rendered by the English Court of Appeal in 1980, between the judgment of the Court of Appeal and that of the House of Lords

²⁸⁴ (1980) A.C. 930.

in **Zamir: R. v. Secretary of State for the Home Department, ex parte Khan**.²⁸⁵ The wind then appeared to blow in the opposite direction. Khan, an immigrant from Pakistan, had left his wife in their native country when he emigrated to England. When he landed at Heathrow airport, “Wendy Boden [the immigration officer] did not ask him his age. She did not ask him if he was married. She did not ask him if he was fully dependent on his father. If she had asked him, and he had told her that he was a married man, she would have refused him entry.”²⁸⁶

Lord Denning then expressed the following view (p. 341):

In the present case, I cannot see that Mangoo Khan was guilty of any fraud or misrepresentation at all. There had, it is true, been a change of circumstances. In 1972, at the age of 14, he was an unmarried and fully dependent son under 21 years; but in 1978 he was married and independent and over 21 years. That change of circumstances was such that the immigration officer might, under the immigration rules, have refused him leave to enter. But I do not know that he was under any duty to disclose this change of circumstances to the immigration officer, unless she asked him. She could see, by his passport, that he was over 21. Yet she did not refuse him on that account. By failing to ask any questions, she seems to have ignored any change of circumstances, or, indeed, to have waived any objection on that score.

(...)

This [1949 White Paper on Immigration, paragraph 14], suggests to my mind that, in a case such as the present, when the holder of an entry clearance presents himself, the immigration officer should examine him to see whether there has been a change of circumstances. It should not rest on the man to disclose it. I would hold that there is no duty of disclosure; and that, in the absence of deception, if the man is granted leave to enter, that leave is good. I would, therefore, allow this appeal and grant the habeas corpus.

Lord Denning wrote (p. 342) that “*Zamir* presents us with a problem”. But he and his two colleagues found that the two cases could be distinguished on the facts. Yet with Khan we are moving away from the high duty set in *Zamir*.

The fourth judgment to be considered was rendered in 1981 by the Federal Court of Appeal: **Minister of Employment and Immigration v. Gudino**.²⁸⁷ Here again, the applicant from Mexico failed to disclose a material fact, loss of his employment in Toronto, and argued that he had not been asked any question in this respect. The Federal Court of Appeal rejected this contention and relied largely on the House of Lords in *Zamir*; it concluded that the applicant had “breach[ed] ‘the duty of candour’ referred to by Lord Wilberforce in the *Zamir* case” (p. 752).

The fifth judgment on our list was rendered by the English Court of Appeal: **R v. Secretary of State for the Home Department, ex parte**

²⁸⁵ (1980) 2 *All E.R.* 337.

²⁸⁶ Extract from the opinion of Lord Denning, p. 340.

²⁸⁷ (1981) 124 *D.L.R.* (3d) 748.

Jayakody.²⁸⁸ But it was then November, 1981, and the House of Lords had passed on **Zamir**. Lord Denning, after quoting from Lord Wilberforce's opinion in **Zamir**, said (p. 463):

I can understand that an immigrant is under a positive duty to disclose material facts, but I do not think he is under a duty to disclose facts which are not material. What facts then are to be regarded as 'material facts'? I think that they are facts which are of a decisive character. They must be such that, if he had disclosed them, the Home Secretary would have been bound to refuse him entry or on which the Home Secretary would in all probability have refused him entry.

(...)

If the deception is neutral, as in our present case, it is not of such a decisive character and the leave to enter is not vitiated.

The two other members of the court agreed.

The last judgment which must be considered was rendered by the House of Lords in 1983: **Khawaja v. Secretary of State for the Home Department**.²⁸⁹ The applicants were respectively of Indian and Pakistani origin. Again, the cases turned on concealment of marriage, one in India, the other in Belgium. Discussing the extent of the duty of disclose under the law, the House of Lords decided to disavow the theory of the "high duty of candour" which it had approved and applied in **Zamir**. Of special interest is the fact that Lord Fraser of Tullybelton and Lord Wilberforce sat on both appeals.

In **Khawaja**, the four colleagues of Lord Wilberforce agreed to depart from what Lord Wilberforce had written but two years before in **Zamir**. Lord Wilberforce could not be prevailed upon to recant; speaking of **Zamir** he wrote (p. 332):

I ventured the opinion that a system of consideration of individual cases for the privilege of admission to this country can only work humanely and efficiently on a basis of candour and good faith on the part of those seeking entry. If here I trespassed on to the ground of moral judgment, I am unrepentant.

But Lord Fraser, who had agreed with Lord Wilberforce in **Zamir**, had now changed his mind; he wrote (p. 330):

I agree also with Lord Bridge's observations on the passage in the speech of my noble and learned friend, Lord Wilberforce, in *Reg. v. Secretary of State for the Home Department, Ex parte Zamir* [1980] A.C. 930, 950 where Lord Wilberforce expressed the opinion that an alien seeking entry to the United Kingdom owes "a positive duty of candour on all material facts which denote a change of circumstances since the issue of the entry clearance." The opinion was not a necessary part of the reasoning leading to Lord Wilberforce's conclusion, but was obiter. At the time when his speech was delivered I agreed with all of it including that passage, but further reflection, in the light of the arguments in the present appeals, has convinced me that it would be wrong to construe the Immigration Act 1971 as if it imposed on persons applying for leave to enter a duty of candour approximating to *uberrima fides*.

²⁸⁸ (1982) 1 *All E.R.* 462.

²⁸⁹ (1983) *W.L.R.* 321.

Lord Scarman put the same idea another way (p. 340):

The Immigration Act does impose a duty not to deceive the immigration officer. It makes no express provision for any higher or more comprehensive duty: nor is it possible in my view to imply any such duty. Accordingly I reject the view that there is a duty of positive candour imposed by the immigration laws and that mere non-disclosure by an entrant of material facts in the absence of fraud is a breach of the immigration laws.

Finally Lord Bridge wrote (p. 350):

In so far as the passage in the speech of my noble and learned friend Lord Wilberforce in Zamir's case at p. 950 may be understood as imposing on an applicant for leave to enter a duty of candour approximating to *uberrima fides* the breach of which would have the same effect as fraud, it cannot, I think, be accepted. If intended in that sense, it was obiter, was not supported in the present case by Mr. Brown for the Secretary of State and, as I understand, does not now find favour with my noble and learned friend Lord Wilberforce himself.

In his brief of 29 July 1986, entitled "The Duty to Disclose", Professor Cotler has argued that the British and the Canadian schemes are different to the point "that the interpretation of the Act in **Khawaja** is not pertinent to an interpretation of the Canadian Act". (p. 8) The Commission is not prepared to agree that there would exist between the two schemes such basic material differences; it accordingly prefers to rest its opinion on a comparative analysis of what it considers to be the relevant jurisprudence.

From this jurisprudential pilgrimage, it is regrettable that the picture which emerges is somewhat blurred. In a few words, the courts have decided over a recent ten-year period as follows:

Brooks (Canada):

There is a duty to disclose material facts, even in the absence of questions;

Zamir (England):

There exists a high duty of candour on all material facts;

Khan (England):

There exists no duty to disclose in the absence of questions (saving deception);

Gudino (Canada):

Relies on **Zamir** (non-disclosure was material);

Jayakody (England):

There is a duty to disclose material facts;

Khawaja (England):

Zamir went too far and is disapproved; entertains even non-disclosure of material facts (saving fraud or deception).

Faced with such conflicting views by a public servant, lawyers and academics, law officers of the Crown and the highest courts, the Commission finds itself in the invidious position of having to make a choice: so it will.

On the one hand, the applicant can be held to no duty beyond that imposed by the relevant statute: submit to questions, then answer truthfully.

However, that process must take into consideration a particular ground for denaturalization: concealment of material circumstances. There, a duty of candour emerges: no information may be withheld, even absent any relevant question, which is material to the disposition of the application.

This conclusion is consonant with the burden which ss. 8(1) of the *Immigration Act, 1976* imposes on the applicant:

8. (1) Where a person seeks to come into Canada, the burden of proving that he has a right to come into Canada or that his admission would not be contrary to this Act or the regulations rests on him.

The Commission accordingly *FINDS* that:

38- With respect to both immigration and citizenship, the applicant is under no other duty than to answer truthfully the questions put to him by the statutory authority; in so doing, however, the applicant ought to acknowledge a duty of candour implied in his obligation not to conceal circumstances material to his application, even absent any relevant questions.

ii) *Is the relevant evidence available?*

The judicial process aimed at the revocation of citizenship of a suspected war criminal will involve a comparison between his actual activities during World War II and his declarations to the Canadian authorities for purposes of immigration or citizenship. The purpose of the exercise will be to find whether there was, in the process, false representation or fraud or concealment of material circumstances.

As to the suspect's activities during the war, numerous archival depositories are available in Europe and in America, which should provide useful information in those cases where the suspect did indeed hold official functions or participate in organized operations. Furthermore, there may remain eyewitnesses of those activities. Finally, since the proceedings for revocation of citizenship are civil in nature, as we established before, the rules of civil procedure will apply: the suspect cannot refuse to testify for fear of incriminating himself²⁹⁰ and he may be summoned for examination on discovery.

Of course, each case must be assessed individually but, difficult as it may be, establishing the activities of a suspect during World War II should not prove, in most cases, an insurmountable task provided the government be prepared to appropriate the necessary human and financial resources.

²⁹⁰ See discussion of this question in the Commission's decisions: appendices I-N and I-O.

Strangely enough, the other side of the coin, proof of the declarations of the suspect for purposes of immigration or citizenship, may be more elusive or fruitless.

First of all, a general finding: proof of citizenship declarations is more readily accessible; but it is proof of immigration declarations which would probably be more useful.

Citizenship declarations

Samples of the various forms in use since World War II for application for citizenship have been filed together as exhibit P-74; there are five of them:

Form C	In use from 1947 to early 1950s;
Form CR-3	In use from 1950-1951 to 1959-1960;
Form CR-303	In use from 1960-1961 to 1974-1975;
Form CR-304	In use from 1975-1976 to 1983;
Form SEC 3-46	In use from 1983 to date.

On none of those forms does the Canadian government show any curiosity about the activities of the applicant prior to his landing in Canada. Even the one question dealing with commitment to jail or mental hospital is limited to Canada, except on Form CR-304. In this connection Ms. Gile testified as follows:²⁹¹

Q. Now, looking at Question 17 on 304 I notice here that the question has been rephrased and broken down into A, B, and C with some changes. The principal change would appear to be there is no reference to Canada any more.

A. That is correct, yes.

Q. Are you aware of whether that came about as a result of any change in policy, or was the policy still the same as far as you know?

A. As far as I am aware there was not any policy shift. It may have been an error in making up the form.

Indeed, the restriction to Canada reappeared in the 1983 form, explicitly in question number 7 and implicitly in question number 6.

Of course, those prior activities must be taken in consideration for the purpose of establishing the "good character of the applicant". On Form C — the earliest one — the topic was dealt with in the form of a direct statement by the applicant: "16. I am of good character." In the three successive forms 3, 303 and 304, the matter was left to the appreciation of the presiding judge who had to give his certificate. On the last form the question was suppressed: the new Act left the matter to an objective test.

²⁹¹ Evidence, vol. XIV, p. 1770.

The law gave no guidelines to help reach a decision on the character of the applicant. However, the department published a brochure in 1947 entitled "How to become a Canadian Citizen".²⁹² It contained the following significant passage (p. 13):

19. The Applicant's Character:

At the final hearing an inquiry is made into the applicant's character and criminal record. It is very important for an applicant seeking citizenship to have a clean record of good behaviour, since a person who has been convicted of any major crime might find it difficult to get Canadian citizenship. The definition of "good character" raises a point involving wide differences of opinion as some judges are more strict than others. The final decision, however, rests in the hands of the individual judge who must decide whether or not the applicant has fulfilled the requisites of good character.

It must be remembered that this official statement was issued by the government shortly after the war and remained in force during the first period of years when war criminals might have tried to enter Canada.

A new brochure was published in 1950.²⁹³ In its paragraph 17, it repeated the first half of the above-quoted text. However, it did away with the reference to "wide differences of opinion", but added the mention of the discretion of the Minister.

In 1956, yet a fresh brochure was published.²⁹⁴ It said in its paragraph 5, in its relevant part:

An applicant appearing for examination before the Court must satisfy the Judge that the information supplied in his Application is correct; and in addition that he is of good character.

In 1963, substantially the same text appeared in the expanded brochure then produced by the department.²⁹⁵

So it appears that the first two brochures referred expressly to "conviction of any major crime" in relation to good character, while the last two left the matter entirely with the discretion of the presiding judge. Be that as it may, the decision of the judge cannot help; the forms provided that the judge merely had to express his opinion by 'yes' or 'no'. What questions the judge had put to the applicant — it is impossible to know; no records of the applicant's examination were kept and there was no uniformity of practice among the judges. Ms. Gile testified that it varied from court to court quite a bit.²⁹⁶ She had already stated:²⁹⁷

Whose decision was it, whether the person was of good character?

²⁹² Exhibit P-106.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*, *Guide to Canadian Citizenship*, p. 88.

²⁹⁶ Evidence, vol. XIV, p. 1797.

²⁹⁷ *Ibid.*, pp. 1774-1775.

A. The presiding officer of the court where the applicant made his or her application.

Q. Are you able to tell us to your knowledge what type of examination or the extent of any examination was made by the presiding officer of good character of an applicant?

A. No, I am not able to tell you that because it was — the requirement was to be of good character. There were no guidelines given to assist the presiding officer in determining what good character was. So, therefore, it became the individual judgment of the presiding officer.

And Ms. Gile added for good measure:²⁹⁸

Q. But do you have any record of what questions were put by the presiding judge?

A. No.

This is borne out by the report of the Interdepartmental Committee:²⁹⁹

In the normal course, citizenship judges asked no questions about the personal history of applicants prior to their arrival in Canada in connection with the issue of fitness.

Essentially the department and the citizenship judges appear to have taken for granted that this whole question must have been dealt with satisfactorily during the immigration process.

As an overall conclusion, the Commission accordingly *FINDS* that:

39- Applications for citizenship are available from the earliest times; they are not likely, however, to yield useful results for the purpose of unveiling war criminals and leading to the revocation of their citizenship.

Immigration Declarations

The Commission has been supplied with samples of the various forms in use for immigration purposes after World War II. Until the end of 1946, according to Mr. George O'Leary, Chief, Program Guidelines for Immigration,³⁰⁰ "there was no application processing abroad at all".³⁰¹ At most, some people may have come forward "under ministerial authority to permit entry by Order in Council".³⁰² So there was no official form available until 1947. Then during the next 12 years, half a dozen forms were put in use:

IMM-55	January 1947 to November 1950;
IMM-OS.8	Late 1950 to early 1951;
IMM-OS.8 (1951 rev.)	Early 1951 to April 1953;

²⁹⁸ *Ibid.*, p. 1784.

²⁹⁹ Exhibit P-77, p. 13, no. 19.

³⁰⁰ Evidence, vol. V., p. 628.

³⁰¹ *Ibid.*, p. 630.

³⁰² *Ibid.*, p. 631.

IMM-OS.8 (1953 rev.) April 1953 to early 1954;
Green Form Early 1953;
IMM-OS.8 (1954 rev. twice) 1954 to at least 1959;³⁰³

Form 55, in use until the end of 1950, contained no question respecting the wartime activities of the applicant.

The original OS.8 form inquired about the jobs of the applicant during the previous 10 years: this might have led to disclosure of military activities, though nothing was asked expressly on the subject.

The 1951 revision of Form OS.8 did not inquire any further.

The 1953 revision, however, marked a substantial departure from, not to say a serious improvement over, the previous form: a half page was devoted to a detailed questionnaire on employment or military service, year by year from 1938 through 1954.

It must be interpolated here that in 1953 a landing form was put in use for the first time, to be completed by the immigrant: IMM-1000.³⁰⁴ It is still in use, after some seven revisions. For the first time an official questionnaire asked the immigrant: "17. Have you been convicted of a criminal offence?"³⁰⁵ But no question was put concerning the immigrant's military record, if any. Yet that question appeared on the 1953 revision of Form IMM-OS.8.

Returning to the above list of forms, the Green Form contained no question relevant to our topic. It had been developed by the RCMP and must be filled concurrently with Form OS.8.

Finally, the last revision of Form OS.8, in 1954, contained again the same questionnaire on employment or military service; a curious development occurred, however, for which the Commission has heard no explanation. It was underlined as follows by Mr. O'Leary:³⁰⁶

Q. Was there any inclusion of wartime military service?

A. Yes, that remained a part of that application on pages 3 and 4. One item you might notice is that in that revision they deleted 1938 and 1939 and went from 1940 to 1956. I guess the people drafting the form were looking only in terms of the validity of the form itself, potential validity of it, and arbitrarily lopped off 1938 and 1939 which were crucial years. That is just my opinion; I am only guessing. It was away before my time.

It is obvious, therefore, that, contrary to the citizenship documentation the immigration forms contained, at least since 1953, questions which were bearing directly on the matter of wartime activities and should have prompted answers

³⁰³ See exhibit P-35, item Q, document nos. 1-6; O'Leary, evidence, vol. V, from p. 626.

³⁰⁴ Exhibit P-72; see also O'Leary, evidence, vol. XIV, p. 1713.

³⁰⁵ *Ibid.*, p. 7G.

³⁰⁶ Evidence, vol. V, p. 664.

which, if false or deceitful, might have opened the door to revocation of citizenship through a finding of unlawful admission into Canada. A two-fold problem arises however:

1. Before 1953, the immigration forms were as devoid of interest as the citizenship forms;
2. In any event, the immigration forms are not available — contrary to the situation in the U.S.A. where that evidence is available. But a word of explanation is necessary.

As can be readily understood, paperwork in the field of immigration is considerable: "From 1946 until 1984 inclusive, the total immigration movement to Canada was 5,282,299 immigrants".³⁰⁷ During the same period "approximately 50 to 55 million applicants have applied to come to Canada as immigrants . . . worldwide".³⁰⁸ Such a mass of applications evidently generated mountains of documents in the Department of Immigration but, after World War II, microfilming was still in its infancy. Systematic destruction of documents was seen as the only answer. Needless to say, other government departments were faced with the same problem: a general policy had to be settled. The Honourable Robert Kaplan, P.C., declared before this Commission:³⁰⁹

It is a general policy of this government throughout history to try and destroy files when they are not operational any more.

In 1945, the government established a "Committee on Public Records"³¹⁰ whose duties were generally described as follows:

3. The duties of the Committee shall be to keep under constant review the state of the public records and to consider, advise and concert with departments and agencies of government on the organization, care, housing, and destruction of public records.

Paragraph 6 added however that primary responsibility should rest with the departments and agencies concerned. Actual destruction of records would be authorized by the Treasury Board.³¹¹

In 1961, the Committee was reorganized under Order-in-Council 212 (exhibit P-43). The situation did not essentially change. But in 1966 the Public Records Order³¹² displaced the responsibilities while continuing the "retention and removal" policy: it provided that

4. With respect to public records in the custody of departments, the Dominion Archivist shall

³⁰⁷ Sabourin, evidence, vol. X, p. 1213; Immigration Statistics, exhibit P-53, p. 3.

³⁰⁸ *Ibid.*, Sabourin, p. 1214.

³⁰⁹ Evidence, vol. XX, p. 2649.

³¹⁰ Exhibit P-42: Order-in-Council P.C. 6175, 20 September 1945.

³¹¹ Hayward, evidence, vol. X, p. 1151.

³¹² Exhibit P-44, P.C. 1966-1749, 9 September 1966.

- (a) assess all proposals to destroy records and approve such of those proposals as he considers to be in the public interest.

It provided further as follows:

8. (1) Each department shall
 - (b) submit to the Dominion Archivist any proposal to destroy records, other than those covered by existing schedules, or to remove records from the ownership of the Government of Canada;
 - (c) by May 1, 1969, submit for the approval of the Dominion Archivist retention and disposal schedules applying to all operational records.

Finally, on 22 March 1983 the Treasury Board issued its Circular Number 9 entitled "Records Management Policy" (exhibit P-46). Under the heading "The Public Archives", it provided that "the Dominion Archivist is responsible for assessing and approving proposals to destroy records or to remove them from the control of the Government of Canada."³¹³

This policy is in force today.³¹⁴

Now, under those general rules the department responsible for immigration has, over the years, submitted for approval schedules of destruction of documents. Those are quite detailed documents which seem to cover all imaginable circumstances. Immediately after the last war, the relevant instruments were Treasury Board Minutes 160481 (2 June 1936) and 260350 (16 March 1944).³¹⁵ The second one provided more particularly that landing records be destroyed after two years.³¹⁶

In 1959, the Department of Immigration produced a schedule (exhibit P-48) showing the situation since the mid-1950s.³¹⁷ Article 4.03: "Schedule of Retirement" explained that appendix A applied in Canada and appendix B overseas. In appendix A, p. 1, item 1: "form 55 applications", the period of destruction is set at two to five years, depending upon certain specifications. On p. 2, item 3: "form OS8 and OS8(a) applications (or equivalent)", the period is set at one to five years "or longer". In appendix B, p. 1, item 1, sub-item (b) to (f) deals with forms 55 and OS8: the delay is fixed at from one to three years.

On 23 April 1964, the Public Records Committee approved a request for temporary authority to continue destruction on the basis of the 1936 and 1944 Minutes of Treasury Board (exhibit P-47).³¹⁸ Further authority was granted at a meeting of 30 July 1964 (exhibit P-50), which was approved by Treasury Board on 3 September 1964 (exhibit P-51). The approved schedule provides for

³¹³ Exhibit P-46, c. 460, item 1.4.2, p.3.

³¹⁴ Hayward, evidence, vol. X, p. 1162.

³¹⁵ Filed together as exhibit P-47.

³¹⁶ *Ibid.*, Hayward, p. 1184.

³¹⁷ *Ibid.*, Hayward, p. 1187.

³¹⁸ All relevant documents filed together as exhibit P-49.

a retention delay of two years in Canada and one year overseas in cases of “3 (a) Applications immigrant or non-immigrant (Other than Iran Curtain countries)” and a five year delay overall in cases of “3 (e) Applications immigrant or non-immigrant (Iron Curtain countries).”

In 1970, yet another schedule was approved by the Dominion Archivist (exhibit P-52) which “is strikingly similar to that of 1964”.³¹⁹ Then, according to Mr. Hayward:³²⁰

Essentially, the schedule of 1970 is intact today, with various amendments that have been made up and including 1984. Generally speaking, however, the schedule is the same. There are various amendments that have been made in the area of archival limitations, but that is the schedule as of today.

Such were the rules of the game during the whole of the period since World War II, and the Department of Immigration applied them overseas as well as at home.

Copies of relevant documents went back and forth between Canada and immigration posts in Europe: there they were also destroyed in agreement with the above-quoted retention schedules: “the file Retirement Schedule applied to both sides [of the Atlantic]”.³²¹ Mr. A.L. Greening who, after serving in the army, spent eight years in Germany as an RCMP officer, testified:³²²

If subsequently the person was cleared for security and a visa was issued for his entry to Canada, our entire file would subsequently be destroyed eventually, including those notes, the green forms, the OS-8, that we had received from the Immigration Officer. They would all be destroyed in due course.

In Canada, the retention and destruction rules are not just theoretical: Mr. L. Sabourin, Head of the Query Response Center in Immigration, testified:³²³

These schedules are applied to our case files, both in Ottawa and in our field offices and overseas on a continuous basis.

The program is a continuing one because of the volumes involved, and we apply those schedules continuously.

Mr. Sabourin added that files are not microfilmed before destruction,³²⁴ specifically that forms IMM-0S8 are microfilmed neither at headquarters nor in the regions,³²⁵ and that no record is kept of files destroyed, only of those kept in storage.³²⁶

³¹⁹ Hayward, evidence, vol. X., p. 1203.

³²⁰ *Ibid.*, p. 1204.

³²¹ O’Leary, evidence, vol. VI, p. 751; see also pp. 743-744-747.

³²² Evidence, vol. VIII, p. 1050; see also Robillard, evidence, vol. XI, p. 1277.

³²³ Sabourin, evidence, vol. X, pp. 1233-1234.

³²⁴ Sabourin, evidence, vol. XI, p. 1252.

³²⁵ *Ibid.*, pp. 1227-1229.

³²⁶ *Ibid.*

Thus it appears that immigration archives cannot be relied upon to furnish the information necessary to establish the factual basis essential to a successful attempt at revocation of citizenship.

It is true that copies of the same documents were sent to other government departments and agencies; but these also obeyed their individual retention and disposal schedules. The Commission will examine briefly the situation in External Affairs, RCMP and CSIS.

External Affairs

The general principles of retention and disposal have been applied during the whole period under consideration, i.e., since World War II. Mr. James McLaughlin, Improvement Records Officer and Training Officer with External Affairs, has explained the specific requirements of his department as approved by the Records Committee and the Treasury Board.³²⁷ Essentially, they are stated in details in exhibit P-73. There is no interest in going into all the particulars; suffice it to state the following: under Circular B-114, 25 October 1950, authority to destroy was given concerning 31 categories of files "being dormant for five years". The following categories would be of interest for the work of the Commission:

- 1. Immigration
- 3. National Status, Revocation of Naturalization, etc.
- 12. Release from Internment
- 30. Applications for Post-War Work

Under c. 2, annex C of the department's *Manual for Post Abroad*, item 2 stated:

MATERIAL THAT POSTS ARE AUTHORIZED TO DESTROY

Type	Minimum Retention Period
D - visa records relating to "Immigration" and "Visits to Canada" maintained at some External Affairs posts on behalf of the Department of Manpower and Immigration	Period specified for each category

Particulars in the following chapter provided for a destruction delay, especially in cases of forms 55 and OS8, of one year. There have been adopted no relevant amendments to date.³²⁸ The records of External Affairs therefore no longer contain the documents which might have led to proceedings in revocation of citizenship.

RCMP: Royal Canadian Mounted Police

³²⁷ Evidence, vol. XIV, p. 1734 ff.

³²⁸ MacLaughlin, evidence, vol. XIV, p. 1738.

The same general principles apply. By virtue of those, the RCMP had a record destruction policy in place at least since the 1940s — the Commission did not inquire into the situation before the last war. Assistant Commissioner W. John Wylie is Director of Informatics and, as such, responsible for records in the whole of the RCMP. He has filed as exhibit P-75 an impressive collection of some 130 documents purporting to give the full picture of destruction schedules and authorizations since the 1940s. Put very summarily, the longest retention period was five years; today it stands at three years.³²⁹

Here again the practical aspect is important, and it was stressed by Assistant Commissioner Randolph R. Schramm, Director of Criminal Investigations for the RCMP:³³⁰

Yes, there was a normal and routine destruction policy, which is approved by the Dominion Archivist and files would be destroyed consistent with those instructions.

Mr. Wylie has added that the general retention period is now three years³³¹ after which, in principle, everything is destroyed including cards and index.³³²

It so happens, however, that the RCMP must observe two separate moratoria on the destruction of files which have been imposed: one by the McDonald Commission in 1977-1978 and partially lifted, the other by this Commission in April 1985³³³ and in full force in effect. Mr. Wylie has affirmed:³³⁴

We are not even destroying any of our financial records and it is a tremendous burden to keep. We are keeping every record.

But this does not improve the situation with respect to the 25-year period immediately following the war: the RCMP files cannot help any more than those we previously examined.

CSIS: Canadian Security Intelligence Service

CSIS is an independent agency which has succeeded the branch of the RCMP which dealt with security matters. This branch was known by various names over the years until it was dissolved: Special Branch, Security and Intelligence, etc. The files and records of this branch were eventually transferred to CSIS.

Mr. George Joseph Kelly has testified on the file destruction policy of CSIS and of its predecessor agencies. Mr. Kelly is Chief, Records Section of

³²⁹ Wylie, evidence, vol. XIV, p. 1805.

³³⁰ Evidence, vol. VI, p. 832.

³³¹ Evidence, vol. XIV, p. 1807.

³³² Evidence, vol. XV, p. 1828.

³³³ See exhibit P-75, Folio 1-7, Tab 22, Bulletin of 24 April 1985.

³³⁴ Evidence, vol. XIV, p. 1807.

CSIS to which he transferred in July 1983; before that he had been a member of the RCMP for 27 years.

Mr. Kelly did not know of, nor could he give any information on the file destruction policy of the Special Branch of the RCMP before 1956.³³⁵ He filed, however, as exhibit P-81 a whole series of documents beginning 2 August 1956 down to 19 January 1983.

In 1956, on the recommendation of the Public Records Committee, the Treasury Board authorized the destruction of RCMP files generally, with the following proviso:³³⁶

The Board further directs that files of the Special Branch be destroyed only at the discretion of the Commissioner.

Shortly thereafter, the Commissioner of the RCMP exercised his discretion³³⁷ by approving a "Retention and Disposition Schedule — Special Branch Records" (in exhibit P-81) which provided for retention periods of one and five years for security screening files. In 1960, instructions to posts abroad referred to delays of three months, six months and two years.

In 1982, the Department of the Solicitor General expressed the opinion that the 1956 Treasury Board Minute had been "repealed by implication" when the Public Records Order³³⁸ came into force in 1966, and that the Archivist's approval was also required for any Destruction Schedule of the Security Service. This approval came in September 1982 and in January 1983 when, in cases of "individual files on proposed immigrants rejected under the provisions of the Immigration Act",³³⁹ retention periods were fixed at five years, ten years or twenty years depending upon the record classification.

To complete this overview, it must be added that no files have been put on microfilm,³⁴⁰ and that no record is maintained of material that is destroyed.³⁴¹ Now the whole system is presently on hold, because when this Commission was set up, the Solicitor General imposed a moratorium on the destruction of any of the files of CSIS: "nothing has been destroyed since", according to Mr. Kelly.³⁴²

Not surprisingly, the general conclusion concerning CSIS is not different from the one we have reached in the case of the RCMP: no material help can be expected from the files of CSIS, except possibly by accident.

³³⁵ Evidence, vol. XVI, p. 2058.

³³⁶ T.B. Minute 506164.

³³⁷ Kelly, evidence, vol. XVI, p. 2062.

³³⁸ See footnote 312, this chapter.

³³⁹ Exhibit P-81, last page.

³⁴⁰ Kelly, evidence, vol. XVI, p. 2080.

³⁴¹ *Ibid.*, p. 2081.

³⁴² *Ibid.*, p. 2056.

In view of these negative results of the search for documentary evidence in the archives of Immigration, External Affairs, RCMP and CSIS, a question mark was raised concerning information on ships' manifests. Indeed, these were used as landing records since the 1800s up to 1953 when individual immigrant records came into being.³⁴³ A sample of the relevant part of a ship's manifest was produced as exhibit P-71.

Those manifests are kept on microfilm.³⁴⁴ But finding a particular name in order to check the information given on the manifest is an impossible job, unless one can furnish the Department with the name of the ship and the year in which it arrived; otherwise "it would be literally going through thousands upon thousands of pages of manifests trying to find one name"³⁴⁵.

Furthermore, assuming that a given name is found on a manifest, one must not forget the point made by Mr. O'Leary:³⁴⁶

Q. Are you able to tell us when this was normally completed by the immigrant?

A. It wasn't completed by the immigrant. It was entered on the manifest by the ship's captain or ship's purser when they boarded the ship in Europe or elsewhere in the world. It was confirmed on arrival by the Immigration Examination Officer or the Customs Examination Officer.

Finally, it is far from sure that, assuming the answers could be attributed to the immigrants, they would give the information necessary for denaturalization proceedings. The only questions connected with prohibited classes were questions 22, 23 and 24 bearing on physical and mental health. No question dealt with military service or activities during World War II, and the question which came closest to this topic was question 18: "What trade or occupation do you follow in your own country?"

It is immediately apparent that no real relief can be expected from ships' manifests in the pursuit of evidence aiming at denaturalization.

The Commission accordingly *FINDS* that:

40- Applications for immigration and connected documents have been destroyed in large numbers over the years, consistently with retention and removal policies in force within Canadian government departments and agencies, more particularly Immigration, External Affairs, RCMP and CSIS, so that evidence for possible revocation of citizenship has become largely unavailable.

³⁴³ O'Leary, evidence, vol. XIV, p. 1710; Sabourin, evidence, vol. X., p. 1239.

³⁴⁴ Sabourin, *ibid.*

³⁴⁵ O'Leary, evidence, vol. XIV, p. 1731.

³⁴⁶ *Ibid.*, p. 1711.

41- Recourse to ships' manifests, which have been microfilmed up to 1953, would be of little use, if any, in view of the absence thereon of questions relevant to the issue.

Some commotion was nevertheless caused when it was learned that a further lot of immigration files had been recently destroyed. Yet, O'Leary had stated before the Commission on 3 May 1985:³⁴⁷ "The files are still being destroyed today. There is a file destruction schedule in process, yes."

The question arose in 1984 in the course of RCMP investigations concerning war criminals. According to information gathered and correspondence produced by the RCMP Commissioner, the RCMP had discovered that a relatively large number of immigration files which had been earmarked for destruction had not been actually destroyed, but kept by Employment and Immigration Canada until 1982, when they were destroyed in late 1982 and early 1983. Public Archives Canada had, however, requested that a ten percent sample be set aside for their purposes and chose the files of persons whose surname began with the letter "F". It appears that this decision was later changed in favour of "the random number generator selection", which produced files covering the period from 1946 to the 1970s.

On 22 May 1984 the Deputy Solicitor General wrote to the Minister (the Honourable Bob Kaplan):³⁴⁸

The [RCMP] Commissioner's correspondence does not offer an opinion upon whether such destruction involved a culpable act, or was "simply" a monumental blunder. What is clear is that the loss of these records, whose destruction should not have taken place, has seriously impaired the ability of Canadian authorities, notably the RCMP, to investigate and take effective action against war criminals in Canada.

The Solicitor General, who had been assiduously working on the matter of war criminals, told the Commission of his immediate reaction:³⁴⁹

We were absolutely furious about it. It just seemed incomprehensible at that particular time that my officials and the RCMP would be foiled that way, if I can put it in that expression, by a file destruction policy working in thin air.

(...)

I just went right down the hall to see him [Deputy Solicitor General Fred E. Gibson] when I got this letter and told him to go over and see Lussier, who was the Deputy Minister of Immigration, and tell him just how serious this was, and that I wanted the RCMP to find out, just to ask them, to find out what had happened and how it had happened, because they were the ones who were applying for this material.

³⁴⁷ Evidence, vol. VI, p. 758.

³⁴⁸ Exhibit P-118.

³⁴⁹ Evidence, vol. XX, pp. 2609 and 2611.

On 19 June 1984, the RCMP Commissioner wrote a long letter to Mr. Gaétan Lussier, Deputy Minister, Employment and Immigration Canada³⁵⁰ where he concluded:

As you can appreciate, if this matter is as it appears, the efforts of the RCMP in its investigation of alleged war criminals may have been inadvertently hampered through the destruction of these records. However, this is something to which we can only speculate, since the files are gone and we will never know what they contained.

In his reply of 20 July 1984,³⁵¹ Mr. Lussier appears to have made a distinction between immigration officials and records management staff and wrote:

The facts, therefore, show that the immigration case files came into the possession of the Public Archives more by accident than design. Our immigration officials were apparently not aware of this situation.

The Commission was thus led to investigate this somewhat strange situation, under the cloud of rumours of a conspiracy to destroy files which might have compromised people suspected of war crimes. Over and above the evidence of Messrs. O'Leary and Sabourin, who were recalled, the Commission heard on this topic the following witnesses:

Terry Gordon Cook, Chief, Social Affairs and Natural Resources Records, Federal Archives Division;

Marcel Bourgault, Director, Recorded Information Management, Department of Citizenship and Immigration;

Jim Mallen, Director, Material Management, Employment and Immigration Commission;

Susan Bertrand, Records Services Officer, Employment and Insurance Records, Department of Citizenship and Immigration;

Gordon Lebeau, Retention and Disposal Analyst, Employment and Immigration Commission;

Gilles Pommerville, Chief, Ottawa Federal Records Centre, Records Management Branch, Public Archives;

Anthony Keenleyside, Barrister and Solicitor.

A first point must be made: regrettable as the destruction of a relatively large number of immigration files in 1982-1983 may have been, those files did not contain material which would have been very helpful in the hunt for Nazi war criminals. A self-evident reason was advanced in support of that statement by several of the witnesses basing themselves on a sampling of 19 boxes of those files which were retained before the destruction of the bulk of them: the files did not contain documents or information relating to events prior to the immigrant's landing in Canada or concerning his past military or criminal

³⁵⁰ Exhibit P-124.

³⁵¹ Exhibit P-123.

history: see the detailed evidence of Cook,³⁵² Bourgault,³⁵³ Bertrand,³⁵⁴ Lebeau.³⁵⁵ Mr. Anthony Keenleyside, a junior counsel to the Commission, examined between 90 and 100 of those files;³⁵⁶ he concluded:

Q. And what did you find in those files which could be of interest to this Commission?

A. In my opinion I found nothing.

Let it be added, *en passant*, that Public Archives has put together a list of the names of the subjects of every file in the 19 boxes (there are 1,093 files in the sample; Cook).³⁵⁷ Mr. Keenleyside compared each one of those names with the names of the suspects appearing on the Commission's Master List; "there were no names that matched".³⁵⁸

It is true that the rate of destruction of immigration files in 1982-1983 reached such a high level as to give rise to suspicions. Mr. Sabourin has produced a chart (exhibit P-128) showing the results of the disposal of files in the Employment and Immigration Commission from 1966 to 1985. Given in cubic feet — one cubic foot equals one box — the average for the period is 1,842 boxes destroyed per year. But during the relevant period, the figures show surprising discrepancies:

1979-1980	2,466 cubic feet
1980-1981	820 " "
1981-1982	1,261 " "
1982-1983	6,462 " "
1983-1984	2,627 " "

Never before or after 1982-1983 was the figure for that year ever approached. Given Mr. Sabourin's estimate on this chart that "between 50 to 60 per cent of the above totals would have been Immigration case files", the destruction would have involved between 3,200 and 3,900 boxes in 1982-1983. We already know that the 19 boxes retained as a sample by Public Archives contained 1,093 files, i.e., an average of 57 files per box. On this very approximate basis, between 180,000 and 220,000 immigration files were apparently destroyed in 1982-1983. The same rough average calculation gives 25,000 files in 1980-1981 and 40,000 files in 1981-1982.

Mathematically, the numerous documents which have been filed before the Commission — exhibits P-128 to P-140 — fail by far to account for the massive destruction of 1982-1983. But this may show as well that the bureaucratic process was crumbling under its own weight.

³⁵² Evidence, vol. XXII, p. 2967; p. 2970.

³⁵³ *Ibid.*, p. 3018.

³⁵⁴ *Ibid.*, pp. 3059-3060.

³⁵⁵ *Ibid.*, pp. 3082-3083.

³⁵⁶ *Ibid.*, p. 3137.

³⁵⁷ *Ibid.*, p. 2968.

³⁵⁸ *Ibid.*, Keenleyside, p. 3135.

Turning to the witnesses and the possibility of a conspiracy, each of them, O'Leary, Sabourin, Cook, Bourgault, Ms. Bertrand, Lebeau and Pommerville, has been put the same question in substantially the same terms:³⁵⁹

Did you ever give, or did you ever receive, or did you ever hear of instructions to destroy files other than in the ordinary course of business within the Department of Immigration, or to destroy files that in any way relate to the presence of (sic) Canada of a Nazi war criminal?

Each of the seven witnesses gave a negative answer without the slightest hesitation. The Commissioner has seen and heard those witnesses, and he knows of no reason why he should disbelieve one or the other of them and hold them to have been parties to such a grand-scale conspiracy.

Rather, the evidence opens the door to a three-fold explanation of this one-time sharp increase in the yearly statistics of immigration files destruction. This explanation relies on three interrelated factors which contributed to a build-up of files slated for destruction:

- 1) The 1976 *Immigration Act* was assented to in 1977 and proclaimed in 1978. According to Mr. O'Leary, most resources were concentrated on that exercise from 1976 to 1978.³⁶⁰ Furthermore, according to Mr. Sabourin,³⁶¹ under the new Act "further files became qualified for destruction".
- 2) The disbandment of the Retention and Disposal Unit (R. & D.) within the department. This unit, composed of around four people, was entrusted with the task of reviewing the files and applying to them the retention and destruction schedules. This was a continuous process. But the unit was disbanded in 1977: it is absent from the 1978 organization chart of the Record Services (exhibit P-134). It was reinstated under Mr. Mallen, unofficially in late 1981, officially on 28 September 1982 (see the chart produced as exhibit P-135). This process has been confirmed by Mr. O'Leary,³⁶² Mr. Sabourin³⁶³ and, of course, Mr. Mallen.³⁶⁴ Needless to say, the disbandment of the unit was followed by an accumulation of files "within Immigration certainly", according to Mr. Sabourin.³⁶⁵
- 3) After the disbandment of the R. & D. Unit, the task of retention and disposal had been entrusted to the Code Classifiers; but, in the words of Mr. Sabourin, "because of the volume of work in their coding classifying responsibility, they had no time in effect to do R and D".³⁶⁶ Bourgault added: "However, it proved then later on that this was just impossible; they

³⁵⁹ Evidence, vol. XXII, p. 2906.

³⁶⁰ *Ibid.*, p. 2901.

³⁶¹ *Ibid.*, p. 2931.

³⁶² *Ibid.*, p. 2902.

³⁶³ *Ibid.*, pp. 2927 and 2932.

³⁶⁴ *Ibid.*, pp. 3022-3027.

³⁶⁵ *Ibid.*, p. 2929.

³⁶⁶ *Ibid.*, p. 2930.

could not keep up with their daily work and review files at the same time. There was too much work involved."³⁶⁷ What was bound to happen did happen: a massive backlog was created.

Those explanations are plausible and are borne out by the facts. Not surprisingly, when the R. & D. Unit was reorganized, it faced a considerable task; but the staff was complete, they were getting more and more familiar with their work³⁶⁸ and its members put in great efforts:³⁶⁹ the results are reflected in the statistics.

As this inquiry was forging ahead into the labyrinth of Immigration and Archives administration, the more clearly it appeared that the 1982 destruction episode had been wrongly built up into an incident of dramatic proportions.

First, it had been described as "a culpable act". But the former Solicitor General, the Honourable Bob Kaplan, has answered as follows before this Commission:³⁷⁰

What I will suggest to you, sir, merely because of the cross-examination that has taken place this morning, that there is not a scintilla of evidence that there was any conspiracy relating to the destruction of these records. You know of none?

A. I agree, I know of none.

Q. And indeed there is not, to your knowledge, any evidence that it was any culpable act which led to the destruction of these records. You have no such evidence?

A. No, I have no such evidence.

Then, the incident was described as "a monumental blunder". This assumes that the information contained in those files was "crucial" to the potential prosecutions, a fact which, as shown above, is far from established. Even if it were, it would only point to a case where the right hand does not know what the left hand is doing. Here is a group of employees performing their task under schedules approved by the proper authorities. They have never been advised that other authorities may wish to retain the files that they are instructed to destroy. Nobody, from the deputy ministers down, has ever given them any specific instructions to derogate from their disposal duties: this has been emphatically stated by several witnesses:

Bourgault:³⁷¹

Q. Had you received any instruction to retain files on the basis that they might be useful for establishing fraud on entry of Nazi war criminals in Canada?

A. No.

³⁶⁷ *Ibid.*, p. 2996.

³⁶⁸ *Ibid.*, Bourgault, p.3013.

³⁶⁹ *Ibid.*, Sabourin, p.2932.

³⁷⁰ Evidence, vol. XXI, p. 2823.

³⁷¹ Evidence, vol. XXII, p. 3015.

Mallen:³⁷²

Q. If there had been any instructions not to destroy documents because of considerations relating to Nazi war criminals in Canada, would you have been aware of such instructions?

A. Most definitely.

Q. So you can say most definitely that there were no such instructions?

A. There were no such instructions ever crossed my desk.

Bertrand:³⁷³

Q. Did you receive any instructions or queries about the files that you were reviewing for retention, such as whether or not they would be useful for investigation about Nazi war criminals in Canada?

A. No.

Q. Were you aware of anyone else in your Unit that received such instructions or query?

A. No.

Q. And if such instructions had been received by someone else in your Unit would you have been aware of it?

A. Yes.

Lebeau:³⁷⁴

Would it be fair to say you received no instructions whatsoever about retaining records on the basis that they might be useful in the search for Nazi War Criminals?

A. I never heard of it. No, I never got any instruction or anything.

Under such circumstances, if the destruction was a blunder, whose blunder was it?

Finally, more prosaically, the incident may well have arisen out of "the application of some routine policy": the expression comes from the mouth of no other than former Solicitor General Kaplan himself.³⁷⁵

I know in government things can just happen and you tend, looking at it from the outside, to be suspicious and assume that there is — as my Deputy said in his letter, that there is a culpable act or simply a monumental blunder, but I have to say without knowing that it could also be the application of some routine policy.

Sabourin has stressed that routine aspect of the operations:³⁷⁶

I can not testify back to 1945, but I have been with the Department since 1958 and I can certify that from 1958 right on through to today there has been almost a continuous file disposal programme in the department.

³⁷² *Ibid.*, p. 3044.

³⁷³ *Ibid.*, pp. 3073-3074.

³⁷⁴ *Ibid.*, p. 3091.

³⁷⁵ Evidence, vol. XX, p. 2612.

³⁷⁶ Evidence, vol. XXII, p. 2927.

Cook sees the instant destruction as routine.³⁷⁷

Having learned of Mr. Kaplan's full gamut of alternatives, which one do you say applies in the circumstances?

A. The third one.

Q. The application of some routine policy?

A. Yes.

There may be no better way of putting the whole matter in its proper perspective than by using the capsule formula of Mr. Mallen:³⁷⁸

... part of our job is to destroy it at an appropriate authorized time. So we do it.

(...)

... you would not even think of stopping because it is part of our job.

On the basis of this evidence, the Commission accordingly *FINDS* that:

42- The destruction of a substantial number of immigration files in 1982-1983 should not be considered as a culpable act or as a blunder, but has occurred in the normal course of the application of a routine policy duly authorized within the federal administration. In any event, if a blunder there was, it arose out of the failure of the higher authorities properly to instruct of an appropriate exception the employees entrusted with the duty of carrying out the retention and disposal policy in their department.

On 3 May 1985, Mr. David Matas gave the following notice of motion:³⁷⁹

Take notice that a motion will be made on today's date, on behalf of the League before the Commission for an order of preservation of Department of Immigration forms OSS 8, application for permanent residence, and OMM-OSS 8-A, occupation profile, and in support of the motion will be read the affidavit of Alan Katchiuk.

After argument it was agreed that a decision on the motion would be suspended while Counsel for the Crown sought instructions. On 15 May Ms. Judith McCann made the following statement:³⁸⁰

In response to the motion by Mr. Matas, the Government of Canada undertakes to, that applications for admission to Canada, the IM-8 forms presently being held in posts overseas; that is, under the retention schedules, and applications which come to those posts during the currency of this Commission, will not be destroyed where it is established that the date of birth of the applicant is 1927 or earlier which would make the individual 18 years of age at the end of the war, and where the country of birth of the applicant is a European country and which would include countries now absorbed by the U.S.S.R., and

³⁷⁷ *Ibid.*, p. 3052.

³⁷⁸ *Ibid.*, p. 3048.

³⁷⁹ Evidence, vol. VI, pp. 835-836.

³⁸⁰ Evidence, vol. XI, pp. 1362-1363.

that the retained applications would relate only to persons granted entry to Canada, i.e. those granted visas.

And instructions will be sent to the posts abroad asking them to review the files which they have on hand and to note and send, and note new files that fall within those parameters. I hope that will satisfy the concerns of the Commission and Mr. Matas.

Mr. MATAS: Yes, they certainly satisfy my concerns.

THE COMMISSIONER: All right. So let us say that that is an agreement which is now on the record.

This undertaking still stands on the record.

iii) *Is there a presumption of fact against the applicant?*

The difficulty of producing adequate documentary evidence in the quest for revocation of citizenship of alleged war criminals has prompted a search for other avenues leading to the required proof. Thus the argument has been developed that there exists a presumption of fact, even absent any supporting document, that the applicant — if indeed he was a member of a prohibited class — must have lied upon entry.

The argument was put forward by Mr. Amerasinghe in his memorandum of 27 May 1983.³⁸¹

However, if we were to prove that the Immigration application forms were in existence, and if we can call evidence, as we can, of former Immigration officers who implemented Immigration policies in Germany shortly after the war, that any person declaring membership in the Nazi Party or employment in the various organizations would have been automatically rejected it would be possible to establish on a balance of probabilities that the individual concerned lied on his Immigration Application Form in order to obtain admission to Canada.

(...)

However, as a broad general principle the worst case that we could have is a case where there was no Immigration Application Form signed by the person but proof of landing in Canada only. In such a case it is my view that it should still be possible to establish on a balance of probabilities that the person gained admission to Canada by suppressing material facts, and/or by fraud and/or by false representations, and that he was not lawfully admitted to Canada and that therefore he did not fulfill the requirements necessary to obtain Canadian citizenship.

In a further memorandum of 30 September 1983, Mr. Amerasinghe added.³⁸²

It is my view that if the standard of proof is on a balance of probabilities then it may well be possible for the Crown to discharge its onus without having to actually produce the application forms signed by the immigrant concerned but rather rely on a specimen form together with the testimony of an immigration officer stationed at the particular place where the immigrant was processed at the particular time. If on the other hand the

³⁸¹ Exhibit P-101, p. 18.

³⁸² Classified document, quoted with the express agreement of counsel for the Government of Canada.

standard of proof is held to be that which prevails in the United States of America namely, "clear, unequivocal, and convincing evidence that does not leave the issue in doubt" I doubt that the Crown would be able to establish its case.

The Commission has concluded earlier that the standard of proof which should be applied in Canada is that of "a probability of a high degree".³⁸³

Now, whether the available evidence could permit the Crown successfully to argue that it had discharged its burden thanks to a presumption of fact establishing "false representation or fraud or concealment of material circumstances" is a debatable question. Indeed, in a lengthy opinion which he gave to Solicitor General Kaplan on 8 December 1983,³⁸⁴ the Honourable Mark MacGuigan, then Attorney General of Canada, expressed serious doubts on the soundness of this position. After summarizing Mr. Amerasinghe's views, Mr. MacGuigan commented:³⁸⁵

All of these arguments would be based by the Crown on the assumption that every R.C.M.P. officer did what he was supposed to do in every single case, without exception. Courts may be reluctant to infer fraud on the basis of this type of evidence, particularly in cases which reach back almost forty years.

Then, addressing the possibility of conflicting evidence on the part of the suspect, Mr. MacGuigan added (*ibid.*):

The Court would then be confronted with a conflict between the Crown's evidence of *general* practice and the suspect's direct evidence of what was said or not said in a *specific* case. The latter type of evidence, if given with any degree of credibility, is ordinarily more persuasive to a judge, particularly where the judge is being asked to make a finding of fraud.

(emphasis in the original)

The theory expounded by Mr. Amerasinghe has now been taken up by Mr. Matas in his brief:³⁸⁶ public officials (e.g., immigration officials and citizenship judges) should be presumed to "have properly discharged their duties" (p. 55); hence, if a war criminal was granted landing or citizenship, he must have lied or concealed material facts. A similar line of reasoning has been adopted by the Canadian Jewish Congress³⁸⁷ and by Professor Sharon A. Williams.³⁸⁸ Finally, Mr. Sol Littman stated during the course of his submission to the Commission:³⁸⁹

Therefore I think that we can still use what we now call the American approach and make the legal assumption that if he was admitted in spite of his past then he must have lied and we don't really need to present the form itself in order to have proof that he did lie.

³⁸³ See recommendation no. 37.

³⁸⁴ Exhibit P-103.

³⁸⁵ *Ibid.*, p. 4.

³⁸⁶ Exhibit P-69, pp. 55-64.

³⁸⁷ Exhibit P-84, p. 39.

³⁸⁸ See her brief to the Commission, "Deportation and Denaturalization of War Criminals in Canada".

³⁸⁹ Evidence, vol. IV, pp. 444-445.

Now, we already know that documentary evidence is fragmentary and, more often than not, irrevocably lost. It is therefore interesting to turn to the oral evidence. On the question which we are considering, five witnesses have been heard; they were connected, at one time or another, with Immigration, External Affairs or RCMP:

Immigration:

George O'Leary, 47, Chief, Program Guidelines for Immigration;
Joseph R. Robillard, 70, retired;

External Affairs:

John McCordick, retired Ambassador;

RCMP:

Albert L. Greening, 63, retired Sergeant;
William H. Kelly, 74, retired Deputy Commissioner.

Outside of Mr. O'Leary, the other four witnesses did actually work in the field in the post-war years. The interest of Mr. O'Leary's evidence stems mainly from his explanations concerning the introduction of the revised Form IMM-OS.8 in April 1953 when, for the first time, a detailed questionnaire appeared concerning the military service of the applicant from 1938 to 1954.³⁹⁰

On the immigration side, this was confirmed by Mr. Robillard. Upon being demobilized, Mr. Robillard began a career with immigration which took him through various positions of responsibility during several years in England, Italy, Austria, Germany, etc. Referring to the previous revision of Form IMM-OS.8,³⁹¹ Mr. Robillard confirmed that it did not contain any question on the military record of the applicant.³⁹² But — and that is where the interest of this testimony for our present purposes begins to surface — questions were put verbally, prior to 1953, concerning the applicant's military service during the war:³⁹³

Q. Right. Prior to 1953, when we were using the previous form which did not request military service, can you tell the Commission whether or not to your knowledge, the prospective immigrant was asked about his military service?

A. Yes, indeed, both by the RCMP and the visa officer in order, again, to give us a clue of why a person was in a refugee camp.

(. .)

Q. But the question to your knowledge was asked—

³⁹⁰ Exhibit P-35, Item Q, Tab 4; evidence, vol. V, pp. 651-652.

³⁹¹ *Ibid.*, Tab 3.

³⁹² Evidence, vol. XI, p. 1275.

³⁹³ *Ibid.*, p. 1283.

A. Oh, yes, oh, yes.

Q. Prior to '51 — '53, excuse me?

A. Yes.

Mr. Robillard even added (*ibid.*):

So this is why — this is what lead (sic) us eventually to make it a formal declaration, please say so on your application form.

Ambassador John McCordick spent nine months with the Canadian Military Mission in Berlin, from June 1946 to March 1947. He was heavily involved in the screening of prospective immigrants; according to him, this process meant more than mere paperwork: "We always interviewed them".³⁹⁴ Then he adds:³⁹⁵

Q. In your questioning that you carried out of prospective immigrants, do you recall whether such questions dealt with the applicant's background and activities during the war years?

A. Yes, we always asked that type of question.

And still further:³⁹⁶

Q. You talked about people in the normal course being asked about their whole life history, effect. Would it be fair to say that these questions were really as a result of the standard instructions that you had, and that you would have followed these instructions in asking the questions that you did?

A. Yes, I think that would be fair, I think it was assumed — and I hope rightly — that common sense would prevail and that we would ask all the normal questions, which were quite comprehensive. We knew that we were dealing with people from, to us, unfamiliar places and backgrounds that we could not verify, so we pressed hard for a full story. As I mentioned earlier, we were on the lookout for gaps and would press harder still if there were any and record all that they gave us.

One must keep in mind the psychological assessment which Mr. McCordick makes of the prospective immigrants he was questioning and the conclusion which he draws.³⁹⁷

Q. And what would you do if somebody volunteered that they had been a member of the Gestapo?

A. These are hypothetical questions, remember, that you are putting and I shall answer them in a hypothetical way. I cannot conceive of a person whose mind had not been damaged a bit volunteering such information, but if he did, I would try to keep track of him.

(. . .)

Q. One other question of this type: What would you have done if somebody had divulged that they had been a member of the Nazi Auxilliary Police in one of the countries that the Nazis occupied?

³⁹⁴ Evidence, vol. XX, p. 2486.

³⁹⁵ *Ibid.*, p. 2487.

³⁹⁶ *Ibid.*, pp. 2499-2500.

³⁹⁷ *Ibid.*, pp. 2502-2505.

A. Well, I just repeat, that unless the person had already lost a lot of his normal instinct of self preservation, I cannot imagine of anyone doing that but my answer then is similar to your other questions. I would have thought immediately this is not a person for Canada or for any further consideration by this military mission, but he is definitely a candidate for close attention by the British security authorities, zonal authorities, because they exchanged all this.

Q. So it would be fair to say that anybody in any of these categories, the Gestapo or the SS or the Nazi Party or the Auxilliary Police, if you knew about their past history you would not have processed them to come to Canada?

A. Certainly not, and we would not have let them just walk out into the open air and forget about. We would have tried to do something more about it than that.

Q. And would it also be fair to say, that if any such people did come to Canada by passing through your mission during that time, in order to do so they must have lied to you?

A. Given the number of filters that there were, no doubt imperfect, if a person succeeded in getting around them and getting into this country, and a person who had a past of the kind of you have in mind of party or party military activities, then I would be sure that part of his success was due to lying. There must have been other factors too but I cannot imagine going, without a pack of lies as part of it, as part of the operation.

On the RCMP side, Mr. Kelly was posted in London, England in 1961 where, in his own words, he "... became the officer in charge of visa controls, as we called it, and the liaison officer between the RCMP and all police organizations, intelligence organizations and security organizations, in what we now know as Western Europe".³⁹⁸ As such, he had nothing to do personally with the actual screening process.³⁹⁹ His evidence cannot help us here.

There remains Sergeant Greening who, as an RCMP member, acted as visa control officer in Germany for nearly eight years, from the summer of 1954 to the spring of 1962. After having generally spoken about the procedure, forms, investigation and interviews, Mr. Greening gave a vivid description of an interrogatory:⁴⁰⁰

... So, what did you expect to find out from this gentleman, first in the course of your interview with him, and then I will go to other stages?

A. Dealing first of all with his papers, if he had been processed by the camp in West Germany in Nuremberg, if he had arrived there with no papers, they would have processed him and issued him with documents, identifying him to us. These would be alien documents; Fremdenpass, as is referred to in Germany.

We would accept that, but if that person was of an age, as you were saying, which would place him in a period of Rumania during the war, I would try to establish, first of all, whether he had served in the Rumanian Army prior to the takeover by German authorities.

Q. By the Nazi authorities?

A. By the Nazis. If that was the case, I would then go on and try to establish whether he had in fact volunteered or served with Nazi authorities after the takeover of Rumania, and if he did, in what category, whether it was a voluntary category, whether had been

³⁹⁸ Evidence, vol. VII, pp. 892-893.

³⁹⁹ *Ibid.*, p. 898.

⁴⁰⁰ Evidence, vol. VIII, pp. 1013-1015.

coerced or, say, taken over either as a Rumanian Army unit or as an individual. If I felt that he had joined voluntarily, of course, collaboration would then come into it. I would have to try to establish whether the nature of his volunteering and the nature of his duties with the German Army was such that it would place him a category which would be objectionable to us. This would all be part and parcel of our procedure at that time.

Q. And given the fact that there are no papers except the alien papers, which have been issued by the West Germans, how did you elicit answers to these very pertinent questions which you say you were posing as a matter of course?

A. I would question the person directly. The direction of my questioning would be guided by the response that I would get from the individual, if he was forthcoming, quite honest, why then, of course, we could go on from there. If there was any hesitation on his part or any obvious attempt of refusing to give information, that would just probably urge me to be a little more intense in my questioning.

Q. And then, Mr. Greening, you would ask your sources, in particular, the Nuremberg Alien Centre, for verification?

A. Correct, or whatever information they may have received from them during their processing.

In cross-examination, Mr. Greening was given an opportunity of describing again the process.⁴⁰¹

Q. When you were asking questions at interviews would you ask people about their involvement in the Nazi party?

A. Oh, yes.

Q. Would you ask them about their involvement in the SS?

A. Yes, if they came within a category that I felt would come within that area.

Q. Would you ask them if they worked in a concentration camp?

A. I would do; I would not hesitate to ask them that.

Q. And these questions would be asked — would they be asked as a matter of course?

A. Well, each case, again, was different. They would be asked as a matter of course if the individual was of a certain age, or who had served in the services. It would be a matter of course then, but, probably, in a different way. It would depend on the individual, on an individual's reactions, on his responses. We would have to gear our questions and form our questions and our questioning in different ways. For instance, somebody who is forthright and obviously or apparently honest would be much easier to question than somebody who was rather hesitant about any admissions or —

Q. Would you ask people about their membership in auxiliary police forces operating under the SS?

A. Well, what we would try to establish is what service he had carried out, regardless of where it was, or what organization it was. We would try to establish that. In other words, try to form a picture of just what he had done.

Then the witness declared (*ibid.*):

Q. But would you say that these sorts of questions that you say you asked about Nazi party membership and concentration camps and so on, to your knowledge, were these the sorts of questions all Visa Control Officers were asking or could you just speak for yourself on this?

A. In Germany, that is the type of questions that we would be asking, yes.

Q. Generally?

⁴⁰¹ *Ibid.*, pp. 1048-1049.

A. Generally.

All of this led to a logical conclusion:⁴⁰²

Q. Now, we are taking the situation where the files are destroyed of the people who passed, so we do not know what, in fact, was on the file, but would it be fair to conclude that if someone had passed, and the file was destroyed, that he must have said that he was not a member of a concentration camp?

A. We would not have passed him if we had information which placed in the rejection criteria. We would not have passed him and therefore that file would not have been destroyed.

Q. Well, I guess I am trying to find out not whether you had the information but whether it would be fair to conclude that if he had passed, and that information turned up subsequently, it would be fair to conclude that person must have lied in the interview with you.

A. That would follow; I would say, yes.

Such is the positive side of the image which emerges from the evidence given essentially by Robillard (Immigration), McCordick (External Affairs) and Greening (RCMP): immediately after the war, Canadian immigration officers and security officers made it a duty to question prospective immigrants on the details of their past and, particularly, their military and political activities. In order to win access to Canada, a war criminal must have lied. The demonstration is both simple and attractive. But before arriving at a firm conclusion, one must take into consideration the negative elements found in the evidence. There are several. For the sake of clarity, the Commission will number them:

- 1) Curiously enough, the first element of doubt came in the form of a statement contained in what should have been a question by Mr. Matas. The relevant passage begins with the last part of an answer given by Mr. O'Leary:⁴⁰³

Answer: Again, these were all questions related to labour market requirements in Canada. Any aspect of their war service or involvement in concentration camps or anything like that would have come out through the Stage B examination and their sources of information.

Question: In other words, it would not have come out by asking people direct questions. It would have come out by investigation through contacts.

- 2) Mr. Kelly expressed some reservations about the quality of the work of the immigration officers:⁴⁰⁴

... There is a question that I cannot answer. It is an Immigration problem.

I am not sure whether they interviewed every person or whether they just vetted the application.

(...)

⁴⁰² *Ibid.*, pp. 1051-1052.

⁴⁰³ Evidence, vol. VI, pp. 770-771.

⁴⁰⁴ Evidence, vol. VII, pp. 904 and 907.

Q. Generally, because I do not think it would be useful to get into particulars, but generally, would you say that the bent of the R.C.M.P. in this process was on all fours with the bent of the Immigration Department?

A. If I am getting your question correctly, I would say that Immigration was more concerned with numbers than they were with security.

Having said that, perhaps I should qualify it. Perhaps they were less concerned with security because they knew the R.C.M.P. was dealing with it, but they certainly quarrelled with us often enough because we were not producing results quickly enough, and, of course, the results that we were producing depended upon the support and the co-operation of our sources.⁴⁰⁵

- 3) Mr. Greening had spoken of his experience in Germany between 1954 and 1962: several years had already elapsed since the end of the war. Whether his experience can be transposed to the immediate post-war years becomes questionable after one has read Mr. Greening's rather acid comments:⁴⁰⁶

I think I can say that our procedures that we were carrying out in 1954 were quite a bit more sophisticated and polished than they had been previously in 1946, 1947 and 1948, because at that time they had very few resources, manpower-wise, and also access to their sources. A lot of the information would not have been gathered and recorded. Therefore, as the years progressed, our resources increased; our methods were polished. As the result of exchange of correspondence, our policy was rounded off so that we could apply more consistent procedures in doing the security screening.

This is on a progressive nature and, as I say, by 1954 it was quite a bit better than it would have been in 1946, 1947, 1948, and 1949.

- 4) Mr. McCordick became at a certain moment less positive about the extent of the questioning of applicants:⁴⁰⁷

Q. Would you ask people if they had been members of the SS?

A. Whether in every case we would ask that specifically, just saying "SS", I do not know. We would certainly inquire about their party affiliations and party activities and military activities and military associations. Whether we would run down the whole list of organizations, including the SS, I just do not know. I suppose it would depend on the individual case.

- 5) Finally, a question mark rises on the horizon, based on the time which those officials and their colleagues could devote to every individual immigrant. Mr. McCordick states that the Berlin office "was a very busy, in fact, pretty heavily loaded office".⁴⁰⁸ Mr. Greening says, about the Bremen office:⁴⁰⁹

I had one man posted in Bremen. The months that I was there, it varied, but it would run probably from 10 to 35 cases a day over a five-day week. I kept statistics of course but I don't recall what they were, but I do remember cases where I would probably be interviewing 20 and 25 people a day and they would be long days.

⁴⁰⁵ See also the considerations of Mrs. Alti Rodal in her study prepared for the Commission, pp. 228-229 and 271-277.

⁴⁰⁶ Evidence, vol. VIII, p. 1053.

⁴⁰⁷ Evidence, vol. XX, p. 2501.

⁴⁰⁸ *Ibid.*, p. 2490.

⁴⁰⁹ Evidence, vol. VIII, p. 1078.

Greening adds that there were "more cases in Berlin" (*ibid.*). Now, if one takes an average of 25 interviews a day, the Canadian official could not physically devote to each applicant much more than 15 to 20 minutes. During that time, he must examine the file, review the answers put down by the applicant on the relevant form and, no doubt, ask a few routine questions. Mr. Greening happened to speak German, but not all officials did; it then became necessary to use the services of an interpreter, which of course slowed down the process. What time was there left for the screening officer to delve into the applicant's past? Precious little, if any.

These various negative elements have an importance which should not be minimized, when it comes to establishing the practice amongst the screening officials 40 years ago. Presented with this somewhat conflicting evidence, would a court conclude that the Crown has established with a high degree of probability the existence of a presumption of fact against the suspected war criminal?

Before attempting to answer the question, let us consider a further complication which Mr. MacGuigan had actually foreseen in his opinion of 8 December 1983 (exhibit P-103). Mr. MacGuigan pointed out (p. 4):

Moreover, such evidence could be rebutted by a suspect offering "credible" testimony (...) that he was not asked such questions, or that if any such questions were asked they were truthfully answered.

This is exactly what happened on 1 April 1986 when the Commission was examining the suspect who bears number 287 on the Commission's Master List. The examination was proceeding with the aid of an interpreter; the relevant passage reads as follows:

Q. Does he have any recollection of meeting with one or more officers of the Royal Canadian Mounted Police during the course of being processed for immigration to Canada?

A. There must have been somebody because when I went to consulate they looked at the papers.

Q. Does he have any specific recollection of being asked a series of questions by officers — by an officer of the Royal Canadian Mounted Police at that time?

A. The one I think I remember, I was asked whether I was a Communist or I was a Nazi.

Q. By an officer of the Royal Canadian Mounted Police?

A. I don't know.

Q. By an official of the Canadian government?

A. Yes, somebody from Canadian government.

Q. Did Mr. — disclose to that official of the Canadian government during that process that he had served in the Lithuanian army from 1941 to 1943?

A. Nobody asked me that question.

Q. And he did not volunteer the information?

A. *I wasn't asked that question; and that questions that I was asked, I answer to the translator.*

(emphasis added)

But such was not an isolated incident. A similar instance occurred again on 28 April 1986 when the Commission was examining its suspect number 187. To wit:

Q. When you applied in November, 1951 for immigration to Canada, did you divulge to the Canadian authorities your service in the Einstazgruppen —

A. No.

Q. — Einsatzkommando 10A during the war?

A. No.

Q. Were you asked what you had done during the war?

A. *They didn't ask me at all.* They only asked me about "Were you a member of the party?" —

Q. Yes.

A. — and some other organizations.

Q. Did you tell the Canadian authorities that you had been a member of the Nazi Party until 1945?

A. Sure. Sure. I have to.

Q. Yes. But you did not volunteer the information about your service in the Einsatzkommando?

A. No. *They didn't ask me, you know.* They only put down a thing on paper, one, two, three, four. I was a party member, and I put this down.

(emphasis added)

Here are two examples of a direct contradiction by the suspect of the practice alleged by the government officials.

The Commission should not, and will not, attempt to substitute itself for the courts and decide in advance and in general the fate of the presumption which is advocated, especially since the Commission cannot foresee what importance a court of law would give to the duty of candour, the existence of which the Commission has acknowledged earlier. For instance, in case number 287 quoted above, a court may or may not find that that particular suspect had the duty to volunteer the information concerning his service in the army during World War II; or in case number 187, his service in the Einsatzkommando.

Suffice it, therefore, for the Commission to *FIND* that:

- 43- The existence of a presumption of fact that a former immigrant, if a war criminal, must have lied for purposes either of immigration or of citizenship, cannot be taken generally for granted, in light of the conflicting evidence before the Commission. It must be left to the**

courts to decide whether, in any given case, such a presumption has been established with a high degree of probability.

4. *Incidental questions*

This discussion about revocation of citizenship has rendered useful a consideration of some questions incidental to the main issue. The Commission proposes to discuss them briefly.

i) Persecution

Revocation of citizenship entails, as we have seen, proof of “false representation or fraud or concealment of material circumstances”. This in turn opens the door to subjective considerations as well as to grave difficulties of proof, were it only due to the lapse of time. It appears desirable to find an objective criterion which, while retaining the basic fairness exacted by our system of law, might lighten to some extent the burden of the prosecution.

With this goal in mind, inspiration can wisely be gained from a reading of the so-called “Holtzman amendment” adopted by the U.S. Congress in October 1978.⁴¹⁰ In the words of Congress itself, the Act was intended “To amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion under the direction of the Nazi government of Germany, . . .”.

We will consider in the next section of this chapter the question of deportation, at which the American amendment was expressly directed; but, in the opinion of the Commission, this amendment would also be a valuable improvement to the Canadian legislation on citizenship.

The Commission is, however, prepared to go further. Persecution is indeed but one facet of crimes against humanity, as appears from the definition which the Commission has recommended earlier for inclusion into the *Criminal Code* (see recommendation number 28). A reference to crimes against humanity would therefore include persecution, whereas the U.S. Congress was obliged, in the state of its own legislation, to pass an Act dealing specifically with persecution.

But a further difficulty arises, which has been outlined by Mr. Sopinka in his brief (exhibit P-160). Either an amendment would be sought dealing only with Nazi war criminals, on the model of the Holtzman Bill; or it would deal with war criminals in general, on the model of the Finestone motion.⁴¹¹ In the

⁴¹⁰ Public Law 95-549, 30 October 1978.

⁴¹¹ After the name of the lady member of the Canadian House of Commons who moved the amendments earlier referred to in this report and generally declared out of order by the Chairman of the Committee and the Speaker of the House. The Commission's recommendation number 28 is patterned after that set of amendments.

first event, according to Mr. Sopinka, "A decision to prosecute only Nazi war criminals would be open to the charge of discrimination based, *inter alia*, upon race or national origin."⁴¹² In the second event, "Such an amendment falls outside the terms of reference of the Commission." (*Ibid.*). In other words, you're damned if you do and you're damned if you don't.

The Commission has decided earlier to make its recommendation general. Parliament will decide, in its wisdom, if it is appropriate to amend the law at all and, in the affirmative, to deal only with Nazi war crimes or to legislate on war crimes generally. One way or another, such legislation should foresee, for the past, revocation of citizenship on account of the commission of war crimes, irrespective of false representation, fraud or concealment of material circumstances and, for the future, a prohibition of the granting of citizenship to war criminals.

To assure the effectiveness of such a statutory prohibition, it should be coupled with improved administrative practices. The Commission shares the views expressed on this topic by the Interdepartmental Committee:⁴¹³

17. As an initial step, current administrative practices might be modified to ensure that any applicant for future admission to Canada is required to answer questions as to his activities during the Second World War or in any other area of conflict. The object would be to avoid an influx of persons under investigations in other countries who might now be able to enter Canada without any inquiry as to possible involvement in war crimes. Furthermore, the requirement of written responses to such questions would provide a clear evidentiary basis on which to move against an individual who might subsequently be admitted to Canada on the strength of misrepresentations in this regard.

⁴¹³ Exhibit P-77, p. 29.

The Commission accordingly *RECOMMENDS* that:

44- In order to prevent the granting of citizenship to war criminals or, as the case may be, to ease the revocation of citizenship of war criminals, the *Citizenship Act* (23-24-25 El. II, c. 108) should be amended

a) by adding to ss. 5(1) the following paragraph (f):

"(f) has not committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*.";

b) by adding after the word "person", in the 7th line of ss. 5(4) the following:

"except a person barred under paragraph 5.(1)(f)";

⁴¹² Exhibit P-160, p. 50.

⁴¹³ Exhibit P-77, p. 29.

- c) by adding after the word “circumstances”, in the 8th line of ss. 9(1), the following:
 - “or in spite of having committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*,”;
- d) by striking, at the end of paragraph 10.(1)(b), the word “and”;
- e) by adding, in ss. 10(1), the following paragraph (c):
 - “(c) has not committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*; and”;
- f) by renumbering “(d)” paragraph 10.(1)(c);
- g) by adding, at the end of paragraph 17.(1)(b), the following:
 - “or in spite of having committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*.”.

45- The immigration screening process and interview procedure should be tightened, so that:

- a) a minimum and standard set of questions to be put to the applicant be established by regulation;
- b) such questions bear explicitly on the applicant’s past military, para-military, political and civilian activities;
- c) all further questions to the applicant and all answers by the applicant be reduced to writing and signed by the applicant;
- d) the applicant be required to sign a statement providing, in substance, that he has supplied all information which is material to his application for admission to Canada and that an eventual decision to admit him will be predicated upon the truth and completeness of his statements in his application.

46- Where the application is granted, immigration application forms should be kept until either it is established or it can be safely assumed that the applicant is no longer alive.

ii) Statelessness

The Interdepartmental Committee has expressed the fear⁴¹⁴ that “[r]evocation of citizenship might, in some circumstances, mean that the

⁴¹⁴ Exhibit P-77, p. 29, no. 45.

person in question would thereby be rendered stateless. That factor implies some degree of inconsistency with certain international obligations and general principles of international behaviour to which Canada has subscribed.”

This fear appears to be groundless in light of both domestic law and international law.

It is true that, under the 1946 *Canadian Citizenship Act*, the Canadian government had adopted a regulation⁴¹⁵ requiring the applicant for citizenship “to make a declaration, in prescribed form, of renunciation of his previous nationality or citizenship.”

But in 1973 the Federal Court of Canada found that regulation *ultra vires*: *Ulin v. The Queen*:⁴¹⁶

If the legislator intended to require more than an oath of allegiance in order to obtain Canadian citizenship, it would have been a simple matter to so enact such other requirements as are considered necessarily and substantially required for the protection of the quality of Canadian citizenship. Parliament, however, has not done so and the Governor in Council is not empowered, under the guise of carrying into effect the purposes and provisions of the Act to enact such a substantive requirement as a declaration of renunciation merely by regulation.

Pursuant to the judgment, Canada repealed the impugned regulation in January 1974.⁴¹⁷

Upon his citizenship being revoked, a war criminal who would have executed such a renunciation prior to becoming a Canadian citizen might well argue that such a renunciation had no sustainable basis in law and should be set aside. Of course, whether he had in any event lost his previous citizenship and, if so, whether he could recover it as a result of the above-mentioned judicial pronouncement, are questions which ought to be resolved under the relevant provisions of the law of the country of prior citizenship. It is, therefore, impossible to establish here general principles: each case must be resolved according to its own circumstances.

In any event, even if statelessness were to result, in a given case, from the revocation of citizenship of a war criminal, three international instruments would assure Canada of a secure position in international law.

The Universal Declaration of Human Rights provides, in its art. 15:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

⁴¹⁵ “Canadian Citizenship Regulations”, *Canada Gazette*, 1968, Part II, vol. 102, p. 1180, art. 19.(1)(b).

⁴¹⁶ (1973) F.C. 319, at p. 325.

⁴¹⁷ *Canada Gazette*, Part II, 1974, vol. 108, p. 278.

The critical word is of course "arbitrarily". There would be nothing arbitrary in the revocation of citizenship of a war criminal: it could only be decreed after a full judicial inquiry; and far from deserving qualification of arbitrary, it would fall in line with two other international instruments.

The *Convention relating to the Status of Stateless Persons*⁴¹⁸ is referred to in the discussion of the Interdepartmental Committee⁴¹⁹ as being "relevant". The Committee does not, however, say how or where. At most, art. 32 might have a remote connection with our subject matter:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

This provision bears no relation, on the face of it, to revocation of citizenship for cause. But more to the point is art. 1.2 of the Convention which states expressly:

1.2 This Convention shall not apply:

(iii) To persons with respect to whom there are serious reasons for considering that:

- (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes.

The Commission is surprised that the Interdepartmental Committee referred to this Convention as relevant, without at all mentioning the existence of this exclusionary provision concerning war criminals.

Yet it is this very provision which renders the Convention relevant to the denaturalization process, since it contributes to divesting that process of any arbitrary character insofar as war criminals are concerned.

The *Convention on the Reduction of Statelessness*⁴²⁰ provides in its art. 8(1):

A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.

However, the very next paragraph contains the following exception:

2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:

- b) Where the nationality has been obtained by misrepresentation or fraud.

⁴¹⁸ *Convention relating to the Status of Stateless Persons*, Adopted 28 September 1954. Entered into force 6 June 1960. Canada is not a party.

⁴¹⁹ Exhibit P-77, p. 29, no. 45.

⁴²⁰ *Convention on the Reduction of Statelessness*. Done at New York, 30 August 1961. In force 13 December 1975. In force for Canada 15 October 1978.

The Canadian statute precisely provides for revocation of citizenship on grounds, amongst others, of false representation or fraud. For the second time, the Commission cannot avoid raising a question mark as to why the Inter-departmental Committee saw fit to quote paragraph 1 of art. 2 but failed entirely to refer to paragraph 2(b) of the same article.

The Commission accordingly *FINDS* that:

- 47- There exist no legal or contractual obstacles, either domestically or internationally, for Canada to strip a war criminal of his acquired Canadian citizenship, even at the risk of rendering him stateless.**
-

iii) Deportation

In some cases, suspected war criminals have never applied for Canadian citizenship. In the majority of cases, they have, sooner or later, become Canadian citizens. In appropriate circumstances, the latter could be divested of their citizenship. In the search for an adequate punishment of war criminals, the next step in all cases is deportation.

Now, because of the changes in legislation over the years and of the variety of dates at which the suspects entered Canada, a detailed consideration of this matter opens the door to infinite complications: the Commission does not intend to lose itself in this labyrinth and will keep to essentials.

1. *Grounds for deportation*

Through the years, the formulation of those grounds has slightly varied, but in substance they have remained the same: misrepresentation, untrue answers, improper means, etc. The provision most closely related to war criminals in the *Immigration Act, 1976* is s. 27(1)(e), under the heading "Removal after admission":

(e) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person.

In the present state of the law, and barring consolidation of procedures in agreement with recommendations 29, 30 and 31, deportation means proving a second time, but before a different authority, the facts by and large which had led to revocation of citizenship (unless, of course, the suspect never became a citizen). This ground has already been covered and we will not labour the point any further.

The whole process, however, would be made more secure if a specific provision were to deal with admission and removal of war criminals, both in the section on "Inadmissible classes" and in the section on "Removal after

admission” of the *Immigration Act, 1976*. This, however, raises in turn the problem of refugees.

The condition of refugee is governed by the *Convention relating to the Status of Refugees*.⁴²¹ Canada has incorporated into the *Immigration Act, 1976* both a reference to the Convention and its 1967 Protocol in s. 2.(2) and an express definition of the phrase “Convention refugee” in s. 2.(1):

“Convention refugee” means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or

(b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

However, the Canadian Parliament has not seen fit to include into the Act the cessation and exclusion clauses which appear in art. 1 of the Convention. The exclusions contained in s. 4.(2)(b) and 55 of the Act are foreign to this topic. Now, art. 1(F) of the *Refugee Convention* provides:

F. the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

It would be highly appropriate that this specific exclusion be reflected in our legislation: no demonstration of this proposition appears to be needed.

On 17 April 1985, Rabbi W. Gunther Plaut, O.C., submitted to the Minister of Employment and Immigration, the Honourable Flora MacDonald, the final report of his study on “Refugee determination in Canada”.⁴²² He came upon the same situation (p. 58): “Our legislation has not adopted any of the exclusion and cessation clauses contained in the Convention.” Rabbi Plaut pursued (p. 60): “It has been suggested to me that to list the exclusion and cessation clauses in our legislation would tend to limit our refugee commitment unnecessarily. But this consideration, it seems to me, is outweighed by the desirability of creating reliable and objectively applicable legal standards. It is therefore recommended that the clauses of the Convention, where necessary, form part of our law.”

In agreement with this conclusion, Rabbi Plaut recommended (at p. 63) that art. 1(F) of the Convention “be made part of our law”.

⁴²¹ *Convention relating to the Status of Refugees*. Adopted 28 July 1951. In force 22 April 1954. In force for Canada September 1969.

⁴²² Canada Cat. no. MP 23-69/1985.

For all those reasons, the Commission *RECOMMENDS* that:

48- In order to reflect in Canadian legislation the exclusion of war criminals contained in the *Convention relating to the Status of Refugees*, the *Immigration Act, 1976* (25-26 El. II, c. 52) should be amended

a) by adding, in s. 2.(1), after the word “person” at the end of the first line of the definition of the words “Convention Refugee”, the following:

“(except a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*”;

b) by adding, at the end of s. 4.(2)(b), the following:

“or a person coming within the exception to the definition of ‘Convention Refugee’ in s. 2.(1)”;

c) by adding, at the end of s. 19.(1), the following paragraph (j):

“(j) persons who have committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*”;

d) by replacing, in the fourth line of paragraph 27.(1)(a), “or (g)” by “,(g) or (j)”;

e) by replacing, in the second and third lines of paragraph 55.(a), “or (g)” by “,(g) or (j).”

2. *Obstacles to deportation*

Whatever the name under which it is known, deportation is strongly objected to, and several obstacles are said to lie in its path; they are founded mainly on the notions of domicile and lawful admission. Essentially, the question turns on the effect which should be given to s. 127 of the *Immigration Act, 1976*:

127. Where a person acquired Canadian domicile in accordance with the *Immigration Act* as it read before it was repealed by subsection 128(1) of this Act and did not lose Canadian domicile before the coming into force of this Act, a deportation order may not be made against that person on the basis of any activity carried on by him before the coming into force of this Act for which a deportation order could not have been made against him under the *Immigration Act* as it read before it was repealed by subsection 128(1) of this Act.

The notion of domicile has not changed materially over the years. The basic definition read as follows in the 1910 legislation:⁴²³

2.(d) "domicile" means the place in which a person has his present home, or in which he resides, or to which he returns as his place of present permanent abode, and not for a mere special or temporary purpose.

On 1 January 1947 the definition was amended to read as follows:⁴²⁴

Domicile means the place in which a person has his home or in which he resides or to which he returns as his place of permanent abode and does not mean the place where he resides for a mere special or temporary purpose.

Together with the other provisions governing Canadian domicile, those were the dispositions under which the vast majority of suspected war criminals may have acquired a domicile in Canada after their post-World War II immigration.

Now, assuming irregularity — not to say, illegality — upon entry due to misrepresentation, or untrue answers, or improper means, could a Canadian domicile be acquired nevertheless? And, if so, is it now an insuperable obstacle to deportation? Again, those questions have raised a considerable debate which the Commission must now attempt to resolve.

i) *domicile and fraud on entry*

Under the 1910 Act, landing meant "lawful admission into Canada . . . otherwise than for . . . a temporary purpose . . .".⁴²⁵

Under c. 325 of 1952, landing meant "lawful admission . . . to Canada for permanent residence".⁴²⁶

Canadian domicile could be acquired by the immigrant residing in Canada during a period of three years, then five years after landing.⁴²⁷

Thus, the final result is predicated upon the value of each of the intervening steps: Canadian domicile depends on residence, which depends on landing, which depends on lawful admission. Let the legality of the original admission be successfully challenged: the whole edifice crumbles, and Canadian domicile cannot be claimed by the suspect.

This is the view expounded by Professor S.A. Williams:⁴²⁸

On account of this provision [s. 4] in the 1952 Act, if the landing was void *ad initio* because it was acquired by improper means already discussed, then the right to

⁴²³ 9-10 Ed. VII, (1910), s. 2(d).

⁴²⁴ An Act to amend the *Immigration Act*, 10 G. VI, c. 54, s. 3.

⁴²⁵ Section 2(p).

⁴²⁶ Section 2(n).

⁴²⁷ (1910) *ibid.*, 1952, s. 4.(1).

⁴²⁸ Williams, brief to the Commission, "Deportation and Denaturalization of War Criminals in Canada", p. 61.

permanent residency would not have been validly acquired and domicile would not have been obtained. Thus, deportation could take place under the 1976 Immigration Act.

The courts have also upheld that view. In **Rex v. Jawala Singh**,⁴²⁹ Sloan J., speaking for the Court of Appeal of British Columbia, said:

Counsel for the respondent pressed us with his submission that when examined by the Board of Inquiry in 1937 the respondent was a Canadian citizen, having acquired this status since his re-entry into Canada in 1935. That submission, to my mind, cannot be supported. The entry of the respondent into Canada in 1935 was an unlawful entry and in consequence the respondent cannot be said to have "landed" in Canada within the meaning of the *Immigration Act* (see sec. 2[1]). Canadian domicile cannot be acquired, for the purposes of the *Immigration Act*, except by a person having his domicile for at least five years in Canada after having been "landed" therein, i.e., after having made a "lawful admission" into Canada. The present respondent fails to fulfil both conditions precedent to the acquisition of Canadian domicile (see sec. 2[e][i]).

A few years before, in **Michelidakis v. Reginbald**,⁴³⁰ the Superior Court of Quebec had decided:

[Translation]

Under the *Immigration Act*, a domicile can only be acquired in this country by a person who comes here legally. Degridakis could only enter Canada because of false representation or stealth, therefore he could not acquire here a lawful domicile within the meaning of immigration laws.

The Commission accordingly *FINDS* that:

49- The notion of the valid acquisition of a Canadian domicile is dissolved, once fraud on entry is established against a suspect.

It is, however, argued in certain quarters that Parliament has spoken with a voice which denies that conclusion. Two legal provisions are called in aid of this submission.

The first such provision is contained in s. 19(1)(e)(viii) of the *Immigration Act 1952*, which declares "subject to deportation", according to its paragraph (2), a person "other than a Canadian citizen or a person with Canadian domicile" who has gained admission through, generally, "fraudulent or improper means". The conclusion is drawn that a Canadian domicile may be acquired by an immigrant in spite of fraud on entry.

This conclusion, in the view of the Commission, bears witness to a quite erroneous reading of the Act. Nowhere does the Act say that a Canadian domicile can be built on the sand of a fraudulent entry. What the Act does say

⁴²⁹ (1938) 3 *W.W.R.* 241, at p. 246.

⁴³⁰ (1917), 23 *R. de J.* 375, at p. 377.

is that, once a Canadian domicile has been established, a further fraudulent entry cannot lead to deportation: his duly obtained Canadian domicile will shield the person involved from deportation. But that is far from saying that a fraudulent entry can be at the root of a Canadian domicile. This latter construction does violence to the spirit and the letter of the Act.

The other provision which is invoked by the supporters of the theory of the "fraudulently valid domicile" is ss. 9.(2)(a) of the 1976 *Citizenship Act*. The Commission will quote ss. 9.(2) in full:

(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if

(a) he was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances; and

(b) he subsequently obtained citizenship because he had been admitted to Canada for permanent residence.

It is argued that Parliament has thus endorsed the principle that fraud on entry can nonetheless lead to lawful admission to Canada and establishment of a valid residence. There are two answers to this objection:

- 1) Such is not the true meaning of the provision. Parliament cannot be taken to have wanted deliberately to legalize fraud and to confer civil and political rights, however restricted, upon persons resorting to fraud or stealth in order to gain access to Canada. The true meaning of this provision is, therefore, that even though the admission to Canada had been considered lawful, once the fraud was detected, the admission lost that character of lawfulness. This is so true that, lawful as it may have been at the outset, due to the authorities being unaware of the fraud, as soon as this fraud was exposed, the admission lost all effect, and the person involved became liable to having his citizenship revoked.
- 2) Subsection 9.(2)(a) deals with permanent residence; what we are concerned with is Canadian domicile under the previous Immigration Acts. Whatever effect Parliament may have attached to fraud on entry with respect to permanent residence is not relevant to fraud on entry in relation to Canadian domicile.

The Commission therefore stands by its finding number 49.

ii) *domicile and deportation*

Assuming however, for purposes of discussion, that a valid Canadian domicile could be established in spite of fraud on entry, the further question arises: does this domicile constitute an obstacle to deportation of a war criminal?

Two lines of argument are followed in an effort to support a negative answer to the question.

The first aspect is raised by Messrs. Matas and Cotler. In order to understand clearly the thrust of this discussion, it is first necessary to quote directly from their respective briefs.

Mr. Matas writes:⁴³¹

The 1952 Immigration Act provides that a person who is denaturalized loses domicile when he ceases to be a citizen.¹⁴⁶ A denaturalized Nazi war criminal would have no protection from domicile, since he would not be domiciled in Canada.

Footnote 146 refers to s. 4(6) of the *Immigration Act 1952*.

Mr. Cotler presents the same argument as follows:⁴³²

The present *Immigration Act* does not distinguish between persons with and without Canadian domicile. Earlier versions of the *Immigration Act* did. However, s. 4(6) of the 1952 *Immigration Act* (R.S.C. 1952 Vol. V Chap. 325) makes it clear that loss of citizenship entails deemed loss of domicile as well. Loss of citizenship by reason of false representation or fraud is set out in s. 19(1)(b) of the 1952 *Citizenship Act* (R.S.C. 1952 Vol. II, C.33). Consequently, revocation of citizenship also means loss of domicile by virtue of the operation of s. 4(6), and hence loss of protection from deportation, as found in s. 127. In other words, the bar to deportation against a person who had acquired domicile in Canada is removed when citizenship is revoked.

Unfortunately for the proponents of this theory, their submission suffers from a fatal flaw. It is true that s. 4(6) of the *Immigration Act* provided for automatic loss of domicile consequent on loss of citizenship. It is equally true that s. 19(1)(b) of the *Canadian Citizenship Act* provided for revocation of citizenship as a result of false representation or fraud or concealment of material circumstances. However, the automatic loss under s. 4(6) would not have been triggered even by a successful resort to s. 19(1)(b) resulting in the revocation of the citizenship of a war criminal. The reason is simple: s. 19(1)(b) has been left explicitly out of the ambit of s. 4(6). This latter section in the *Immigration Act* applies when citizenship has been revoked "under section 15, section 17 or paragraph (a), (d), (e) or (f) of subsection (1) of section 19 of the *Canadian Citizenship Act*." None of those provisions applies to war criminals. The one which might have applied, paragraph (b) of ss. 1 of s. 19, has been deliberately left out.

It is, therefore, not correct to generalize and to submit that "a person who is denaturalized loses domicile when he ceases to be a citizen" (Mr. Matas) or that "revocation of citizenship also means loss of domicile by virtue of the operation of s. 4(6)" (Mr. Cotler). This is true in the circumstances *specified* by s. 4(6) of the *Immigration Act*, but *not in all* circumstances, as Messrs. Matas and Cotler have argued. This first line of argument therefore fails.

The second line of argument aims at getting around s. 127 of the *Immigration Act, 1976*:

⁴³¹ Exhibit P-69, p. 52.

⁴³² Exhibit P-84, p. 44.

127. Where a person acquired Canadian domicile in accordance with the *Immigration Act* as it read before it was repealed by subsection 128(1) of this Act and did not lose Canadian domicile before the coming into force of this Act, a deportation order may not be made against that person on the basis of any activity carried on by him before the coming into force of this Act for which a deportation order could not have been made against him under the *Immigration Act* as it read before it was repealed by subsection 128(1) of this Act.

The opponents of deportation argue that almost all suspected war criminals have acquired a Canadian domicile before 1976 and could not, *ex hypothesi*, be deported for war crimes under the previous immigration laws; they cannot be threatened with deportation now. But this time, this argument has an Achilles' heel.

Indeed if the Commission is right in its finding number 49, the suspect concerned will have lost his Canadian domicile, and this decision will show that, due to fraud on entry, this so-called domicile could never have acquired any value and, to use the expression of Professor Williams, was "void *ab initio*". The requirement of s. 127 that, for it to have effect, domicile must not have been lost "before the coming into force of this Act" will therefore be constructively satisfied: domicile will indeed have been lost — one might prefer to say: never acquired — before then. So, for that particular suspect, s. 127 will have become pointless. This second line of argument, therefore, succeeds.

The Commission accordingly *FINDS* that:

- 50- Even assuming that fraud on entry did not preclude the acquisition thereafter of a "fraudulently valid" Canadian domicile, such a domicile cannot constitute an obstacle to deportation of a war criminal.**

In view of all those difficulties, the Commission *RECOMMENDS* that:

- 51- To dispel doubts surrounding the construction of certain statutory provisions:**
- a) s. 9 of the *Citizenship Act*, 23-24-25 El. II, c. 108, should be amended by adding a provision making it declaratory, so as to render it explicitly applicable to situations arising under former laws on citizenship and immigration.
 - b) s. 127 of the *Immigration Act*, 1976, 25-26 El. II, c. 52 should be amended by adding a second paragraph, as follows:
"This section does not apply to a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*".

iii) *country of deportation*

This matter is governed by s. 54 of the *Immigration Act*, 1976. This section foresees various possibilities, with or without the concurrence of the

Minister or the wish of the deportee. In its brief, exhibit P-77, the Interdepartmental Committee has made a detailed analysis of those possibilities (paragraphs 53 through 57), with their individual pros and cons. The Committee has concluded (paragraph 57):

At the eventual end of the revocation of citizenship/deportation process, then, there may lie a particularly invidious series of options. In the absence of amendments to subsection 54(3), the choice seems to be to permit voluntary departure (with the corresponding inference of connivance in the person obtaining a haven) or returning him summarily to the tender mercies of Soviet or other Eastern European criminal justice. With amendments to subsection 54(3), there is a potentially negative impact from the civil liberties perspective, (by actually or ostensibly circumventing the extradition process) or potential exposure to international embarrassment.

(...)

This ultimate choice now appears to be a matter of some concern and it seems therefore to be a prudent matter for consideration prior to the formulation of an initial policy choice.

The Commission has already stated that denaturalization and deportation do not constitute the ideal remedy to the problem of war criminals: it comes, therefore, as no surprise that this remedy may lead to results which are not entirely satisfactory, especially in the selection of the country of deportation. Surely the deportee should not be allowed to pick the country of deportation: even if Canada could maintain that its sole concern is not to tolerate a war criminal on its soil, there would be no great satisfaction in knowing that the deportee has found refuge in an acknowledged haven for war criminals. In a parallel fashion, the Minister should not be restricted in his discretion to direct deportation to a country of his choice which is willing to receive the deportee. Section 54, as presently drafted, does inhibit that discretion, in the event one of the countries listed in ss. 54(2) expresses such willingness. That country might not meet our criteria of fairness in the administration of justice; yet, the Minister would have no discretion but to pursue the execution of the removal order to that very country.

In order to avoid those two unfortunate consequences, the Commission therefore *RECOMMENDS* that:

52- In order to assure the effectiveness of the deportation process in the case of war criminals, s. 54 of the *Immigration Act, 1976* should be amended by adding a paragraph (4), as follows:

“(4) Notwithstanding ss. (1), (2) and (3), when a removal order has been made against a person who has committed or been involved in or associated with a war crime or a crime against humanity, as those crimes are defined in ss. 6(1.9) of the *Criminal Code*, the Minister shall have full and sole discretion to select the country to which that person shall be removed.”

e) General observations

In the section of this chapter dealing with possible amendments to Canadian legislation, particularly the *Criminal Code*, the Commission stated the reasons why it would make recommendations concerning war crimes and crimes against humanity, but would "let Parliament, should it so wish, embark upon" dealing with crimes against peace. Hence, recommendation 28 dealt with the introduction of war crimes and crimes against humanity into the *Criminal Code*, but did not refer to crimes against peace.

Logic wanted, of course, that any further reference to this matter take into consideration recommendation 28. Recommendations 44, 48, 51 and 52 suggested, therefore, the introduction into the *Immigration Act, 1976* of provisions which, in turn, referred only to war crimes and crimes against humanity.

The Commission accordingly *RECOMMENDS* that:

- 53- Should Parliament decide that an amendment to the *Criminal Code*, as proposed in recommendation 28 or otherwise, should encompass crimes against peace, recommendations 44, 48, 51 and 52 should then be understood also to cover crimes against peace.**
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