

## War crimes prosecution in Canada: 2010

by David Matas

Justice in Canada for the victims of Nazi war crimes has been elusive. Immediately after World War II, it was easier to enter Canada if you were a Nazi war criminal than if you were a Jewish refugee. The perpetrators of the Holocaust are not just people in some far off land. At the time of the Holocaust, they were the neighbours of the victims. After the Holocaust, they became our neighbours.

Canada, by the conservative estimate of Howard Margolian, a historian who worked for the Justice War Crimes Unit, admitted 2,000 Nazi war criminals and collaborators<sup>1</sup>. The sheer numbers have created a constituency for doing nothing.

The policy of the Government of Canada till 1987 was not to bring to justice fugitive war criminals in Canada. Canadian immunity came from the notion that justice for the victims of fugitive mass murderers was not about us; it was about them. The official attitude was that the effort to bring fugitive mass murderers to justice not about protecting the interests of Canadian society; it was rather about perverting general institutions to serve a special interest group.

The RCMP 1962 non-investigation policy began with these words:

"In view of the possibility that individuals or organizations may attempt to employ the force as an investigational agency for groups engaged in locating and punishing individuals suspected of war crimes, unless otherwise instructed by Headquarters, Ottawa, investigations into allegations of this nature are not to be conducted by the Force."<sup>2</sup>

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<sup>1</sup> "Unauthorized Entry: The Truth About Nazi War Criminals in Canada, 1946-1956" University of Toronto Press 2000.

<sup>2</sup> David Matas with Susan Charendoff, *Justice Delayed: Nazi War Criminals in*

It is striking that reporting the identity and location of a mass murderer to the police was viewed by the police as an attempt to divert them from their proper tasks. What indeed are the police for, if murder is beyond their purview?

## **A. Chronology**

### **1. Albert Helmut Rauca** (June 1982)

Robert Kaplan, a Member of Parliament from Toronto, and Solicitor General in the Trudeau government from 1980 to 1984, tried to push the Canadian government into ending the immunity of Nazi war criminals in Canada. He elicited extradition requests from Western governments and initiated investigation of cases in Canada for that purpose. He pushed the investigation that eventually led to the arrest in June 1982 and the extradition in May 1983 of Albert Helmut Rauca to Germany. Rauca had been accused of responsibility for 11,500 deaths in Kaunas, Lithuania in 1941.

Rauca died in a German prison in October 1983 awaiting trial, forty two years after the crimes took place that he was charged with committing. He had spent thirty three of those years in Canada<sup>3</sup>.

### **A Commission of Inquiry** (1985)

The Government of Brian Mulroney created the Commission of Inquiry on War Criminals in early 1985. It was headed by the Honourable Jules Deschênes.

The Commission in December 1986 recommended a variety of options for bringing war criminals in Canada to justice. The Government of the day chose what it called a made in Canada solution and guided through Parliament an amendment to the Criminal

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*Canada* 1987, Summerhill Press page 77.

<sup>3</sup> Sol Littman, *War Criminal on Trial: The Rauca Case*, Lester & Orpen Dennys, 1983

Code to allow prosecution of these criminals. That legislation proved unworkable.

Legislation allowing for prosecution of war criminals and criminals against humanity came into force in 1987<sup>4</sup>. The Crown began its prosecutions sequentially, rather than simultaneously, waiting to see how the precedents developed before launching new cases.

## **2. Imre Finta** (December, 1987)

Only four prosecutions were launched after 1987, when the law came into force. None of the four cases led to a conviction.

The first prosecution was that of Imre Finta, charged in December, 1987. Finta was accused of being a key official in the rounding up of the Jews of Szeged, Hungary in 1944 and sending them off to Auschwitz, a Nazi death camp, and to Strasshof, a Nazi concentration camp.

Finta was accused of being in charge of getting Jews from the ghettos to the concentration centre in Szeged, a brickyard. He was allegedly in charge of the concentration centre. His responsibilities supposedly included making sure that the Jews were kept in the brickyard and could not escape. He took charge of taking valuables from Jews that were in the brickyard. His counsel at trial admitted he made daily announcements demanding that the prisoners relinquish all valuables on pain of death. Finally, he allegedly supervised the loading of the prisoners onto boxcars. These boxcars took the Jews to Auschwitz and their death or to Strasshof and forced labour.

The evidence against Finta was overwhelming and unanswered. Yet Finta was acquitted. His acquittal was upheld both by the Ontario Court of Appeal and the

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<sup>4</sup> Criminal Code section 7(3.71).

Supreme Court of Canada, in March 1994.

The Supreme Court of Canada, in reasoning subsequently repudiated in the case of *Mugesera* discussed later, held that the defences of mistake of fact and obedience to superior orders which were put to the jury were, according to the majority of the Supreme Court of Canada properly put, because there was evidence led at the trial which gave an air of reality to the defences. The Court listed evidence of nine circumstances which gave the defences of mistake of fact and obedience to superior orders an air of reality.

One of those nine circumstances was "the Jewish sentiment in favour of the Allied forces". Another of the nine circumstances was "the general publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary." Yet another of the nine circumstances was "the universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews."

The notion that there is a "Jewish problem" or that Jews were "basically hostile" to the military objectives of Hungary is unadulterated racial prejudice. The majority appears to have held that killing members of the victim group may lack the requisite intent for the international offenses where the perpetrator believes the propaganda which incited the killing, that all members of the victim group are hostile to the military efforts of the government of the perpetrator. By holding that committing prohibited acts while feeling some forms of racial prejudice may mean the requisite guilty mind is lacking, the Court excused the very evil the law seeks to punish.

Once a defence is put to the jury, the jury may legally acquit based on that defence. According to the ruling of the Court, there may be an acquittal of a crime against humanity or a war crime, not in spite of the existence racial prejudice, but because of the existence racial prejudice.

### **3. Jacob Luitjens** (January, 1988)

Jacob Luitjens served in two Nazi auxiliary organizations during World War II responsible for rounding up Jews and resistance fighters in the Netherlands. Luitjens took part in searches for and arrests of resistance fighters sought by the Nazis. Two of the resistance fighters he tried to arrest were shot and killed in the pursuit, one before arrest, the other attempting to escape after arrest. Luitjens was convicted in 1948 in the Netherlands in absentia for his anti-resistance activity and sentenced to life in prison.

After the war Luitjens spent sixteen months in Germany in various refugees camps under a false name pretending to be a refugee from West Prussia. Luitjens came to Canada from Paraguay as a landed immigrant in 1961. When he applied to come to Canada, a Canadian immigration form he completed asked the applicant for immigration to list all residences since 1939 if the applicant had ever resided in Germany; and to list all residences for the last ten years if the applicant had never resided in Germany.

That form Luitjens completed was filed in evidence in his denaturalization case. In the form Luitjens listed his residences in Paraguay for the previous ten years. But that was all. He lied about his earlier residence in Germany. He lied about his previous residence in Holland. It was established in court that if he had disclosed his prior residence in Holland, his application for immigration would have been referred to the Dutch authorities. The Dutch authorities would have informed the Canadian authorities of the conviction of Luitjens. Once the Canadians found out about the conviction, they would have refused Luitjens admission to Canada.

The Minister initiated proceedings against Jacob Luitjens on January 21, 1988. Luitjens lost his citizenship and was ordered deported by reason of misrepresentation of entry to Canada. Luitjens was removed to the Netherlands on November 21, 1992, almost five

years later<sup>5</sup>.

#### **4. Michael Pawlowski** (December, 1989)

Pawlowski was charged in December 1989 with murdering 410 Jews and 80 non-Jewish Poles in what was then Byelorussia in 1942. The Crown sought permission from the Court to question witnesses in the Soviet Union by videotape. Chadwick J. refused permission<sup>6</sup>.

The Crown did not appeal this ruling to the Ontario Court of Appeal, for unpersuasive technical reasons<sup>7</sup>. Instead it applied for leave to appeal directly to the Supreme Court of Canada. Leave was denied on February 6, 1992.

#### **5. Stephen Reistetter** (February, 1990)

Stephen Reistetter was charged in February 1990 with shipping 3000 Jews from Slovakia to a ghetto in Poland in April and May 1942. Most of the 3,000 were taken a few months later from the Polish ghetto to the death camp Treblinka. The prosecution dropped the Stephen Reistetter case because two witnesses had died<sup>8</sup>.

Of the two witnesses who died, one was an expert witness, a Czech historian, in principle replaceable by another expert. The other witness who died was an eyewitness who had already had his evidence videotaped. The videotaped evidence could have been presented in court.

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<sup>5</sup> David Matas *Nazi War Criminals in Canada: Five Years After*, Institute for International Affairs of B'nai Brith Canada, November 1992, Chapter four.

<sup>6</sup> Ontario Court of Justice (General Division), Reasons for Judgment, June 21, 1991.

<sup>7</sup> See David Matas *Nazi War Criminals In Canada: Five Years After*.

<sup>8</sup> David Matas *Nazi War Criminals in Canada: Five Years After*, Chapter three, page 24.

Between the time of the laying and dropping of the charge there was a turnover of personnel in the Justice War Crimes unit. One explanation for the dropping of the charge, the official explanation, was that the quality of the evidence deteriorated. Another plausible explanation is those later responsible for laying charges were overly cautious, so cautious that they were prepared to overturn a previous judgment of their colleagues.

#### **6. Arthur Rudolph** (July, 1990)

Arthur Rudolph employed slave labour in the production of V-2 rockets for the Nazis during World War II. He lived in the U.S. but left in 1984 for Germany after the Nazi war crimes unit in the U.S., the Office of Special Investigation, began proceedings against him to deprive him of his citizenship. He voluntarily relinquished his U.S. citizenship.

Rudolph came to Canada in July 1990. The Government of Canada directed Rudolph to an immigration inquiry alleging he was a person about whom there are reasonable grounds to believe that he is a war criminal. Rudolph returned to Germany in August 1990 voluntarily a month after he arrived. The immigration proceedings continued in Canada in his absence.

An adjudicator found the allegation to be well founded and on January 11, 1991 ordered Rudolph deported from Canada. His counsel on his behalf applied to the Federal Court of Appeal to overturn the decision. The Federal Court heard the case and rejected the application on May 1, 1992. Rudolph applied for leave to appeal to the Supreme Court of Canada. Leave was denied on October 8, 1992.

#### **7. Radislav Grujicic** (December, 1992)

Grujicic immigrated to Canada in 1948 and became a Canadian citizen in 1956. He was a paid informer for the RCMP security service from 1949 to 1951, when his cover

was blown. Yugoslavia asked for extradition. The request was never honoured.

Grujicic was accused in December 1992 of conspiring with German occupying forces in Belgrade Yugoslavia in the persecution of communists during World War II. The prosecution dropped the charges against Grujicic in September 1994 because he was too ill to stand trial<sup>9</sup>.

### **8. Konrad Kalejs** (June, 1994)

Kalejs was deported from the US for war criminality in April 1994. He went to Australia and then came to Canada as a visitor in June 1994. He was ordered deported in August 1997, over three years later, for complicity in war crimes and crimes against humanity. He was company commander of a Latvian auxiliary police unit at Salaspils slave labour camp in which there were public executions, starvation and torture, as well as prisoners killed shot for attempting to escape<sup>10</sup>. He was deported to Australia the same month as the deportation decision.

### **A shift** (January, 1995)

In January of 1995, because of the *Finta* decision, the government abandoned its made in Canada solution. It announced a change in its approach to dealing with war criminals, shifting from the criminal prosecution of these individuals to revocation of citizenship.

### **9. Helmut Oberlander** (January, 1995)

The Government began revocation of citizenship proceedings against Helmut Oberlander January 27, 1995, alleging that he had obtained citizenship by false

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<sup>9</sup> Roseann Danese "War crimes case against 'feeble old man' stayed" Law Times, October 10, 1994

<sup>10</sup> *M.C.I. v. Kalejs*, AD IRB File no. 0003-95-1395, August 18, 1997, A. Iozzo, Adjudicator.

representation or fraud or by knowingly concealing material circumstances, through hiding his complicity in Nazi war crimes. The Federal Court dragged its heels dealing with this and other war crimes cases.

A member of the government legal team in this case and the cases of Erichs Tobiass, and Johann Dueck raised concerns about the delays with Julius Isaac, the Chief Justice of the Federal Court. Because the government lawyer had done so in the absence of counsel for Tobiass, Oberlander and Dueck, Mr. Justice Cullen of the Federal Court Trial Division threw out the cases altogether.

The Federal Court of Appeal reinstated them. The matter went to the Supreme Court of Canada, which in addition to affirming the reinstatement, remarked that the delays in the cases were "inordinate and arguably inexcusable"; that the dilatoriness of the cases "defies explanation"<sup>11</sup>.

The Federal Court eventually found against Oberlander on February 28, 2000, five years later<sup>12</sup>. The Federal Court held that Oberlander was a member of Einsatzkommando 10a, a unit that systematically carried out mass executions of civilians, particularly Jews, in the occupied Soviet Union.

The Governor in Council revoked the citizenship of Oberlander August 21, 2001, a year and a half later. In May 2004, the Federal Court of Appeal quashed the revocation of Oberlander's citizenship.

The cabinet revoked the citizenship of Oberlander a second time May 17, 2007. The Federal Court of Appeal quashed the revocation a second time November 17, 2009<sup>13</sup>.

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<sup>11</sup> *M.C.I. v. Tobiass et al.*, [1997] 3 S.C.R. 391 paragraph 81.

<sup>12</sup> *M.C.I. v. Oberlander* T-866-95, Mackay J.

<sup>13</sup> 2009 FCA 330

The case of Oberlander is now pending before cabinet for a third decision.

**10. Erichs Tobiass** (January, 1995)

Erich Tobiass was accused of having concealed his participation in the execution of Jews in Latvia. The Minister commenced revocation proceedings in Federal Court against Erichs Tobiass on January 27, 1995. He died after the Supreme Court ruled in September 1997 that his case could proceed. Tobiass died in December 1997 almost three years later, but before the Federal Court proceedings were complete.

**11. Johann Dueck** (January, 1995)

January 27, 1995, the government commenced proceedings against Johann Dueck. The case was finally decided by Mr. Justice Noël on December 21, 1998 almost four years later<sup>14</sup>.

The judge ruled that lying before June 1950 about participation in war crimes to get entry to Canada did not matter, because before June 1950, even though there was security screening in fact, there was no legal basis for that screening. Because security screening had no legal foundation, a lie told in the process of security screening was immaterial to entry.

The judge ruled that there was no regulation under the Immigration Act before June 1950 establishing security screening. Counsel for the Minister had argued that security screening could be supported by the Crown prerogative, without regulation. The Court ruled that the Crown prerogative could not provide a basis for security screening, because the field of security screening was occupied by the Immigration Act by the mere fact that a power to regulate was given by the Immigration Act even when there was no regulation exercising that power<sup>15</sup>.

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<sup>14</sup> *M.C.I. v. Dueck*, T-938-95, December 21, 1998.

<sup>15</sup> Paragraph 303.

In the case of *Kisluk*<sup>16</sup>, Mr. Justice Lutfy came to a different conclusion from Mr. Justice Noël on this point. Mr. Justice Lutfy held that there was in 1948 a legislative and regulatory basis for security screening. As well, he questioned whether the legislation in place at the time fully displaced the Crown prerogative of prohibiting entry on security grounds.

The second contentious ruling of Mr. Justice Noël in the *Dueck* case was that the Government had to prove more than a lie that foreclosed inquiries<sup>17</sup>. It had to prove the very lie that was alleged in the notice of revocation of citizenship. Since the Government had alleged Dueck was a shooter, it had to prove Dueck was a shooter, or, at the very least, prove he was a member of the shooting unit, the Selidovka police. Since the Government did not prove that, Dueck, despite his lies, was off the hook.

The Court erred, in my opinion, by ruling that the government must prove its allegations of what was not disclosed on entry made in the notice of revocation of citizenship. In my view, that is an error of law, because what should be at issue in a revocation hearing is the fraud, false representation or concealing material circumstances of the person concerned.

Allegations of what was not divulged are there to show what inquiries were foreclosed by the fraud, false representation or concealing material circumstances and for no other purpose. There is no need to show that the allegations of what was not divulged are true in order to show that citizenship was obtained by fraud, false representation or concealing material circumstances. Any fraud, false representation or concealing material circumstances proved at the trial which led to obtaining of citizenship should be within the scope of the notice of revocation.

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<sup>16</sup> *M.C.I. v. Kisluk* (1999) 50 Imm. L.R.(2d) 1 (T.D.).

<sup>17</sup> Paragraph 135.

That ruling of the judge was correctable in other cases by more precise notices. It was even correctable in the Dueck case by starting a new case against Dueck with a new notice.

### **12. Joseph Nemsila** (April, 1995)

In April 1995 Joseph Nemsila, a landed immigrant who had never applied for citizenship, was accused of commanding a unit that had deported Jews to Auschwitz and killed Slovak civilians. His removal proceedings were delayed in July 1995 when An immigration adjudicator ruled in July 1995 that Nemsila had acquired Canadian domicile and was protected under the Immigration Act from being deported for any pre-1978 activities for which he could not have been deported at that time.

On appeal this ruling was overturned by Justice James Jerome. The latter's ruling was also appealed, but the Federal Court of Appeal decided not to release its decision following Nemsila's death in April 1997.

### **13. Peteris Vitols** (December, 1995)

Canada did not keep its immigration records from the post war. There was systematic destruction of records. Evidence of lying on admission depends on the oral testimony of immigration officers who processed applicants immediately after World War II. Many of those officers have died or become incapacitated.

Peteris Vitols was served with a notice dated December 28, 1995 seeking to revoke his citizenship. In late fall of 1941, Vitols was part of the Waffen SS and a police battalion in Latvia during World War II. He was taken prisoner of war, put in a displaced persons camp in Germany, and released. After release he moved to Germany and applied to come to Canada.

Vitols did not tell Canadian immigration authorities of his involvement with the Nazis

before he came to Canada. The crucial question in denaturalization proceedings became: Was he asked? If he was asked, then he must have lied on entry.

The testimony of immigration officer Keelan was that Vitols was not asked. Keelan testified that he did not ask applicants for immigration whether they were collaborators presently residing in previously occupied territory on the ground that displaced persons could not be residing in previously occupied territory when he was interviewing them in Germany. On the basis of that evidence, Mr. Justice McKeown of the Federal Court, in September 1989, dismissed the government case against Vitols.

That testimony of Keelan was contradicted by two other officers, Cliffe and Kelly<sup>18</sup>. The testimony of Keelan was preferred because Keelan was the only one testifying who was in the field in 1950, the year Vitols applied to come to Canada.

The testimony of Keelan in the case of *Vitols* contradicted his own earlier evidence in the case of *Bogutin*, who was found in February 1998 by the same Federal Court judge, Mr. Justice McKeown, to have lied on entry to Canada. In the *Bogutin* case, Keelan testified that he understood that all collaborators with the Germans, wherever they resided, were excluded<sup>19</sup>. Between the *Bogutin* case and the *Vitols* case, Keelan had had a stroke. Government counsel argued that the Keelan testimony in the *Vitols* case should be disregarded because it was clear that Keelan was not well<sup>20</sup>. Mr. Justice McKeown nonetheless relied on that evidence to dismiss the case against Vitols.

#### **14. Antanas Kenstavicius** (February, 1996)

Antanas Kenstavicius had supervised the massacres of thousands of Jews when he was stationed as police chief in Svencionilla, Lithuania between 1941-44. He arrived in

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<sup>18</sup> Paragraph 156.

<sup>19</sup> *M.C.I. v. Bogutin*, T-1700-96, February 20, 1998, paragraph 91.

<sup>20</sup> Paragraph 159.

Canada shortly after World War II as a permanent resident, but never obtained citizenship. The Department of Justice began deportation proceedings against him in February 1996. He died in January 1997, at the age of 90, just before the scheduled hearing of his case.

**15. Wasily Bogutin** (April, 1996)

The Minister launched proceedings against Wasily Bogutin on April 4, 1996. He lost in Federal Court on February 20, 1998.

Mr. Justice William McKeown determined that Bogutin had collaborated with the Nazi occupation forces in the town of Selidovo, Ukraine and, as an auxiliary police officer, was personally and directly involved in effecting the roundup of young persons for forced labour in Germany. When applying to immigrate to Canada following the war, Bogutin fraudulently claimed to be a Romanian national, and did not reveal his collaboration with the Nazis.

The Governor in Council revoked his citizenship on July 15, 1998. At his deportation proceedings, he made a refugee claim. He died January 31, 2000 before the claim was resolved, almost four years after the commencement of proceedings against him.

**16. Vladimir Katriuk** (August, 1996)

The case of Vladimir Katriuk began August 15, 1996. The Federal Court found against him on January 29, 1999<sup>21</sup>. The Federal Court of Canada found that Katriuk was a member in the Schutzmannschaft Battalion 118 and participated in its activities in Belarus, including anti-partisan operations.

Though the law does not contemplate an appeal from the decision of the Federal Court Trial Division, Vladimir Katriuk, after losing in the Federal Court Trial Division, tried to

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<sup>21</sup> *M.C.I. v. Katriuk*, T-2409-96, Nadon J.

argue that there was such an appeal first in an appeal to the Federal Court of Appeal<sup>22</sup> and then in a leave application to the Supreme Court of Canada. While Katriuk was engaging these legally futile steps, the Government sat twiddling its thumbs, awaiting their outcome before it moved on with the statutory procedure.

The cabinet decided not to revoke the citizenship of Katriuk on May 17, 2007. The League for Human Rights of B'nai Brith Canada challenged this decision in Federal Court arguing that the statute did not give the cabinet power to do this once the Federal Court had found he entered by Canada by false representation or fraud or by knowingly concealing material circumstances. The Federal Court ruled in June 2009 in favour of Katriuk<sup>23</sup>. The Federal Court of Appeal affirmed in November 2010<sup>24</sup>.

### **17. Ladislaus Csizsik-Csatary** (October, 1996)

Ladislaus Csizsik-Csatary was accused, in revocation citizenship proceedings begun October 30, 1996, of involvement, while a member of the Royal Hungarian Police in 1944, in the confinement of thousands of Jews and their subsequent deportation to death camps. In July 1997, just before his Federal Court hearing was to begin, he decided not to oppose the loss of his citizenship. Cabinet revoked his citizenship, August 27, 1997. By October 1997, he was reported to have left the country<sup>25</sup>.

### **18. Serge Kisluk** (February, 1997)

The Minister commenced proceedings against Serge Kisluk February 24, 1997. The Federal Court ruled against Kisluk on June 7, 1999.

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<sup>22</sup> A-127-99, December 7, 1999.

<sup>23</sup> *League for Human Rights of B'nai Brith Canada v. Canada*, 2009 FC 647, Barnes J.

<sup>24</sup> *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307

<sup>25</sup> Fifth Annual Report of Canada's Crimes against Humanity and War Crimes Program 2001-2002 page 36.

The Court found that Kisluk voluntarily collaborated with the Nazi occupation forces in Poland in 1940 and 1941 and that he was a member in the auxiliary police unit under Nazi command in Ukraine from late 1941 until February 1943. The Court also found that he participated in the beating of an elderly Jewish victim and the killing of a young Jewish woman in March of 1943. All of this, the Court found, Kisluk hid on entry.

The cabinet revoked his citizenship on March 2, 2000. A deportation inquiry began on October 6, 2000. He died awaiting deportation proceedings on May 21, 2001, more than four years after the commencement of proceedings.

### **19. Eduards Podins** (May, 1997)

Federal Court proceedings began against Eduards Podins on May 23, 1997. He was accused of concealing his past as an employee at a concentration camp, Valmiera, during World War II in Latvia.

Mr. Justice McKeown in this case on July 9, 1999 made much the same finding that Mr. Justice Noël had made in the case of *Vitols*, that Podins did not obtain citizenship by false representation or fraud or by knowingly concealing material circumstances because the government had made allegations about criminality it could not prove<sup>26</sup>. That decision was as legally unfounded in that case as this. What should have mattered and other cases determined did matter was that the concealment of his past foreclosed inquiries that could have been made at the time about his participation in war crimes.

### **20. Mamertas Roland Maciukas** (July, 1997)

Proceedings began against Maciukas in Federal Court July 4, 1997. He had failed on entry to Canada to disclose his membership. There was evidence of membership in a

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<sup>26</sup> *M.C.I. v. Podins*, T-1093-97

Lithuanian police battalion killing unit which murdered about 50,000 Jews in Byelorussia during the War. His lawyers told the Court in January 1998 that he would not contest the proceedings. He voluntarily left the country.

**21. Michael Baumgartner** (September, 1997)

The Minister began proceedings against Michael Baumgartner on September 24, 1997. The Federal Court found against him on August 31, 2001, almost four years later<sup>27</sup>. The Court found that he was a guard at the Stutthof and Sachsenhausen concentration camps during World War II.

Baumgartner died in July 2005. Though his death was almost four years after having lost in Federal Court, the cabinet before his death had yet to consider and decide on his revocation of citizenship.

**22. Wasyl Odynsky** (December, 1997)

Court proceedings began against Wasyl Odynsky in December 1997. In March 2001, the Federal Court of Canada found that Odynsky obtained Canadian citizenship by deception in that he concealed his service as a guard at the SS forced labour camps of Trawniki and Poniatowa<sup>28</sup>

The cabinet decided not to revoke the citizenship of Odynsky on May 17, 2007. The League for Human Rights of B'nai Brith Canada challenged this decision in the Federal Court and the Federal Court of Appeal along with the *Katriuk* decision.

B'nai Brith argued in Federal Court that, once the Court had found that an individual had entered Canada by covering up his Nazi past and the Minister of Citizenship requested revocation of citizenship from cabinet, the legislation did not give the cabinet

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<sup>27</sup> *M.C.I. v. Baumgartner*, 2001 FCT 970 McKeown J.

<sup>28</sup> *MCI v. Odynsky* 2001 FCT 138 MacKay J.

the power to reject the request. B'nai Brith was successful in fending off a challenge that it did not have standing to raise the issue. However, the courts ultimately decided to allow the cabinet decision in favour of Katriuk to stand<sup>29</sup>.

### **23. Ludwig Nebel** (June, 1998)

Immigration proceedings commenced against Nebel on June 30, 1998. He was not a Canadian citizen, but only a permanent resident. So he went straight into deportation proceedings.

The evidence against him was that, in Austria prior to the war, he was a member of the SA, the SS and the Nazi Party. Following the Nazi occupation of Austria, he held various positions in both the SS and the Gendarmerie unit, reaching the level of Hauptmannschaftsfuhrer in the Stanislau region of Galicia, then Poland, now Ukraine.

His case was referred to the Adjudication Division of the Immigration and Refugee Board on July 6, 1998. Nebel died in July of 2000, more than two years after the commencement of the proceedings without their having been concluded.

### **24. Jacob Fast** (September, 1999)

The Minister gave notice to Jacob Fast in November 1999 that the Minister intended to see revocation of Fast's citizenship on the basis that it had been obtained by false representation or fraud or by knowingly concealing material circumstances. On October 3, 2003, the Federal Court of Canada ruled that Fast had obtained his Canadian citizenship by deceit, in that he failed to reveal his German citizenship when applying to come to Canada in 1947. The Court also found that Fast had collaborated with the German Security Police responsible for enforcing the racial policies of the German

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<sup>29</sup> *League for Human Rights of B'nai Brith Canada v. Odynsky, League for Human Rights of B'nai Brith Canada v. Katriuk* 2010 FCA 307

Reich<sup>30</sup>.

Jacob Fast, according to Justice Pelletier, was part of the political section of the Nazi auxiliary police in Zaporozhye, Ukraine. All of the auxiliary police participated in the rounding up and killing of the Jews of Zaporozhye. The political section was responsible for the arrest, imprisonment, torture and deportation of prisoners to concentration camps in Poland and Germany.

The government began proceedings against Jacob Fast on September 30, 1999. The Federal Court decided against Fast on October 3, 2003, four years later. May 24, 2007 citizenship was revoked. He died September 5, 2007.

**25. Walter Obodzinsky** (February, 2000)

Proceedings against Obodzinsky began in Federal Court on February 1, 2000. In September 2003, the Federal Court ruled that Obodzinsky obtained Canadian citizenship by misleading Canadian officials about his World War II activities<sup>31</sup>.

The Court ruled that Obodzinsky was an accomplice in the perpetration of atrocities committed during the German occupation of Belarus. Holocaust survivor Sidney Itzkowitz witnessed Obodzinsky participate in the shooting death of Itzkowitz's father. Obodzinsky died in March 2004 before cabinet had revoked his citizenship.

**26. Michael Seifert** (November, 2001)

In November 2000, an Italian military tribunal found Michael Seifert guilty, *in absentia*, of various crimes committed while he was a guard at a German police transit camp in northern Italy and sentenced to life in prison. At Italy's request, the Canadian government commenced extradition proceedings against Seifert.

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<sup>30</sup> *MCI v. Fast* 2003 FCT 1139

<sup>31</sup> *M.C.I v. Obodzinsky* 2002 CFPI 943

The Minister of Citizenship and Immigration also commenced proceedings to revoke Seifert's citizenship in the Federal Court of Canada on November 13, 2001. The Federal Court found against Seifert on November 13, 2007.

On December 28, 2005, the Minister of Justice ordered Seifert's surrender to Italy. He was extradited to Italy February 15, 2008.

**27. Jura Skomatzuk** (November, 2003)

The notice of revocation for Jura Skomatzuk was dated November 13, 2003. On August 17, 2006, following a trial combined with that of Josef Furman, the Federal Court of Canada ruled that Skomatzuk had obtained his Canadian citizenship through fraud or material misrepresentation. The Court found that he had hidden his wartime activities from Canadian officials when he was lawfully admitted to Canada in 1952, and that he served as a guard in the German concentration camp system after training at the SS Trawniki training camp in 1943.

He died July 28, 2008. At the time of his death, the cabinet had yet to revoke his citizenship, almost two years after he lost in Court.

**28. Josef Furman** (November, 2003)

The notice of revocation for Josef Furman was also dated November 13, 2003. On August 17, 2006, following a trial combined with that of Jura Skomatzuk, the Federal Court of Canada ruled that Furman had obtained his Canadian citizenship through fraud or material misrepresentation.

The Court found that he had hidden his wartime activities from Canadian officials when he was lawfully admitted to Canada in July 1949, and that, during the Second World War, he served in the German concentration camp system after training at the SS Trawniki training camp in 1943.

He died August 31, 2007. Again, there was no cabinet action on his case before his death.

## **B. Summary**

Of the twenty eight Nazi war crimes case in Canada, the Government removed seven - Rauca, Luitjens, Seifert, Rudolph, Kalejs, Maciukas and Czik Cztery. Two of these seven were extraditions - Rauca and Seifert - and five were deportations.

Of the five deportations, three initially had status in Canada which was removed, and two - Kalejs and Rudolph - did not have status in Canada and were merely attempting entry. Of the three who had status in Canada, two did not contest the proceedings against them.

Luitjens, the only one of the three who did contest his removal proceedings, did not exhaust every recourse. After having been ordered deported, he could have sought judicial review of his deportation order in Federal Court but did not do so. So we do not have even one case of a person with status in Canada losing that status and being removed after having exhausted every available recourse.

The government lost four cases on the merits - Finta, Podins, Vitols and Dueck. They lost one case on procedural grounds, Pawlowski. Three are still pending - Katriuk, Odynsky, and Oberlander.

The Katriuk and Odynsky cases are still pending only because of the challenges of the League for Human Rights of B'nai Brith Canada. As far as the Government is concerned, these cases are over. The Government won in court but decided that these two could stay anyways. In the other pending case, the government won in Federal Court on the issue of false representation or fraud or by knowingly concealing material circumstances.

That leaves thirteen. These thirteen terminated prematurely because of death or illness. In one case - Reistetter, the cause was the death of witnesses. In another case - Grujicic, the cause was illness of the person concerned.

In eleven cases, the cause was the death of the person concerned - Fast, Bogutin, Tobiass, Nemsila, Kenstavicius, Kisluk, Baumgartner, Nebel, Obodzinsky, Skomaczuk and Furman. Though none of these eleven were removed, eight - Fast, Bogutin, Nemsila, Kisluk, Baumgartner, Obodzinsky, Skomaczuk and Furman - had lost in court before death. If they had lived, they likely would have been removed.

The Simon Wiesenthal Center in a report released April 10, 2010 slammed Canada for its complete failure to bring Nazi war criminals to justice. To call the effort a complete failure is going too far. Twenty eight cases were launched. The Government was successful in court in eighteen and failed in only five. Five others were terminated by death or illness before a court decision favouring one side or the other.

Yet, to call the effort a complete success would be going too far in the other direction. There were many failings, if not complete failure. Some of these failings led to corrections along the way. Others manifested problems which have yet to be resolved.

## **C. Lessons learned**

### **1. Avoiding duplication**

Jacob Luitjens lost his citizenship and was ordered deported by reason of misrepresentation of entry to Canada. At his immigration hearings, he insisted that the case made against him at citizenship proceedings be proved a second time. The end result of the immigration proceedings were obvious, given the result of the citizenship proceedings. Luitjens attempted to exploit a loophole in the system in order to string

out the time he remained in Canada before the inevitable happened<sup>32</sup>.

In response to the Luitjens dodge, Parliament, in 1993, changed the Immigration Act. According to the 1993 change, a removal order can be made against a person for the sole reason that the person lost citizenship on the ground that the person had earlier obtained permanent residence through fraud, false representation or concealing material circumstances. In removal proceedings, there is no need to prove a second time that permanent residence was obtained through fraud, false representation or concealing material circumstances. It is enough just to file the revocation certificate, and provided revocation itself was decided because permanent residence was obtained by fraud, false representation or concealing material circumstances, that is the end of the matter<sup>33</sup>.

## **2. Developing a specialized investigative unit**

The Deschênes Commission made a disastrous recommendation that the Government of Canada, in bringing Nazi war criminals in Canada to justice, not establish a specialized investigative unit as in the United States, but instead give the responsibility for investigation to the RCMP. The Government of Canada acted on this recommendation and threw the job of investigation of Nazi war criminals into the swamp of inertia, indifference and hostility of the RCMP.

Delay has had more than one cause. But surely one of those causes was the decision to leave investigation of these crimes to the RCMP alone. The problem was not just that we lost the advantage of specialization a focused unit would have had. Even more problematic was that investigation became subject to the RCMP corporate culture that this was not proper police work, that it was doing the work of a particular interest

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<sup>32</sup> David Matas "Nazi War Criminals in Canada: Five Years After", Institute for International Affairs of B'nai Brith Canada, November 1992, Chapter four.

<sup>33</sup> Section 27(2)(i).

group rather than helping make Canadian justice whole.

To do investigative Nazi war criminal work, the RCMP hired police with language skills in the language of the accused. The typical accused Nazi war criminal in Canada was a local member of the Nazi police auxiliary in the country of Nazi occupation. These police auxiliary joined the roving Nazi killing units which killed Jews wherever they were found. The auxiliary police formed killing units of their own or rounded up Jews to ship them off to the gas chambers in Auschwitz, Maidanek, Chelmno, Treblinka and elsewhere.

So Canada ended up with investigators having more in common with the accused than the victims, investigators who were police, like the accused, investigators who spoke the same language as the accused, investigators often with the same ethnic backgrounds as the accused. Whether it was the similarity of background of the investigators with the accused, or the pervasive corporate do nothing culture of the RCMP for Nazi war crimes, or just simply bureaucratic infighting, the result was foot dragging, lethargy, investigations that never got done.

The Government announced in July 1998 a series of initiatives with the goal of what it euphemistically referred to as increased coordination between the RCMP and the War Crimes Unit in the Department of Justice in order to provide "enhanced cooperation". Put less politely, the Government was concerned about lack of coordination between investigators and prosecutors, about the fact that investigators were not cooperating with prosecutors. The Government attempted to put in place a corrective.

Much of the first ten years after the Government decided to act on the recommendations of the Deschênes Commission was spent first waiting for the RCMP to do investigations that never materialized. Second, the War Crimes Unit in the Department of Justice headed at the beginning by Bill Hobson, and later by Peter Kremer, after it eventually gave up on the RCMP, engaged in a long jurisdictional battle

so that the War Crimes Unit could do jointly with the RCMP the investigation that the RCMP was doing so poorly alone. Third, once that jurisdictional battle was won, the War Crimes Unit in justice had to do the investigations that the RCMP was mandated to do but never did.

### **3. Shifting to revocation**

In retrospect, it was mistake to begin the effort to bring Nazi war criminals to justice with prosecution and extradition alone. Seven years were lost, from the time the *Finta* case began in 1987 until it was decided in the Supreme Court of Canada in 1994, establishing that prosecution was unworkable. Revocation of citizenship and deportation should have begun much earlier. But at least in 1995, the effort commenced.

The resistance to bringing Nazi war criminals to justice which had made Canada a haven until 1987 did not disintegrate in 1987 with the enactment of the Criminal Code provision allowing for the prosecution of war criminals and criminals against humanity nor in 1995 with the decision to switch to revocation of citizenship and deportation. Advocates for immunity continued to resist. They argued against revocation on the ground that it was not based on whether the person was a war criminal or criminal against humanity but rather on whether the person on entry had entered Canada by false representation or fraud or by knowingly concealing material circumstances.

Fraud on entry is not limited to failing to disclose facts that would make the person inadmissible. It includes foreclosing inquiries which, if made, may have, at the time, led to a discovery that the person is inadmissible. This foreclosure of inquiries is sufficient to allow for revocation of citizenship and deportation whether or not it can be shown today that the person would have been inadmissible at the time of entry.

The logic behind the law is that a person should not benefit from his own fraud. A person should not be able to insist that the Government of Canada, many years after a

fraud that allowed the trail of evidence against him to grow cold, to prove a case of inadmissibility against him. The person who lied on entry should suffer the consequences of his lies and not be able to benefit from them.

The Government of Canada, as a matter of policy, decided not to apply the law against accused Nazi war criminals about whom the Government believes that accusations are ill founded. The Government decided to use a form of prosecutorial discretion, not launching cases against some people, even though the law would allow the Government to succeed.

However, this policy of not proceeding against those wrongly accused of Nazi war is just that, a policy. It is not part of the law. Once the Government goes to court for revocation of citizenship and deportation it neither has to allege nor prove allegations of war criminality. Proof of fraud on entry is enough.

It makes sense to say that a person should not be able to benefit from his lies. It makes to sense to say that a person should not be able to hide the evidence of his crimes for fifty years through lies and then insist that those crimes be proved fifty years later when the lies are found out, as if the lying never happened.

The longer a lie succeeds the harder it becomes to prove what the liar may have covered up. There should be no statute of limitations for immigration fraud. Coverups should not be rewarded, provided only that they succeed for a certain period of time.

#### **4. Repealing *Finta***

Parliament eventually passed legislation that had a clause which repealed the *Finta* decision. Section 14(3) of the Crimes against Humanity and War Crimes Act of June 2000 provides:

"An accused cannot base their defence under subsection (1) on a belief that an

order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group."<sup>34</sup>

Subsection (1) prohibits the defence of superior orders, with limited exceptions. So the principle that war criminal fugitives in Canada could be prosecuted, legislated in 1987, and made unworkable by the Supreme Court of Canada in the *Finta* case in 1994 was resuscitated by new legislation in 2000.

The Supreme Court of Canada itself overruled the *Finta* decision in the *Mugesera* case decided June 28, 2005<sup>35</sup>.

"Since *Finta* was rendered in 1994, a vast body of international jurisprudence has emerged from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR ... to the extent that *Finta* is in need of clarification and does not accord with the jurisprudence of the ICTY and the ICTR, it warrants reconsideration<sup>36</sup>.

"We see no reason to depart from the well-reasoned and persuasive findings of the ICTY and the ICTR on the question of discriminatory intent. Insofar as *Finta* suggested that discriminatory intent was required for all crimes against humanity (see *Finta*, at p. 813), it should no longer be followed on this point."<sup>37</sup>

The *Mugesera* decision was unanimous. Of the four judges in the majority in the *Finta* case, three had by then retired. Mr. Justice Major was still on the bench and overruled himself.

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<sup>34</sup> 2000 Statutes of Canada chapter 24

<sup>35</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40

<sup>36</sup> Paragraph 126.

<sup>37</sup> Paragraph 144.

## **D. Lessons to be learned**

However, we are not there yet. Canadian efforts had led to some course corrections, but not enough. We have still to learn all the lessons we should from the efforts to bring Nazi war criminals in our midst to justice.

### **1. Inadequate funding**

It is easy to say and to see that the proceedings suffered from delay. This delay had more than one cause. Proceedings started far too late. The problem here was not just the late start after World War II, an excusable thirty nine years between the end of the War and the launch of the first case, against Albert Helmut Rauca. It is also the delays subsequent.

What is the justification for starting the *Furman* and *Skomatzuk* cases in November 2003, almost nineteen years after the Government had shifted, in January 1995, to a policy of seeking removal? The short answer is money.

The Government had only so much money to allocate to the War Crimes Unit. That meant that the Unit could not investigate and prosecute all cases at once. It had to spread its efforts over many years, because of its limited annual budget.

That answer though is more than an excuse than a reason. The Unit could not proceed without funds. But the Government surely could have given it the funds if it wanted to do so. The real answer is that the Government did not place a high enough priority on the effort to give the Unit the funds. Without adequate funding, cases have to proceed sequentially rather than simultaneously.

Admission to Canada after the War of thousands of Nazi war criminals created a huge justice problem once the justice system became engaged. There are many reasons why Canada should not have opened its doors to Nazi war criminals. The obstacles it

placed in the way of justice is surely one of them.

## **2. Prosecutorial foot dragging**

The cause of delay though was not just inadequate resources. It was also lack of enthusiasm for the task at hand.

This is what Bill Hobson, head of the prosecution unit in Justice said in March 1997 about prosecution. After he was appointed in 1987, there soon emerged "activist" and "reluctant" camps within the Justice Department. There was a "horrific" turf war. "There was obviously a message coming from somebody above that there weren't going to be a lot of cases proceeding." "I encountered strong resistance to doing what the government told me to do. I was told I was pushing too hard. I wanted to do more and we were capable of doing more." He estimated that "bureaucratic conflict and finger pointing delayed the process in his shop for five years." Recommendations for action were ignored or stalled by "fearful" senior officials who were scared of "opening up old wounds" between Canada's Jewish, German and Ukrainian communities. He and other activists were finally "forced out" of the unit.

This fear attributed to recalcitrant Justice officials of opening up old wounds is another hypocritical evasion. Who, after all had the wounds, and who inflicted them? Nazi war criminals were not wounded, only their Jewish victims. The Holocaust was not a war between Jews and Nazis. It was the killing of defenceless innocents, including two million children. The only old wounds from the Holocaust are the wounds of the Jewish community. The suggestion of Justice officials that it did not want to open up old wounds, is a suggestion that prosecution would be too painful for the Jewish community, that the Justice department had to protect the Jewish community from the agony of prosecution. Yet, that is a position that the Jewish community has never expressed. It was dishonest for prosecutors in Justice to thwart prosecutions in the supposed interests of the Jewish community.

William Hobson levelled against his successor Unit Director, Peter Kremer, the accusation of antisemitism affecting a senior Jewish counsel in the Unit, Arnold Fradkin. A report to the Deputy Minister of Justice by Osgoode Hall Law School Professor John McCamus dated March 1998 found "no basis in fact" for the accusation.

The McCamus report nonetheless confirms that there was a good deal of division within the Unit about how the Unit should go about its work. This internal wrangling inevitably impacted on the overall efficiency of the Unit.

For the justice system to work, it is essential that those responsible for engaging the legal system believe in justice. In the war crimes area, private prosecution is impossible. The state has a monopoly on initiating proceedings. If the War Crimes Unit did not believe in what it was doing, the effort was bound to fail.

### **3. Prosecutorial stays**

The statutory sequence is cumbersome enough. In addition, there are a number of steps which the present law does not require, but also does not forbid.

For instance, it is possible to make a Federal Court application challenging the decision of the Minister to report to the Governor in Council that citizenship was obtained by fraud or false representation or knowingly concealing material circumstances. The decision of the Federal Court Trial Division on this challenge is subject to appeal to the Federal Court of Appeal as of right, and, by leave, to the Supreme Court of Canada.

As well, it is possible to challenge in Federal Court Trial Division the Governor in Council revocation decision. That challenge too can go, as of right, to the Federal Court of Appeal, and with leave, to the Supreme Court of Canada.

Because these steps are not contemplated by legislation, they need not halt or delay the removal of the person concerned from the country, unless and until the Court rules

adversely to the Government. However, the Government has been prepared to stay its own hand, though neither statutory law nor the courts have forced it to do so. In principle, the march of the persons concerned out of the country should not slow for an instant simply because these persons have engaged non-statutory procedures.

Though the law does not contemplate an appeal from the decision of the Federal Court Trial Division that a person entered Canada by false representation or fraud or by knowingly concealing material circumstances, Vladimir Katriuk, after losing in the Federal Court Trial Division, tried to argue that there was such an appeal first in an appeal to the Federal Court of Appeal and then in a leave application to the Supreme Court of Canada. While Katriuk was engaging these legally futile steps, the Government sat twiddling its thumbs, awaiting their outcome before it moved on with the statutory procedure.

One can provide many more such examples. The Government should not be waiting the outcome of non-statutory procedures to move on to the next step in the process. Its having done so, even when the engagement of these procedures was patently frivolous, generated inexcusable delays.

#### **4. Fragmentation**

Revocation and deportation for war criminals and criminals against humanity need to be consolidated to avoid repetitive procedures. Deportation should follow as a matter of course once citizenship is revoked.

Having two separate proceedings accomplishes nothing, but chews up time and resources. That is certainly true in a case where fraud, misrepresentation or knowingly concealing material circumstances is the only issue at both the revocation of citizenship and deportation stage. It would also be true if reasonable grounds to believe that the person committed a war crime or crime against humanity is the only issue at both stages. The two procedures should be consolidated into one.

The steps that are required, for revocation of citizenship, are a report from the Minister, a decision of the Federal Court, and a decision of the Governor in Council. Once citizenship is revoked, the Government must take three separate steps before an immigration adjudicator can order deportation. The Department of Immigration must issue first a report of violation of the Immigration and Refugee Protection Act, second a referral for inquiry to determine whether there is a violation of the Act, and third a notice of time and place of an admissibility determination. Historically, the Department has taken all three of these steps serially, with many weeks between each step. A member of the Immigration Division of the Immigration and Refugee Board then issues a removal order. Once a removal order issues, the person is to be removed, as soon as reasonably practicable.

There have been legislative attempts over the last eleven years to attempt to consolidate those procedures. Those attempts have gone nowhere. One could understand the legislative inaction if these attempts were private member's bills. But these failed efforts have all been government bills.

There was Bill C-16, with first reading November 25, 1999. The Bill actually passed the House of Commons and got as far as second reading in the Senate, June 27, 2002. But that is where it ended. There was then Bill C-18 which got first reading on October 31, 2002 but ended with second reading on November 8, 2002. Now there is Bill C-37, given first reading on June 10, 2010.

The Citizenship Act needs amending to give the Federal Court power to revoke citizenship without the need to go cabinet. As well, Parliament should amend the Act to allow a Federal Court judge to order removal of a war criminal or criminal against humanity from Canada at the time that citizenship has been revoked.

Bill C-37 is a definite improvement over the present law, but with flaws. It does

remove the cabinet step. And it does allow a Federal Court judge to order removal. However the Bill does not go far enough.

### **a) Grounds of removal**

The Federal Court can order removal on some grounds, but not on every ground, and, indeed, not on the ground most commonly used in World War II cases. The Bill allows the Federal Court to issue an order of removal based on complicity in war crimes or crimes against humanity but not based on misrepresentation.

Right now, once a person loses citizenship because of fraud, false representation or knowingly concealing material circumstances committed at the time of obtaining permanent residence, the person is deportable solely for having lost citizenship on that basis<sup>38</sup>. That form of deportation would remain, if the Bill became law, unconsolidated. For that form of deportation, we would be left with a multi-step system. The Federal Court, at the same time it decides revocation, should have the power to determine a person is inadmissible for misrepresentation.

A failure to consolidate the misrepresentation grounds gives an opportunity for the liar and his friends to argue exactly that. With the new system as it is presently drafted, a person will potentially lose citizenship because of his lies, but not be ordered removed in consolidated proceedings because, so many years after the fact, proving complicity in war crimes becomes impossible. The liar will argue, from the failure to find war criminality in consolidated proceedings, that he is innocent of wrongdoing and should not be removed.

### **b) Grounds of revocation**

The grounds of revocation of citizenship should be expanded to include participation in genocide, war crimes and crimes against humanity. Now, there is a mismatch

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<sup>38</sup> Immigration and Refugee Protection Act section 40(1)(d).

between the grounds of revocation and the relevant grounds of inadmissibility.

Bill C-37 proposes that a person can lose his or her citizenship only for various forms of misrepresentation, and can be ordered deported in the same proceedings only for various forms of criminality or security. A person can not in the same proceedings both lose his or her citizenship and be found inadmissible for misrepresentation only. Nor can a person in the same proceedings both lose his or her citizenship and be found inadmissible for criminality or security. The advantages of consolidation are heightened when the same finding can be used for two different purposes.

Because of the mismatch between citizenship revocation grounds and inadmissibility grounds in consolidated proceedings, it would be possible for the Federal Court to have before it evidence that would allow it to make a finding on war crimes or crimes against humanity committed before the person came to Canada, but be prevented from making a finding on that evidence because the Court found in favour of the person concerned on the issue of misrepresentation. The Bill sets out a sequential procedure - revocation evidence and decision first, inadmissibility evidence and decision second. But the Bill also provides that evidence heard at the first stage can be used for the second stage. So the Court, at the first stage, might hear enough evidence to allow it to make a finding at the second stage, but be prevented from doing so because it can not make a first stage finding of revocation.

In most cases, one of the forms of misrepresentation is going to be easier to establish than war criminality. Yet, for those cases where the opposite is the result, and it is war criminality that is established, but not misrepresentation, that war criminality should be enough for revocation.

Because of the difficulties in proving fraud, false representation or concealing material circumstances, the Government needs an alternative means of proceeding. Proving that there are reasonable grounds to believe that a person has committed genocide, a

war crime or crime against humanity will present its own difficulties. At least the Government will have a choice. It may well be that, for one accused, the proof exists of commission of a war crime or crime against humanity even if it does not exist for fraud, false representation or concealing material circumstances on entry. Proof of that participation in persecution should be enough to take away citizenship without the further need to prove fraud, false representation or concealing material circumstances on entry.

## **5. Judicial indifference**

Canada has suffered from a judiciary which, in many instances, seemed little interested in bringing mass murderers to justice. One example is Mr. Justice Chadwick.

One reason Chadwick J. gave in the *Pawlowski* case for refusing the Crown permission to collect evidence abroad was the passage of time since World War II. Parliament, by its legislation, has rejected the argument that the passage of time justifies inaction. The judge, by the mere countenancing of this reason as having validity or relevance was refusing to apply the legislation because he doubted its wisdom, an inappropriate stance for a judge.

Chadwick J. was concerned that the witnesses the Crown wanted to videotape had, in previous statements, under duress from Soviet officials attempting to elicit confessions, implicated Pawlowski as an accomplice. Yet, there was no evidence to which the judge referred that Soviet duress was directed towards attempting to implicating Pawlowski. There was nothing preventing counsel for Pawlowski from cross examining these witnesses on any duress that they suffered.

The judgement of Chadwick J. was not a judgment on the admissibility of evidence. It was a judgment on the collection of evidence. A judgment on admissibility could and should have been made after the evidence was collected.

As noted earlier, Mr. Justice Cullen threw out the cases against Tobiass, Dueck and Oberlander because a government lawyer had concerns about the inordinate delays in these cases with the Chief Justice in the absence of counsel for the three individuals. Mr. Justice Marceau of the Federal Court of Appeal found Mr. Justice Cullen "quite unreasonable" and acted "on the basis of a mistaken understanding". Pratte J.A. added that "no reasonable person would ever conclude" what Cullen J. had concluded<sup>39</sup>.

Mr. Justice Reilly of the Ontario Superior Court in the second in a sequence of remarkable decisions in favour of Oberlander assumed jurisdiction to consider on judicial review a decision which had already been litigated in the Federal Court, the legality of the decision of cabinet to revoke the citizenship of Oberlander<sup>40</sup>. Mr. Justice Martineau in the Federal Court had found the cabinet decision lawful.

Mr. Justice Kent granted leave to appeal from the decision of Mr. Justice Reilly. Mr. Justice Kent found that "there is good reason to doubt the correctness" of the ruling of Mr. Justice Reilly taking jurisdiction over the case in the first place<sup>41</sup>. Mr. Justice Kent called the reasoning of Mr. Justice Reilly "possibly overreaching". By giving Oberlander a forum to pursue arguments which could have been raised in the proceedings before Martineau J., Reilly J. had, according to Kent J., permitted "fragmented litigation".

The appeal from the decision of Reilly J. for which Kent J. gave leave was never heard because of the Court of Appeal overturned the decision of Martineau J. The Federal Court of Appeal found in favour of Oberlander on the peculiar ground that the cabinet's reasons for revocation were not ample enough.

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<sup>39</sup> As quoted in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391

<sup>40</sup> *Oberlander v. A.G. Canada*, C-1076-03, January 6, 2004

<sup>41</sup> April 7, 2004.

Again the cabinet revoked the citizenship of Oberlander, this time providing more ample reasons. Again, the Federal Court, Mr. Justice Phelan, found the decision legal. And again the Federal Court of Appeal overturned the Federal Court judgement on revocation (this time with a dissent) for the bizarre reason that the cabinet did not deal with an argument Oberlander did not raise but could have raised, on duress.

The *Mugesera* case, though a Rwanda and not a Nazi war criminal case, is a good example as any of the indifference of some judges to justice for the victims of mass murder. Mugesera failed at every level except the Federal Court of Appeal. The Federal Court of Appeal stated:

"the seriousness of the allegations require exceptional care and caution in applying the rules of administrative law".

This standard of exceptional care is perverse. The result, deportation, is the same, whether the allegations are trivial or serious. In principle, the standard of care should be the same no matter whether the allegations are trivial or serious. Indeed, it is chilling to suggest that a person who the Minister has determined to have committed only trivial or minor or technical breaches of the Immigration and Refugee Protection Act is entitled to a lesser standard of care when determining whether or not to receive the same treatment, removal, than a person who the Minister has determined to have committed major, serious violations<sup>42</sup>.

The classic Canadian case for judicial indifference to the victims of mass murder was the Supreme Court of Canada decision in *Finta*. The majority in that case had a similar approach to the Federal Court of Appeal in *Mugesera*. Mr. Justice La Forest, in dissent, has commented on this inverted form of reasoning:

"The approach taken in the courts below leads to the following incongruous

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<sup>42</sup>

Paragraph 22

result. War crimes and crimes against humanity were viewed as so heinous as to require a procedure so unmanageable as to make successful prosecution unlikely."<sup>43</sup>

## **6. Need for appeal**

The government lost cases it should have won - Johann Dueck, Eduards Podins and Peter Vitols. Here the problem is not delay, but the absence of an appeal. If there were an appeal, these are cases the Government might well have won on appeal.

Bill C-37, proposes an appeal, or rather repeals the prohibition against appeal. The effect of Bill C-37 is to allow appeal as of right. Yet, appeal should be by leave rather than by right. If an applicant to the Federal Court of Appeal has a weak case for appeal, leave will be dismissed. The person will be removable more quickly than under the present bill, with an appeal as of right.

Right now, under the Immigration and Refugee Protection Act a person subject to a removal order can apply for leave and judicial review of that order to the Federal Court Trial Division. If leave is granted, then the decision of the Federal Court Trial Division on the application can be appealed to the Federal Court of Appeal only if the Federal Court Trial Division judge who heard the application certifies that the application involves a serious question of general importance<sup>44</sup>.

It is anomalous to vary the manner of access to the Federal Court of Appeal depending only on the procedure the Minister chooses. Yet, that is the result of the Bill in its present form. If, under the Bill, the Minister seeks a removal order from the Federal Court Trial Division, then access to the Federal %' Appeal is a right. If the Minister decides to seek a removal order from the Immigration Division of the Immigration and

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<sup>43</sup> *R v. Finta* [1994] 1 S.C.R. 701.

<sup>44</sup> Section 74(d).

Refugee Board, then access to the Federal Court of Appeal requires certification of a serious question of general importance from the Federal Court Trial Division. This anomaly should be removed.

Of course, an appeal can make matters worse rather than better, as the decisions of the Federal Court of Appeal in the two *Oberlander* cases reviewing the cabinet decisions on revocation and the *Mugesera* case reviewing the decision of the Immigration Appeal Division of the Immigration and Refugee Board to deport show. In these cases, the Government won at the Federal Court and lost at the Federal Court of Appeal for unconvincing reasons.

The possibility of an appeal from a Federal Court decision that a person has entered Canada by false representation or fraud or by knowingly concealing material circumstances, in itself, will serve little purpose as long as the Federal Court of Appeal shows more sympathy for the perpetrators than the victims. For an appeal to contribute to justice, the culture of immunity which has infected some elements of the judiciary must dissipate.

## **7. Discretion**

The notion has to end that war criminals and criminals against humanity should be allowed to stay in Canada because they have been quiet neighbours once they arrived. This idea has tainted cabinet revocation procedures. Cabinet allowed both Katriuk and Odymsky to stay in Canada despite the fact that the Federal Court found they had entered Canada by false representation or fraud or by knowingly concealing material circumstances.

Though cabinet gave no reasons, both their counsel submitted to cabinet that the two should be allowed to stay in part because of their post entry behaviour. Other cabinet decisions have been postponed interminably because politicians have dithered over this consideration which should in principle be irrelevant.

The League for Human Rights of B'nai Brith Canada has challenged the Katriuk and Odynsky decisions in Court on the ground that the cabinet has no such power, that the scope of discretion given to cabinet does not allow consideration of post entry behaviour. The challenge is now pending in the Federal Court of Appeal.

If the League challenge fails, the most that could be said against it is that the League position on the law is wrong. But if the law now truly does allow mass murderers to stay in Canada for no better reason than that they have mowed their lawns faithfully since arrival, then, as Mr. Bumble in the Charles Dickens novel *Oliver Twist* said, the law is an ass.

It is inappropriate for cabinet, or anyone, to allow war criminals and criminals against humanity who lied their way into Canada to stay in Canada simply because of the lives they have led in Canada. This policy is recognized in the Immigration and Refugee Protection Act. In that Act, a person who commits outside Canada an act that constitutes a war crime or crime against humanity can not be allowed to stay in Canada on the basis that the Minister is satisfied that his or her presence would not be detrimental to the national interest<sup>45</sup>. There is no reason why the policy should be different for the Citizenship Act.

## **8. Secrecy**

The effort at understanding, of learning the lessons from the Holocaust must never stop. For that to happen, the files of those against whom there is compelling evidence of complicity in Nazi war crimes and who are now dead must be made public.

We have a duty to the victims, not just to remember that they died, but why they died, how they died. The picture of memory we paint must be real and complete. That

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<sup>45</sup> Section 35(1)(a) and (2).

picture must include the murderers.

### **a) War criminal files**

There must be an end to secrecy about the Nazi war criminal effort. The Task Force on International Cooperation on Holocaust Education Remembrance and Research (ITF) Stockholm Declaration of 2000 asserts the principle of opening up archives bearing on the Holocaust to researchers<sup>46</sup>. Canada is a member of the Task Force not yet in compliance with this principle for archives of persons suspected of complicity in Holocaust related crimes. A National Task Force was formed to share and enhance Holocaust education and research in Canada.

The RCMP, by letter dated January 29, 2009, confirmed this information:

- 1) The RCMP has 300 files dealing with war criminals, but the records of the files are not marked specifically with World War II references. It would require an examination of each file to determine if the file contained evidence or allegations of war criminality during World War II.
  
- 2) The names of the individuals to whom the files relate is publicly available information, not protected by privacy legislation. However, identifying those names would require a file by file search and is not available from a central registry.
  
- 3) Twenty years after the death of the individual who is the subject of a war crimes file, the contents of the file are publicly available, though the file would have to be examined to determine if parts of the file fall within other privacy or access exemptions. As well, the death of the individual could be determined only by examining the file itself.

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<sup>46</sup>

Principle 7.

The National Task Force in November 2011 asked the Government of Canada to establish a central registry for all Nazi era war crimes files of the Government<sup>47</sup>. There should be no need to go to several different registries in a variety of departments to seek the relevant information.

Each catalogue entry in the central registry should indicate the name of the individual to whom the file relates. Where the person has died, the catalogue entry should state the date of death.

The registry should be kept up to date. The date of death of any person for whom there is a file should be entered into the catalogue of the registry as soon as the Government of Canada becomes aware of the date of death.

### **b) The Rodal report**

The Commission of Inquiry on War Criminals hired Alti Rodal to write a report on the history of war crimes efforts in Canada. The was titled "Nazi War Criminals in Canada: The Historical and Policy Setting from the 1940s to the Present" and prepared for the Commission on September 1986. She wrote that the efforts of Robert Kaplan were frustrated by his boss Prime Minister Pierre Elliott Trudeau. Trudeau opposed the effort to bring to justice Nazi war criminals for fear it would generate inter-ethnic tension.

This report is available through Access to Information with many deletions and blank pages. The blanks are explained by reference to section numbers in the Access to Information Act. B'nai Brith Canada has appealed the deletions and blanks to the Information Commissioner.

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<sup>47</sup> Letter from Alain Goldschläger, Chair National Holocaust Task Force and Ruth Klein, Executive Director National Holocaust Task Force to Hon. Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, November 26, 2010

It is impossible to know what has been deleted simply by considering the section numbers on which reliance has been placed. The only justifiable deletion is information pertaining to an accused person still alive.

One of the provisions of the Access to Information Act to which constant reference is made in the censored version of the Rodal report in justifying deletions is section 19(1). That subsection justifies non-disclosure of personal information. Yet, personal information about accused persons now dead, as well as information about civil servants or politicians involved in dealing with the issue of war criminals in Canada but not themselves accused of criminal activity, can not justifiably be kept from public view under this provision.

A couple of other provisions of the Access to Information Act to which reference are made are sections 13(1)(a), which refers to information obtained in confidence from a foreign state, and section 15(1), information the disclosure of which would be injurious to foreign relations. It would be perverse if these provisions were used to keep secret information which came from a state which is a member of the ITF and because of that membership is committed, as Canada is, to the principle that opening up archives bearing on the Holocaust to researchers. It may be that permission of the foreign state which is the source of the information needs to be sought. Nonetheless, if the source country is a Task Force member, that permission should be readily forthcoming.

The reference in the censored report to section 16, about law enforcement, can justify only non-disclosure of law enforcement efforts which would jeopardize ongoing investigations and prosecutions. It can not be used to justify non-disclosure of law enforcement efforts which amounted to nothing, went nowhere and have ceased.

Reference was also made to section 23 which excuses disclosure of information subject to solicitor client privilege. This exception has the same scope as the section 19 exception. It would apply only to cases of persons now alive either before the courts

or which may at some future time to be brought to court.

**Conclusion**

Bringing Nazi war criminals to justice has been a long and difficult effort. Some of the difficulties are understandable simply because of the nature of the crimes. In mass killings, even the witnesses are victims. When corpses are cremated, autopsies are impossible. Over time memories of bystanders fade.

Yet, piled on those difficulties have been the massive numbers of perpetrators who have generated a political constituency for doing nothing, the sympathy of investigators for the accused, the bungling, quarrelling and foot dragging of prosecutors, the dithering of politicians, the fragmentation of the process, inadequate funding, the absence of an appeal to correct errors, the assertion of jurisdiction to allow perpetrators to stay in Canada no matter what their crimes, inordinate secrecy and the half hearted commitment of all too many judges to justice for the victims. What originally started off as a Nazi war criminal made in Canada solution became a sequence of made in Canada problems.

The effort to seek justice for victims of Nazi war criminals could not possibly have brought every perpetrator to justice. Canada started too late; there were just too many perpetrators in Canada; too much evidence had been destroyed or lost. The effort rather was an attempt to make whole the Canadian justice system and to construct a justice legacy for the victims of the Holocaust.

Even today, it is not too late to learn the lessons from the errors and failures. We owe it to ourselves, to our commitment to the ideals of justice, as well as to the victims of the Holocaust to build a justice system which will prevent Canada from being in the future what it has been in the past, a haven for mass murderers.

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