# *Archives in Court: The John Munro Case*

by **CATHERINE BAILEY***

Apart from the obvious value of archival documents as sources of evidence for historical researchers, they can be of inestimable value to the legal process. Documents from the National Archives of Canada, for example, have been used to substantiate claims for damages by Japanese Canadians dispossessed during World War II, to track Nazi war criminals, and to substantiate aboriginal land claims. However, while archival documents in many forms have been used by researchers in court cases before, such documents are not usually gathered by archivists reacting to a subpoena directed at the archives itself. Yet this is what happened in June 1990, when the National Archivist of Canada personally received a subpoena in the case of *R.* v. *the Hon. John Carr Munro* et al., demanding that he produce certain documents for the court. The arrival of this subpoena generated a flurry of activity in the Government Archives Division (GAD) throughout July and August 1990, which culminated in the appearance of the Assistant National Archivist in the Provincial Court of Ontario, Judicial District of Ottawa-Carleton, on 24 August. This article will outline the steps taken by the National Archives to respond to the subpoena, the problems archivists had in determining exactly what material was being requested, and some of the related issues which arose during the course of the work. Certain patterns and conclusions relating to this incident may well be of interest to archivists outside the National Archives.

## *The Crown's Case*[1]

John Carr Munro became Minister of Indian Affairs and Northern Development (INA) in 1980. After the resignation of Prime Minister Pierre Trudeau in 1984, Munro made an unsuccessful bid for the leadership of the federal Liberal party. After Munro's personal defeat in the September 1984 federal election, allegations of mismanagement of funds under the control of the Assembly of First Nations (AFN), which had been granted by INA during the period when Munro was minister, led to an RCMP investigation. Begun early in 1985, it culminated in November 1989, when charges of corruption, conspiracy, fraud, breech of trust, theft and other related allegations were laid against Munro and seven other men, including the former leaders of several aboriginal organizations.

Of the seventy-seven charges, thirty-four of them were laid against Munro. The charges against him were subsequently dismissed on 18-19 November 1991.

The charges stemmed in part from a 1984 award of $1,5000,000 dollars to the National Indian Brotherhood (NIB)—later the Assembly of First Nations—for work on native self-government. The Crown alleged that while he was Minister of Indian Affairs, Munro improperly arranged that part of the funds from the INA contribution agreement with the NIB would be channelled back into his Liberal party leadership campaign. To defend his client, Munro's lawyer, John Nelligan, sought access to a large volume of federal government records by having subpoenas issued to prominent figures in various departments, usually at the Deputy Minister level. Those subpoenaed included Harry Swain, Deputy Minister of Indian Affairs; Norman Spector, Chief of Staff in the Prime Minister's Office; and the National Archivist, Jean-Pierre Wallot. The subpoenas, issued on 13 June 1990, required the named person to "attend before the presiding provincial judge or justice on the 24th day of August [1990] . . . and to bring with [them] anything in [their] possession or under [their] control that relates to the said charge . . . as set out in Appendix B." As **Figure 1** shows, the records being subpoenaed from the National Archives were those of the defunct Ministry of State for Social Development. I shall discuss below more fully the nature of the ninety-one metres of unlisted records covered by the subpoena, and the difficulties associated with carrying out an extensive, detailed, but not fully-defined search through them.

When Dr. Wallot received the subpoena on 18 June 1990, he indicated that he would be out of the country on 24 August and therefore unable to testify; the defence agreed to accept an alternate witness. As the archivist responsible for the requested records from the defunct Ministry of State for Social Development (MSSD), I was assigned the task of coordinating the Archives' response to the subpoena and appearing in court as its representative. At the last minute, however, the defence decided that this was not an acceptable alternative, and insisted on the presence of all subpoenaed persons as witnesses or, in their absence, that of their officially designated replacement. As a result, Michael Swift, Assistant National Archivist, took the stand to speak to the documents which the National Archives had collected.

### *The Subpoenaed Records*

The Ministry of State for Social Development was created on 19 June 1980 as one of the new coordinating "super-ministries." Under the direction of Jean Chrétien, and later Jacob (Jake) Austin, the Ministry was to formulate and develop "new and comprehensive policies in relation to the activities of the Government of Canada that affect the welfare of the individual and social development." The Ministry was designed to ensure the integration of programmes and activities of a wide variety of departments and agencies within the Government of Canada, which supported individual welfare and the "fostering of cooperative relationships with the provinces, and with the public and private organizations to secure conditions that allow and assist the fulfilment of human rights, aspirations, and the requirements of social justice."[3] In order to carry out these functions, the MSSD participated in the Cabinet Committee on Social Development in the latter's preparation of strategic plans and priorities for the social sector, coordinated the development of policy proposals across departments and agencies which made up the Social Affairs and Justice and Legal "envelopes," coordinated the review/evaluation

of existing social programmes with regard to the Cabinet Committee's designated priorities, and ensured the effective management of the envelopes' financial resources. Naturally, within its social policy mandate, the MSSD had a coordinating role for the programmes and functions of John Munro's Department of Indian Affairs in particular, and for the welfare of native peoples generally. The Ministry was abolished on 1 September 1984.

The records of such defunct agencies were then governed by section 10.5 of Chapter 460, "Records Management," in Treasury Board's *Administrative Policy Manual* which stated that

> **Records of any defunct government institution and of any operation(s) terminated by any government institution shall be transferred to the control of the Public Archives.**
>
> The sole exception to this directive is when another government institution(s) assumes responsibility for the defunct institution or terminated operation(s). In such cases, control over the records concerned is vested in the institution(s) assuming such responsibility. This directive requires that records management staff of the institution which is to pass out of existence or terminate any operation(s) effect any necessary records scheduling action and all records disposal activity in accordance with Section .8. Advice is available from Public Archives staff.

As a result of this directive, the MSSD records came under the control of the (then) Public Archives of Canada in August 1984, after two staff archivists had completed an investigation to determine the archival value of the records. The records have been stored in the Ottawa Federal Records Centre (OFRC) since that time, as Accession 84-270. Two smaller accessions from the MSSD had been transferred earlier to the Public Archives and had been accessioned into Record Group (RG) 131, Records of the Ministry of State for Social Development.

### *The Archives' Response*

Because the MSSD was a defunct organization, most of the records of which were still in storage at the Federal Records Centre, the duties of the archivist responsible for RG 131 had previously been limited to researching the general nature of the organization and its functions, and responding to occasional reference questions. When the subpoena was served, therefore, no archivist in the Government Archives Division had a clear idea of what specific records were included in the ninety-one metres of Accession 84-270. The records had been searched once before further to a challenge to the Canada Pension Plan under the Canadian Charter of Rights and Freedoms, but no file list existed; there was only a short, block-by-block description completed by Federal Records Centre staff at the time of accessioning. After a discussion with the archivist previously responsible for RG 131, I started my work with brief notes from that previous Charter case search, a copy of the MSSD's classification manual for administrative and operational records, and copies of the OFRC's documentation, a sample of which is in **Figure 2**.

Once I had gathered sufficient material from secondary sources on the structure and history of the MSSD, I reviewed the file classification manual in order to identify file blocks that were likely to contain records relevant to the subpoena. I paid particular

attention to the primary file blocks labelled "Indian and Northern Affairs," and all of its subdivisions:

| | |
|---|---|
| 2700 | Indian and Northern Affairs — General |
| 2706-2 | Indian Associations-National Indian Brotherhood (NIB) |
| 2713 | Band Support |
| 2715-11 | Native Legal Affairs-Parliamentary Committee on Indian Self-Government (Penner) |
| 2715-12 | Native Legal Affairs-Indian Self-Government |
| 2718 | Natives and the Constitution |

I also highlighted other file blocks throughout, including those for the Cabinet Committee on Social Development; Committees and Working Groups (the Northern and Native Issues Committee in particular); the Department of Justice and Natives; Justice and The Constitution; Secretary of State and Native Citizens; and Federalism-First Ministers' Conferences.

After a brief overview of the records themselves in light of the existing documentation, the Archives decided to create a finding aid before going any further with the search for the records demanded by the subpoena. At this point, the decision was made not to include in the listing project any material of no apparent value to the subpoena, such as general administrative records. I then created a priority list of blocks or categories of records that, based on my research, would most likely yield information relevant to the subpoena, and ranked those blocks in descending order of relevance. Arrangements were then made to have the records listed on the Archives' MINISIS computer database system in the proposed order. Not only would this list facilitate the search for the requested material, but it would also be available to lawyers on either side of the case should they require it.

### *Use of the Contemporary Indexes*

My initial overview of the records also brought to light three boxes of the accession which contained sets of 3" x 5" index cards prepared by the MSSD in order to provide them with access to their files. While the listing project was underway, I examined the indexes to determine whether they could be used as another tool for selecting relevant records.

There were several separate indexes. Entries in the *Government Departments Index* consisted of the name of the person who wrote the letter/report/memo, the document date, a brief summary, and the file in which the document could be found. The *Companies, Associations, Etc. Index* contained the same kind of cards, but for private organizations. The *Nominal Index* included the name of the person, a note on her/his affiliation, as well as the date, subject and file number of the correspondence. The *Numerical Index* was just a copy of the classification manual on cards, while the *Individual Names Index* was essentially a cross-referencing tool to other indexes, giving a full title and an address, the heading to search under in order to find documentation, and sometimes a file reference code. Finally, the *Subject Index* consisted of cards with a subject printed on the top and a citation of the file(s) under which to look to find this subject, e.g., "Constitutional Review Process; See Funding of Native Organizations 3535-4."

These contemporary indexes were extremely valuable because they offered a better understanding of how the Ministry staff had arranged and used the records which they had created. While the classification manual highlighted the titles of those blocks of records that *should have* contained the material requested in Appendix B of the subpoena, the contemporary indexes showed whether or not those file blocks actually had been used to file that information. This turned out to be very important because, when the Ministry ceased to function in 1984, many of its files relating to aboriginal issues were transferred to other agencies, such as the Office of Aboriginal Constitutional Affairs in the Federal Provincial Relations Office, and could not therefore be expected to be found in the archival records of MSSD, despite the fact that these files had appeared in the classification manual and indexes as potentially prime sources of valuable information. Since the records were originally created by the Ministry, we had to account for our inability to locate them in our repository.

Before any material could be released to the defence counsel under authority of the subpoena, the files had to be reviewed by the Access Section of the Government Archives Division. The Access Section, however, was not reviewing these files under the *Access to Information* and *Privacy Acts* (*ATIP*), as is normally the case, but under the provisions of the *Canada Evidence Act*. Furthermore, because it had been a "super-ministry" responsible for coordinating government-wide policies, a large proportion of the MSSD files contained Cabinet documents, or Cabinet confidences from a variety of departments and agencies.

The presence of Cabinet documents in the MSSD files was a significant factor during the search for pertinent records. Cabinet documents are excluded from coverage under the *ATIP* legislation for a period of twenty-years; researchers requesting such documents before the end of the twenty year period are usually denied access. Furthermore, Cabinet documents cannot be tabled as evidence in court without the permission of the Privy Council Office (PCO). This meant that, as the Access Section reviewed the relevant files and identified Cabinet documents, the review officers had to make copies of documents and consult with PCO for confirmation of the nature of the documents and their subsequent exemption. This consultation process naturally added to the constraints of an already tight schedule. Finally, under the oaths of cabinet secrecy and responsibility, Munro was not allowed to view any Cabinet material, except that from the Cabinet and his own department during his tenure (i.e., as Minister of Indian Affairs from 1980 to 1984), without receiving special viewing permission from the Prime Minister of the time. The outside dates given in Appendix B covered the terms of three separate governments: Pierre Trudeau, John Turner and Brian Mulroney. If Munro did not receive permission from these three prime ministers, he would not be allowed to view any Cabinet or sensitive documents from other ministries or other time periods which might be found in the MSSD records. Since permission to view Cabinet documents outside Indian Affairs was not forthcoming before the trial date of 24 August, the Access Section was instructed by the Privy Council Office to identify, segregate and remove all such Cabinet confidences from the documents which the Archives would table in court.

In order that GAD Access review officers only had to review files containing information directly relevant to the subpoena, and that they were given the maximum amount of time for this labour-intensive page-by-page work, I used the MINISIS list and the entries in the contemporary indexes early on to identify the most important files needing review. On 25-26 July, a team consisting of all available archivists in the Social Affairs

and Natural Resources Records Section read every potentially valuable file down to the document level, flagging relevant documents for Access review. Each of the seventeen archivists was given a copy of Appendix B and a sheet of instructions which outlined the background of the case and the nature of the information they should be looking for. They were also told to watch for certain keywords on a list which I prepared from the Appendix and the contemporary indexes. During the two-day, eighteen-hour review, a total of 1,050 files were reviewed, of which 213 were found to contain relevant documents. The screening for Cabinet confidences performed by the Access Section resulted in 1,384 pages being withheld, but 4,256 pages of certified true copies were made available to the court on the day of the trial. Later in the article, I shall discuss the issues relating to certified true copies of archival documents in court.

### *Problems in Interpreting the Subpoena*

To state it baldly, reviewing the files to the document level was neither a simple nor an easy task. The wording of certain parts of Appendix B of the subpoena, particularly section 3, was so general that it was difficult to determine exactly what material the defence was seeking. In identifying files for the Access Section's review, the archivists often had to make assumptions about what was actually being requested; indeed, they were urged to be cautious in their interpretations of wording, flagging items which, although they did not follow *precisely* the wording of the subpoena, did appear to contain relevant information.

Several specific examples illustrate this difficulty. In section 2, where the subpoena asked for "All documents related to 'representative Indian organizations,'" it was unclear to the archivists what exactly was meant by this phrase. Did the term "Indian" mean a status Indian as defined by the *Indian Act*, or was it to be taken to mean, more generally, all persons of aboriginal ancestry? This was an important point, as it affected the definition of "representative Indian organizations." Did this phrase refer solely to the main national organization, the National Indian Brotherhood/Assembly of First Nations, which represents status Indians in Canada? Or, because of the second, more general meaning of the term "Indian," did the phrase mean any organization above the band level which has as its members persons of aboriginal ancestry? The latter interpretation could have meant that in addition to records relating to the NIB/AFN, the archivists should have been flagging material on any or all such smaller organizations as the Union of Nova Scotia Indians, the Federation of Saskatchewan Indian Nations, or the Union of B.C. Indian Chiefs. The archivists in the Section specializing in RG 10 (Records Relating to Indian Affairs), who deal with such terminology on a daily basis, interpreted this statement to refer to status Indians, but agreed that even so the phrase was not clearly articulated. We decided to take it to mean precisely what was stated, and looked for the words "representative Indian organizations" before a document was flagged as being relevant under this category of the subpoena.

Section 3 was equally difficult to interpret. No dates were given for statements such as "All documents related to a) the establishment of a Special Committee (of the House of Commons) on Indian Self-Government" — leaving any reviewer not intimately familiar with the history of native self-government to make an educated guess at what documents were being requested. Section 3(d), which stated "All documents related to . . . d) the First Ministers' Conference of 1984 related to self government," was interpreted to mean

both preparations for the Conference and any official documents resulting from the Conference itself. "Preparation" was therefore determined to cover such things as notes on funding given to native groups to participate in the constitutional process, paragraphs outlining public attitudes towards natives and the Constitution, as background for officials, and suggestions to the Minister on how the matter of natives and the Constitution was perceived and therefore how it should be handled.

In the following section, 3(e), the subpoena asked for "All documents related to . . .) advice given to the Minister by his special advisors [*sic*] on self-government." Since it was not explicitly stated, archivists had to assume from the context of the subpoena that "the Minister" was the Minister of State for Social Development, rather than the Minister of Indian Affairs and Northern Development. It is not likely, given the nature of the MSSD, that archivists would find in its records documents which showed the advice given to the Minister of Indian Affairs and Northern Development. Since MSSD was responsible for allocating funds in a wide variety of departments for many social, cultural and economic projects, the individual departments must have had their project proposals or positions well-conceived by the time they reached the super- ministry. It thus remained somewhat unclear which records the defence was actually seeking through this section of the subpoena.

The section that was the most difficult to interpret, however, was Section 3(f): "All documents related to . . . f) other matters related to Indian Self-Government." Archivists were forced to interpret this category as broadly as it seemed to have been intended, flagging as potentially relevant any mention of the subject of Indian self-government, such as a line in a budget document stating that *x* number of dollars would be devoted to the subject in the coming fiscal year; that INA was working on a project to enhance local aboriginal self-government; or that the federal government had a commitment to bring the native people into the constitutional process. Most of the material that the archivists passed on to the Access Section was identified according to this category of the subpoena.

### *The Role of the Archives in Court*

As noted earlier, it is not unusual to have archivists and/or archival documents brought before a judicial body. The most recent and widely-publicized occurrence was that of the Commission of Inquiry on War Criminals, more commonly known as the Deschênes Commission, in 1985-86. During the Commission's proceedings, the National Archives was used both in a traditional fashion, as the institutional memory of the federal government, and as an expert witness on records scheduling and disposal in the federal government.[4] The bulk of testimony from Archives' staff was made in conjunction with the supposedly unscheduled destruction of immigration records which, it was alleged, might have been useful in proving the existence of Nazi war criminals in Canada.

Among those officials who were called to testify concerning the circumstances surrounding the destruction of these documents — the public reporting of which had given the impression that *all* the records from 1945 to 1982 had been wantonly destroyed just before the Solicitor General's office arrived to investigate their contents — were the Records Manager for Employment and Immigration Canada, the EIC Retention and Disposal Officer, the Chief of the Ottawa Federal Records Centre and the Chief of the Social Affairs and Natural Resources Records Section of the old Federal Archives Division.

A variety of documentation created by the Archives during the application of the records retention and disposal schedule in 1982 was entered into evidence, and particularly close attention was paid to the original archival appraisal signed by the Dominion Archivist, because it was that appraisal which authorized the destruction of the material in question. The expert testimony on the process, supported by documentary evidence, allowed Mr. Justice Deschênes to conclude that there was nothing untoward or clandestine about the destruction of these immigration records.

What is significant here is that, during their "expert testimony," archivists were asked to prove that the destruction of the records in question was carried out in accordance with normal administrative procedures. Since the Dominion (now National) Archivist is the only person who can actually authorize the legal destruction of federal government records, the steps by which he is advised to concur with the recommendations for such destruction made by his staff must be carefully documented; it is in that capacity, as creator of those internal documents, that the archivists were called to testify.

Very soon after we began working on our response to the Munro subpoena, there was concern expressed that the Archives was again being asked to provide such expert testimony. Naturally, the defence would have a strong argument if it could show that the records relevant to Munro's behaviour had been improperly destroyed by the very government now prosecuting him. Thus a failure to deliver documents might have become a contentious issue; the absence of evidence is often as important as records surviving intact. The Archives, as custodian of the records of the defunct ministry, would have to show that such a failure was not due to negligence or improper destruction on the part of the Archives, but to a transfer of functions (and therefore records) when the MSSD was dissolved.

In the case of the Munro subpoena, the Archives could not offer the same level of detailed, expert testimony as it had given at the Deschênes Commission. The documents being requested under the subpoena were not created by the Archives, so there could be no direct knowledge of the normal administrative or operational procedures which led to their creation or their destruction, nor could archivists have any extensive knowledge of their informational content. Furthermore, they could not even offer opinions as to the historical context or validity of the records, since, as the records of a defunct organization, the MSSD fonds was being stored in a custodial "limbo" in the Ottawa Federal Records Centre until the expiry of the retention period.

Since the National Archives was not the records creator (nor, as yet the appropriate subject specialists), the decision was made early on that the Archives would consider itself and its staff as only custodians of the records for the purposes of the subpoena. This meant that, although archivists reviewed the records for the specific information requested in Appendix B, the Archives' expert witness would confine his efforts to "presenting information *about* the records in question, presuming such exist, particularly the context around and the circumstances under which they came to be under the control of the National Archives."[5] He would also offer testimony on established archival principles and practices and government records management policies. This legal position was accepted by both the prosecuting and defence counsel.

Another concern that was raised during briefings with the Archives' legal adviser before the court appearance was that the presiding justice could adhere to the specific wording of the appendix to the subpoena and insist on the presence of the original, archival

documents in court, rather than certified copies. In actual fact, there was no basis for concern.

There are two rules which must govern the actions of anyone attempting to introduce documents as evidence: the Hearsay Rule and the Best Evidence Rule. They essentially mean that counsel must convince the court that the document is inherently reliable because of the circumstances of its creation ("made in the usual and ordinary course of business"), and that it is either the original document or a suitable copy, where the original is unavailable.[6] The initial concern was that counsel or the Court might argue that there was no impediment to producing the original documents, except the general archival practice not to allow original archival documents out of the repository. If this archival administrative practice was not stated explicitly in the policies and procedures of the National Archives of Canada, where it could be produced on demand, the Archives would have had no grounds on which to refuse to provide original documents.

The Best Evidence Rule, however, like so many other things in life, is evolving with technology. Photocopies have become so prevalent in modern bureaucracies that a variety of court decisions in Canada, the United States and the United Kingdom have led it to become "a statement of common sense." The general reliability of photocopying equipment for producing exact copies of document(s) removes the burden of having a witness vouch for the authenticity of the copies:

> the fact and the reliability of the photostat . . . machine is a matter of such common experience that it needs no person to vouch for it. That is not to say that (the) . . . machine is foolproof or cannot be tampered with or cannot be so manipulated that it produced something other than a true copy. But surely these are matters which go to the weight to be attributed to a photocopy, not to its admissibility.[7]

This would suggest, then, that the National Archives routine practice of making photocopies of archival documents, then stamping them "Certified to be a True Copy of a document in the National Archives of Canada," followed by the date on which the copy was made, the signature of the National Archivist or his official designate, and a proper, formal archival citation in order to locate the original document(s), was already ideally suited to meet present standards for the admissibility of evidence in Canadian courts.

As it turned out, no question about the acceptability of the MSSD records was raised during the court proceedings. In fact, the massive volume of paper documentation collected by Inspector Henry Kennedy of the RCMP during the course of the investigation was treated in much the same way as the archival documents. Each of his photocopied documents bore a stamp which indicated that it was a copy, and where the original (or even previously copied) document could be located. I suspect that in future this kind of authentication will prove to be sufficient for the courts, and that archives may continue as they have begun, by providing certified true copies of documents when served with subpoenas for records from their holdings.

In the long term, however, the issue of the clarity and comprehensibility (or lack thereof) of the subpoena may have the greatest impact on the National Archives' response to such legal requests. The subpoena gave only a very poor indication of what records were actually being sought. The Archives did not, in an case have to accept the subpoena as it was worded. There was always the option of askinig the Archives' legal counsel to go before the Federal Court of Canada, or the presiding trial judge and make a

representation that the subpoena's appendix, as worded, was too vague, and that therefore the Archives could not respond to it without further clarification of the nature of the requested material. There could, then, have followed negotiation between the Archives' counsel and the defence counsel regarding clarification of the wording of the appendix. If the results were still not satisfactory, the Archives could have instructed its counsel to move to quash the subpoena, thereby obviating the necessity of answering it at all.

For a variety of reasons, the Archives chose not to take this route, but to interpret the subpoena as best it could. Early in the federal government's response to the thirteen subpoenas, a high-level policy decision was made that there would be no move to quash the subpoenas, and that the government would offer as much assistance as was possible to the defence in the gathering of relevant material. This decision not to move against the subpoena was reinforced at the National Archives because it supported the institution's formal position as mere custodians (at that time) of defunct MSSD records, rather than as archivists already conversant with their structure, arrangement, context and subject content. In this respect, I, as the archivist responsible, would not be forced to learn enough details about the records (in an extremely short time) to be able to tell the defence counsel what specific areas needed clarification and, more importantly, *how* to provide the Archives with such clarification.

In hindsight, the Archives' decision to adhere to the policy of cooperation in order to reinforce its position as caretakers may have been a mistake. While I concurred with the decisions made in the summer of 1990, I now believe that we could have asked our legal counsel to seek a reasonable amount of clarification to the Appendix of the subpoena without jeopardizing our "caretaker-not-custodial-witness" position. It should be noted that the Department of Indian Affairs did take this legal route, and succeeded in having their subpoena clarified enough to reduce significantly the scope of their search work. Even obtaining answers to many of the questions raised here would have saved much time, effort and agonizing interpretation of documents during the search stage, to say nothing of the costs involved.

### *The Costs*[8]

The entire process of answering this subpoena took the combined efforts of 47 people, including the Assistant National Archivist, the Director General of the Historical Resources Branch, the Director of the Government Archives Division, the Chief of the Social Affairs and Natural Resources Records Section, the Section's three unit heads, the National Archives' legal adviser and her assistant, fifteen staff archivists, four contract personnel (technicians), three staff members of the Ottawa Federal Records Centre, ten members of the Custodial Services Section in GAD, six senior access review officers, and two access clerks. Over the seven weeks between the arrival of the subpoena in GAD in late June, and the end of August 1990, a total of 1,381 hours of Archives' staff time had been spent on the project. As the archivist responsible, I myself counted for 186.8 of those hours, including thirty hours overtime; a further 297.5 of those hours were accounted for by the Access Section, whose work was carried out in just seventeen days, from 4 August to 20 August. Exact figures for the cost of this project were not gathered at the time, but it is estimated from a variety of sources that this project cost the National Archives approximately $26,307 in staff time and copying costs, not including all overtime pay.

To put these figures, as rough as they are, into perspective, it must be remembered that they relate to one of the smaller departments receiving one of the thirteen subpoenas. Costs for the response of the Department of Indian Affairs would have been many times higher, given that they at one point estimated that they had at least 10,000 files which were relevant to the case, and more than 38,000 pages relevant to points two and three of their subpoena. INA even started reviewing and cataloguing material as early as May 1990, and had hired an additional eight people specifically for this project, bringing the total to ten people working full time on the subpoena. The National Archives, incidentally, was the only department of the thirteen subpoenaed that arrived in court on 24 August bearing the material requested of them.

### *Conclusion*

There is no doubt that there were benefits accruing from the National Archives' response to the John Munro court case subpoena, the greatest being an increased knowledge of the records concerned and their contents, which will be put to good use when the records are officially transferred to the National Archives' holdings in mid-1993. We now know that these records will be quite valuable in terms of the history of the development of Canadian federal social policies, and no doubt will be the subject of much study once they are made available to researchers.

However, if the National Archives were to face another subpoena such as this one, I suggest that our initial actions should be quite different. First and foremost, the institution and its legal counsel should look very closely at the subpoena and discuss not only impressions of its requests but also its motives and implications, especially in light of the experience gained in this case. If we were to look at this subpoena now, a cynical view of the Appendix suggests that the defence was being deliberately vague in order to draw in a wide variety of potentially valuable documents. Given our already heavy load of public service duties, should we have allowed ourselves to expend so much time and energy on a single request, especially when we could have availed ourselves of a legal opportunity to reduce and/or refine our search? Perhaps archivists' long tradition of leaning over backwards to accommodate researchers can backfire when applied to the hard realities of legal battle and courtroom manoevring.

©APPENDIX B (NATIONAL ARCHIVIST)

©IN RELATION TO MINISTRY OF STATE FOR SOCIAL DEVELOPMENT (MSSD)

In all matters referred to below, "documents", "memoranda", "correspondence" should be interpreted especially to include, but not be limited to Ministerial Briefing Notes; minutes, notes, and briefings to Deputy Minister's Executive Committee; and memoranda, minutes, and correspondence (including internal memoranda leading to their preparation) between Ministry of State for Social Development (MSSD) and DIAND, Treasury Board Secfretariat, Office of Aboriginal Constitutional Affairs (OACA) and other departments.

1. All documents related to the National Indian Brotherhood/Assembly of First Nations and its funding from January 1, 1982 - June 30, 1985, Memoranda to Cabinet and Records of Cabinet Decisions.

2. All documents related to "representative Indian organizations", why such organizations are needed from the government point of view, what justifications are given for its funding, for the period of July 1, 1983 - June 30, 1985.

3. All documents related to a) the establishment of a Special Committee (of the House of Commons) on Indian Self-Government, b) development of the government's response to the Committee's Report, c) preparation of legislation referred to in the government response, d) the First Ministers' Conference of 1984 related to self-government, e) advice given to the Minister by his special advisors on self-government, f) other matters related to Indian Self-Government.

4. Minutes and Records of Decision of the Cabinet Committee on Social Development involving any of the above matters in which the Honourable John Munro participated.

**Figure 1:** Appendix "B" of the Subpoena to the National Archivist[2]

RECORDS FINDING AID – L'AIDE DE RECHERCHE DES DOSSIERS

| Accession No – N° d'entrée | Outside Dates – Dates extrêmes |
|---|---|
| 84-270 | 1984 AND PRIOR |

Description, Arrangement and Locations of Records – Description, Classement et lieu des dossiers

| From – De | To – À | Box Nos. Boites n°s | Location Numbers Lieu d'emplace. au dépôt |
|---|---|---|---|
| | | Binders | |
| F - STEERING COMMITTEE MEETINGS | | .3048M | H-100 |
| G - SIX AND FIVE CAMPAIGN | | .6096M | -100 |
| H - PRESS CLIPPINGS | | | -100 |
| J - SPECIFIC PROGRAMS | | | -100 |
| K - ANTI-INFLATION CAMPAIGN | | | -100 |
| II - OPERATIONAL RECORDS 1984 AND PRIOR arranged by type | | | |
| A - OPEN VOLUMES arranged numerically (with Federal/Provincial Meetings of officials on Aboriginal Constitutional Matters at the end); | | 57-137 | |
| 1001-1 | 1003-2 VOL. 9 | | -100 |
| 1003-3 | 1650-7 | | -101 |
| 1653-1 VOL. 5 | 2760-8 VOL. 2 | | -102 |
| 2760-9 VOL. 2 | 4275 | | -103 |
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**Figure 2:** Page 3 of Ottawa Federal Records Centre Documentation for the MSSD Records (Accession 84-270)

## Notes

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1 This section is a summary of coverage of the year-long trial in the *Ottawa Citizen* and from documentation found on Government Archives Division (GAD) registry file 9550-RG131-1, "Custodial - GAD-Projects - Ministry of State for Social Development - John Carr Munro," Volume 1, hereinafter cited as GAD 9550-RG131-1.

2 GAD 9550-RG131-1.

3 Ottawa Federal Records Centre Accession 84-270, Box 282, "Background Documentation, June 1984, Extracts from Part III of the 1984-85 Main Estimates."

4 The information in this section on the Deschênes Commission comes from Robert Hayward, "'Working In Thin Air': Of Archives and the Deschênes Commission," *Archivaria* 26 (Summer 1988), pp. 122-36.

5 GAD 9550-RG131-1, Eldon Frost to Marion Haunton, (Legal Counsel for the National Archives), 6 July 1990, emphasis added.

6 While doing research a few years ago for the section of my Master of Archival Studies thesis which dealt with legal issues relating to computer records, I relied heavily upon Ken Chasse's article on the acceptance of computerized information as evidence in court: "The Legal Issues Concerning the Admissibility in Court of Computer Printouts and Microfilm," *Archivaria* 18 (Summer 1984), pp. 166-201. I am also indebted to Mac Lindsay, Senior Assistant Crown Counsel, and prosecutor in the Munro case, for a copy of his notes for a talk on the subject of documents and evidence which he gave to the Commercial Crime Investigators Course at the Canadian Police College, Dwyer Hill, Ontario, on 10 January 1992. These notes include citations of various legal precedents concerning the hearsay nature of documents, the Best Evidence Rule, the admissibility of copies of documents, authentication, the evidentiary value of documents admitted pursuant to a federal statute, accounting schedules and documents as real evidence. Anyone particularly interested in reviewing these legal precedents themselves may obtain the citations from me.

7 Lindsay notes, page 6, quoting *R.* v. *Lutz*: Ontario Provincial Court, 1978.

8 These figures were calculated on the basis of the number of hours reported by those involved on their month-end reports for the period 25 June 1990 to 31 August 1990, multiplied by the basic salary figures for each classification level as of 1 April 1990. The calculations can be obtained from the author.