VOLUME ONE
THE OVERVIEW

CHAPTER II: THE INQUIRY PROCESS

2.0 Introduction

Commencing more than 20 years after the events under consideration took place and mandated to examine a broad range of factual and policy issues, this Inquiry was faced with significant challenges from the outset. As the work unfolded, further specific obstacles to the expeditious conduct of the Inquiry appeared. Most notable among these was the need to address National Security Confidentiality (NSC) issues. This chapter describes how the Commission approached its mandate, and discusses some of the procedures used to ensure that the Inquiry could proceed as efficiently as possible. The chapter also reviews the various special challenges encountered, many of which have contributed to extending the time and resources necessary to complete the Inquiry's mandated work.

2.1 Outline of the Inquiry Process

2.1.1 Mandate and Initial Process

By Order in Council dated May 1, 2006,[1] the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 was established pursuant to Part I of the *Inquiries Act*.[2] The Honorable Bob Rae, who had been appointed in 2005 to provide independent advice to the then Minister of Public Safety and Emergency Preparedness, had previously concluded that, in spite of the passage of 20 years since the terrorist attack on Flight 182, outstanding questions of public interest still required answers.[3] The Terms of Reference for this Inquiry require the Commission to make findings and recommendations with respect to a broad range of issues arising out of the Air India investigation and prosecution, including issues of threat assessment, aviation security, interagency cooperation, terrorist financing, witness protection, the relation between security intelligence and evidence, as well as the unique challenges presented by the prosecution of terrorism cases.[4]

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1 P.C. 2006-293 (referred to here as the "Terms of Reference").
2 R.S.C. 1985, c. I-11.
3 See *Lessons to be Learned: The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005).
4 See P.C. 2006-293, para. (b).

On June 21, 2006, an initial session of the Commission was convened at which a public opening statement was made on behalf of the Commission addressing procedural matters and setting out some of the principles which would guide the conduct of the Inquiry. The statement expressed the Commissioner's intention to conduct a thorough investigation in compliance with the Terms of Reference and the legal requirement to act fairly.[5]

In June and July 2006, *Rules of Procedure and Practice* were adopted[6] and the Commission received 21 applications for Standing. On August 9, 2006, a ruling was issued granting 18 of the applications.[7] Two types of standing were granted to the successful applicants: Party Standing and Intervenor Standing. Party Standing, the more extensive type reserved for those directly and substantially affected by the mandate of the Inquiry, was granted to a total of eight individuals and organizations, including individual family members of the victims of Air India Flight 182 and organizations representing family members, the Attorney General of Canada (AGC) on behalf of the Government of Canada and all affected departments and agencies, as well as Air India. Family members and organizations representing them were divided into three main groupings for purposes of representation: the Air India Victims Families Association (AIVFA), representing a large group of family members residing in North America, Lata Pada and other individuals aligned with her, mostly residing in North America but not members of AIVFA, and a grouping including the Air India Cabin Crew Association (AICCA), the Family Members of the Crew Member Victims of Air India Flight 182 and India Nationals (FMCMV/IN), as well as individual family members residing in India. Each group was encouraged to cooperate with other groups to the extent possible to avoid repetition during the Inquiry hearings. This was accomplished successfully through a division of labour among counsel representing the three groupings, which ensured that specific areas of evidence were not canvassed separately where the Parties' interests did not require it. On August 9, 2006, Intervenor Standing was granted to a total of 10 organizations and individuals with interests and perspectives relating to the Commission's mandate. As a result of further applications presented during the following months, three additional organizations received Intervenor Standing and one additional individual received Party Standing.[8] Intervenors included a number of organizations representing civil liberty and Canadian democracy interests, as well as organizations representing the legal profession and law enforcement.

Individuals and organizations with Party Standing were represented in the Inquiry hearings and participated by cross-examining witnesses and making submissions on a regular basis. Intervenors had opportunities to participate by presenting written submissions and, in some cases, making oral opening statements.

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5 Opening statement of the Commissioner, Transcripts, June 21, 2006, pp. 8, 10.

6 See *Rules of Procedure and Practice* for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (revised July 17, 2006).

7 August 9, 2006 *Ruling on Standing* in Annex A of this Volume.

8 *Rulings on Standing* dated August 23, 2006, November 1, 2006, March 14, 2007 and May 11, 2007 included in Annex A of this Volume.

On October 12, 2007, one of the Intervenors, the World Sikh Organization (WSO) applied for broader standing, including the right to cross-examine witnesses and to receive notices and documents, and asked that Commission counsel be compelled to call a number of witnesses.[9] On October 29, 2007, the Commissioner granted expanded Intervenor status to the WSO, allowing it to make submissions on all Terms of Reference, but noted that the right to cross-examine witnesses belonged to Parties alone and that the witnesses the WSO wanted called, with one exception, were either already scheduled to testify or did not have evidence relevant to the Terms of Reference.[10] Not satisfied with this ruling, the WSO raised numerous complaints throughout the remainder of the Inquiry and used its Final Submissions, filed on January 31, 2008, to challenge the Commissioner's decisions and even to attempt to circumvent prior rulings by appending documents and referring to "facts" which had not been admitted into evidence and which, in any event, contributed little to matters relevant to the Terms of Reference.[11]

Counsel for the WSO had an important role to play with respect to the reputational interests of the Sikh community. Instead, they expended considerable time, resources, and energy seeking to advance a number of peripheral issues beyond the jurisdiction of the Commission through repeated motions to tender evidence intended to suggest that the Government of India was involved in the bombing of Air India Flight 182. It is regrettable that the WSO missed the opportunity to make a more meaningful contribution to the Inquiry with regard to promoting Sikh reputational interests. Fortunately, those interests were well protected by the evidence brought forward at the Inquiry, which has amply demonstrated that Sikhs in Canada are law-abiding, peaceful, and outraged by the terrorist attacks on Flight 182 and at Narita.

Commission counsel, charged with representing the interests of the Canadian public at the Inquiry, were automatically a Party before the Commission.[12] All Commission counsel were appointed by the Commissioner to assist him in carrying out his mandate. They were responsible for bringing all matters relevant to the Terms of Reference to the Commissioner's attention. Their role was to assist the Commissioner in a non-partisan and non-adversarial manner throughout the Inquiry.[13] To this end, Commission counsel reviewed documents, interviewed witnesses and led the evidence in the Inquiry hearings.

The Commissioner was authorized by the Terms of Reference to recommend that funding be provided to ensure the appropriate participation of the families of

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9 See *WSO Application for Broader Standing*, October 12, 2007 and *WSO Applications to Call Zuhair Kashmeri, Gary Bass, David Kilgour and Gian Singh Sandhu as Witnesses*, October 12, 2007 in Annex A of this Volume.

10 See *Ruling on Standing* and *Ruling on Application to Call Certain Witnesses*, October 29, 2007 in Annex A of this Volume. One of the witnesses proposed by the WSO was called by Commission counsel on December 7, 2007, but the testimony had to be restricted for relevance and because of civil litigation issues.

11 See *WSO Final Submissions*, January 31, 2008.

12 See *Rules of Procedure and Practice*, Rule 2(c).

13 Ontario, *Report of the Walkerton Commission of Inquiry, Part One* (Toronto: Queen's Printer for Ontario, 2002), p. 479 [*Walkerton Report*].

the victims and of any Party granted standing.[14] Recommendations were made to provide funding for counsel representing family members organizations or groups, as well as some of the Intervenors. Those recommendations were accepted by the Government of Canada.

As set out in the *Rules of Procedure and Practice*, the Inquiry hearings were divided into two separate but interrelated stages. Stage 1, which proceeded during the fall of 2006, with one additional witness heard in June 2007, involved the voluntary testimony of family members of the victims of the bombing of Air India Flight 182, who are themselves victims of terrorism. Many family members chose to be heard in the Inquiry hearings to share memories of their lost loved ones, as well as to describe the impact of the bombing and share expectations for the Commission. Printed, audio and video materials were submitted. During Stage 1, the Commission also heard evidence from individuals who were involved in the first response following the explosion. A report entitled *The Families Remember*[15] was released in December 2007, while the Inquiry continued to receive evidence with respect to Stage 2 of the hearings. This first report attempted to record the human toll of the Air India bombing. It was felt that the families had already waited too long to have their stories told and that there was no reason to wait for the entire Inquiry to be complete prior to the release of this first report. Stage 2 of the Inquiry proceeded from November 6, 2006 to December 13, 2007[16] with an inquiry into the matters set out in clauses (b)(i)-(vii) of the Terms of Reference.

2.1.2 Document Collection Process

In July 2006, the Commission issued its first requests for documents and information relevant to the Commission's mandate in the possession of the government departments and agencies involved, beginning with a request dated July 12, 2006, for all documents "relevant to the mandate of the Commission as set out in the Commission's Terms of Reference." Over the ensuing months, numerous additional requests followed as existing documentation was reviewed and new facts learned through the witness interviews and testimony.

New documents were, accordingly, received by the Commission on a continuous basis throughout the proceedings. Even after the conclusion of the hearings, new documents continued to be delivered, sometimes in response to requests from Commission counsel for further information, sometimes at the Government's own instance. A total of 17,692 documents consisting of tens of thousands of pages were provided via a secure electronic network which allowed the Commission to review and organize the materials. In addition, the Commission was provided with access to a portion of the RCMP database on the Air India investigation, containing countless documents with a total number

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14 P.C. 2006-293, paras. (g) and (i).

15 The Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *The Families Remember* (Ottawa: Public Works and Government Services Canada, December 2007).

16 Two additional hearing days were also held in February 2008.

of pages ranging in the millions.[17] Thousands of additional pages of hard copy documents were also obtained and further access was provided to materials which were made available for review on Government premises.

Although document collection did not always proceed smoothly or without incident, ultimately sufficient documentation was identified and made available to the Commission to allow it to discharge the mandate set out in the Terms of Reference. The Attorney General of Canada certified that it was satisfied that the Government and its agents, servants, agencies and departments had diligently searched for and produced to the Commission documents "potentially relevant" to the Commission's Terms of Reference as well as documents responding to the Commission's subsequent document requests.

2.1.3 National Security Confidentiality Claims and Redaction of Documents

All documents received by the Commission from the Government, except documents for which solicitor-client privilege or Cabinet confidence was claimed, were initially provided to the Commission with no deletions or redactions, regardless of any National Security Confidentiality (NSC) claims asserted or to be asserted by the Government.[18] All documents were handled by the Commission in accordance with their security classification.

Eventually, the Government asserted NSC claims and other privilege claims over a large portion of the documents initially provided to the Commission. The claims were made in cases where the Government took the position that the disclosure of information contained in the documents would be injurious to international relations, national defence or national security, or that it could identify confidential sources of information or compromise ongoing investigations.[19] A special process was agreed upon to enable the Government to notify the Commission of the exact documents and extracts over which it intended to assert NSC claims. Commission counsel were required to identify, after a first review of the documents provided by the Government, the documents they anticipated would be entered into evidence or be disclosed to the Parties in advance of the hearings. Lists of such documents then had to be provided to counsel for the Government in the form of "redaction requests". The Government subsequently provided redacted versions of the documents, where all information over which NSC claims were asserted was blacked out.[20] Commission counsel continued to have access to uncensored versions of all

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17 Statement by Barney Brucker, Transcripts, vol. 19, March 9, 2007, p. 1770.

18 Where solicitor-client privilege or Cabinet confidence was claimed, the documents were generally provided to the Commission with the portions over which privilege was claimed already deleted. Where the privilege was claimed over entire documents, the documents were not provided to the Commission, but the Commission was advised of their existence upon request.

19 For present purposes, all Government privilege claims (except solicitor-client and Cabinet confidence which involved a different procedure) will be collectively referred to as NSC claims as the same procedure was followed with respect to all such claims in the context of this Inquiry.

20 A general description of this process was provided in the opening statement to Stage 2 of the hearings by Mark J. Freiman, Lead Commission Counsel, Transcripts, vol. 12, November 6, 2006, pp. 1045-1046.

documents, but only the redacted versions could be disclosed to the Parties and entered into evidence.

In September 2006, the Commission began to receive Government documents in response to its July 2006 and subsequent requests. Approximately 4,500 documents were initially received and the documentary review and redaction requests process began. Meanwhile, as the document collection process continued, more new documents were provided to the Commission in response to prior and new requests. Because a vetting process had already commenced within Government, it was possible in October 2006 for the Commission to provide to the Parties, in redacted form, approximately 1500 documents identified as essential by the Government. Commission counsel progressively sent lists of additional documents requested for redaction to the Government as the documentary review continued, but it was not until December 2006 that the next installment of redacted documents was received. Because of this ongoing process, it was not possible to begin with the Stage 2 hearings in October 2006 as initially planned.[21] At the time, the Commission was still receiving new materials and, most importantly, the process of identifying documents and receiving redacted versions for purposes of disclosure to the Parties and production before the Commission had not progressed sufficiently.

Although it was planned to commence hearing Stage 2 evidence in November 2006, that timetable also proved impossible to meet, as a sufficient number of redacted documents was still not available.[22] This was in large part caused by the nature of the document collection process which required the identification, disclosure and review of documents from several different agencies, covering a period of time ranging over many years. Further, the document collection and redaction process involved electronic versions of documents, since the Terms of Reference required the Commission to process documents using the automated litigation support program prescribed by the Attorney General of Canada.[23] As a result, the process was highly dependent on technology. Unfortunately, several weeks' worth of the Commission's work in processing documents was lost in early November as a result of a technical glitch in the Government's uploading of new documents to the Commission's server.[24] In general, it was difficult for the Government to provide redacted versions of documents within short time frames given its process of extensive internal reviews involving different agencies and departments. It was also necessary to allow counsel for the Parties before the Inquiry sufficient time to review the documents to enable them to contribute to the hearings in a meaningful way. This could not be done until redacted versions of the documents were available for disclosure to the Parties' counsel. The hearings were therefore adjourned to February 2007 in the hope that this would allow sufficient time for this process to be completed.

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21 Statement by the Commissioner, Transcripts, vol. 11, October 13, 2006, pp. 1041-1042.

22 See, generally, statements by Commission counsel, Government counsel and counsel for the families: Transcripts, vol. 12, November 6, 2006, pp. 1044-1051. Evidence about the Canadian consular response following the Air India bombing was nevertheless heard during the week of November 6, 2006.

23 P.C. 2006-293. para. (k).

24 Opening statement by Mark J. Freiman, Transcripts, vol. 12, November 6, 2006, pp. 1046-1047.

Unfortunately, the Stage 2 hearings could still not proceed as planned when the Commission hearings reconvened in February. At that point, a large number of redacted documents had been provided by the Government, but the extent of the proposed NSC claims advanced by the Government made the holding of public hearings impossible. The proposed redactions essentially made the documents meaningless, with too much of the information remaining censored and unavailable to counsel for the families and to the public. Under the circumstances, a meaningful discussion of the factual issues could not have taken place, since even the most basic facts and issues could not have been dealt with in public. A decision was made that resolution of this issue would require reassessment by Government of its position, rather than resorting to *in camera* hearings, either to hear the evidence on the merits or to rule on the justification for the proposed redactions. Since rulings would have been subject to judicial review, the result would inevitably have been long and complex judicial proceedings that would essentially have made the Inquiry "…disappear in the quicksand of bureaucracy."[25]

The Government was asked to reassess the proposed NSC claims before the Commissioner reported to the Prime Minister on the feasibility of carrying out the Inquiry's mandate.[26] Counsel for the Government agreed to work with Commission counsel to review the redactions and determine whether sufficient unredacted documentation could be made available to enable meaningful public hearings to proceed.[27] A new process was devised to provide the Government with an opportunity to reassess its NSC claims. Commission counsel agreed to review all of the documents initially provided by the Government in redacted form and to make a selection of the most important documents and information. To assist the Government, specific extracts of the documents were also identified. The Commission provided the Government with "redaction reconsideration requests" identifying the document extracts, and the Government proceeded to reassess its NSC claims.[28] New versions of the documents were eventually returned with significantly fewer redactions. The new versions were reviewed again by Commission counsel and any additional issues were brought to the Government's attention through "subsequent redaction reconsideration requests" specifically identifying the documents and extracts involved and triggering a new Government examination of NSC claims.

It was hoped that Stage 2 hearings could finally proceed in March 2007. However, the new redaction reconsideration process proved to be equally as time-consuming as the initial redaction process. It required Commission counsel to review for the second and third time a large numbers of documents in order to make the best selection possible and to enable the Government to reassess its claims. The process also placed considerable strain on the Government officials involved, and their ability to provide documents with revised redactions in an

25 Opening statement by the Commissioner, Transcripts, vol. 15, February 19, 2007, p. 1371.
26 Opening statement by the Commissioner, Transcripts, vol. 15, February 19, 2007, pp. 1370-1371.
27 Opening remarks by Barney Brucker, Transcripts, vol. 19, February 19, 2007, p. 1377.
28 See, generally, Statement by Barney Brucker, counsel for the Government, explaining the process: Transcripts, vol. 16, March 5, 2007, pp. 1414-1415.

expeditious manner was dependent on available resources. The Commission was advised by counsel for the Government in early March 2007 that, despite their best efforts, the reconsideration of NSC claims was not yet complete.[29] A sufficient amount of information could not yet be made available to counsel for the Parties to allow them to prepare and contribute in a meaningful way to the proceedings.[30]

As a result, it was only at the end of April 2007 that the Stage 2 hearings referring to the Government documents could finally proceed. Even then, the redaction reconsideration process was still ongoing with respect to documents relevant to the evidence anticipated to be heard in subsequent weeks. In fact, the process continued throughout, and even after the conclusion of the hearings. Documents continued to be received as a result of the ongoing disclosure requests. They were then redacted a first time by the Government following requests by Commission counsel, and then were often redacted a second and sometimes a third time following reconsideration requests. The Commission continued to receive documents from the Government after the conclusion of the hearings. When the documents were suitable for public release, they were produced to the Parties who were given the opportunity to make written submissions as to their contents.

2.1.4 Conduct of the Stage 2 Hearings

While most of the evidence relating to Stage 2 of the Inquiry could not be presented before April 30, 2007 because of the redaction reconsideration process, evidence respecting the Canadian consular response to the bombing, as well as some of the more general evidence respecting RCMP and CSIS structures and mandates, was nevertheless presented during seven hearing days in November 2006 and March 2007. The Stage 2 hearings then proceeded without interruption between April 30 and June 20, 2007 and between September 17 and December 13, 2007. Two additional days of hearings were held on February 14 and 15, 2008. During this period, a total of 85 days of hearings were held and 195 witnesses testified, some on more than one occasion.

In order to prepare the evidence to be presented in the Inquiry hearings, Commission counsel conducted numerous interviews with potential witnesses.[31] This process was necessary to identify the persons who had sufficient knowledge and memory of relevant facts and events. In most cases, the potential witnesses were present or former Government employees. Counsel for the Attorney General of Canada attended most of the interviews, including all interviews of current Government employees. Commission counsel then determined which individuals would be called as witnesses before the Commission and prepared

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29 Statement by Barney Brucker, Transcripts, vol. 16, March 5, 2007, pp. 1414-1421.

30 As had been done during the week of November 6, 2006, the Commission nevertheless proceeded to hear some of the Stage 2 evidence which was not dependent on documentary production, this time with respect to the structure and mandates of CSIS and the RCMP.

31 See Rule 34 of the *Rules of Procedures and Practice*.

statements of the witnesses' anticipated evidence as well as lists of documents associated with the witnesses' testimony ("will say" statements).[32] Those statements were meant to assist the Parties, especially those whose counsel were not present during the interviews, to appreciate the nature of the anticipated evidence and to identify the relevant documents in order to prepare for any cross-examination. Pursuant to the Protocol for the Protection of Privileged Documents and Information between the Government and the Commission, in the case of all witnesses privy to Government documents produced to the Commission, the will say statements prepared by Commission counsel had to be submitted in advance to the Attorney General of Canada, who could then advise of any NSC claims that would be asserted by Government over the proposed evidence. Commission counsel were only permitted to disclose the will say statements to other Parties once they were advised by Government that no NSC issues were involved or once changes were made to remove any NSC concerns.

The Stage 2 hearings were divided into four different phases devoted to specific subject areas related to the Terms of Reference: law enforcement and intelligence response to Sikh terrorism, aviation security, terrorist financing, and terrorism and the justice system. The evidence heard included general descriptive, policy and expert evidence respecting the matters of inquiry, as well as detailed factual and historical evidence respecting specific actions taken in relation to the Air India bombing.

On May 1, 2007, a set of Evidence Binders containing most Government documents relevant to the historical aspects of the Commission's mandate was entered into evidence.[33] Throughout the remainder of the Inquiry, new documents were added to the Evidence Binders. As redactions were reassessed by Government, new versions of the existing documents were also added. At the end of the hearings, approximately 3,300 documents were entered as part of the Evidence Binders, many in more than one version as a result of the redaction reconsiderations. In addition, over 300 documents were entered as separate exhibits throughout the Stage 2 hearings, some simply as updates to the Evidence Binders, others containing many new separate documents. Further updates to the Evidence Binders and other documents, totaling approximately 230, were also entered after the conclusion of the hearings as a result of the continuing document production and redaction process. The limited number of documents entered, as compared to the volume of documentation obtained by the Commission in the document collection process, is a reflection of the selection that had to be made in the context of the NSC claims reconsideration process. Only documents considered essential to the Inquiry's mandate were entered into evidence.

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32 See, generally, Rules 35 and 50 of the *Rules of Procedure and Practice.*
33 Exhibit P-101.

In February and March 2008, the Parties before the Inquiry provided Final Submissions in writing.[34] The submissions addressed the factual issues before the Commission in considerable detail, and provided suggestions of possible recommendations to avoid the recurrence of any deficiencies identified and to address the broader policy issues within the Commission's mandate. All Parties were provided with an opportunity to respond to the submissions presented by other Parties. Many of the Intervenors also provided written submissions focusing on specific areas of inquiry relevant to their expertise and experience, and also suggesting recommendations.

Commission counsel did not prepare written final submissions at the close of the Inquiry hearings in the same manner as Intervenors and Parties. Written submissions were filed by these groups to represent their particular interests and to advocate for specific recommendations. Since Commission counsel, like the Commissioner, were responsible for representing the interests of the Canadian public at large and not of any particular group, it would not have been appropriate for them to file submissions. Their role was rather to ensure that all relevant evidence was presented, that all sides were heard and that all relevant matters were considered.[35]

2.1.5 Section 13 Notices

The Commission issued notices in accordance with section 13 of the *Inquiries Act*[36] to those who might be the subject of findings of misconduct or unfavorable comments in the Commissioner's report. In the context of this Inquiry, such notices were, in the end, only issued to institutions and not to individuals. As required by law, the notices were issued confidentially. The institutional recipients of the notices were provided with an opportunity to be heard and to be represented by counsel in order to respond to any allegations of misconduct. In fact, all recipients had been entitled to participate fully in the Inquiry hearings and were represented by counsel throughout. They could cross-examine witnesses, suggest evidence to be presented by Commission counsel, apply to the Commissioner to present evidence not otherwise presented by Commission counsel, and make closing submissions. Commission counsel advise that no suggestion made by the recipients of the notices for evidence to be called was refused during the course of the Inquiry.

2.1.6 Inquiry Report

The purpose of this Report is to analyze the evidence heard in the public hearings with a view to making recommendations about the changes that can be made to avoid the pitfalls encountered in the Air India matter and to improve Canada's

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34 Counsel for the Air India Victims' Families Association also presented oral submissions before the Inquiry: see Transcripts, vol. 97, February 15, 2008, pp. 12865-12898 (Closing submissions by Jacques Shore, Norman D. Boxall, Raj Anand and Richard Quance).

35 *Walkerton Report*, p. 479.

36 R.S.C. 1985, c. I-11.

ability to respond to the modern reality of terrorism. The recommendations are based on factual findings about what, if anything, went wrong in the investigation of Sikh terrorism and of the Air India bombing, and about the challenges that remain with respect to the response to modern terrorism more generally. Rather than chronologically summarizing the facts and evidence, the substantive issues as set out in the Terms of Reference are used as organizing principles to analyze the evidence and draw conclusions where appropriate.

The Report is based on the evidence presented in the public hearings and in the Commission dossiers. At times, the Commission has taken special measures to protect the identity of certain individuals, where it was felt that their safety could be jeopardized or where court ordered publication bans required it. In some cases, this was achieved by applying additional redactions to Government documents entered into evidence. In a limited number of instances involving less than 20 documents, this was accomplished by not entering into evidence some documents that had been returned by the Government in redacted form. In such cases, the Government quite appropriately refrained from making NSC claims as no national security issues were involved, but the disclosure of the documents, even if the Commission had applied additional redactions, could have jeopardized the safety of individuals. Where facts are described in the Report without reference being made to documents entered into evidence before the Commission, it is because the documents, though not subject to NSC claims, were part of the small number of documents held back to protect individual safety.

The findings of fact in the Report and the opinions expressed are not legal findings of responsibility. They are meant to describe for the public what happened as revealed by the evidence and what can be done to ensure that any such deficiencies do not recur. As mandated by the Terms of Reference, there are no conclusions or recommendations respecting the civil or criminal liability of any person or organization.[37] While, in some cases, the alleged actions or omissions of various individuals or organizations in connection both with the Air India bombing and its investigation had to be examined or mentioned, nothing in the Report should be interpreted as an indication that the Commission has come to any conclusions about the civil or criminal responsibility of anyone.

2.1.7 Research Papers

Fifteen research papers were written for the Commission. Research studies have long been an important part of the public inquiry process in Canada. For example, the McDonald Commission of Inquiry, which examined activities of the Royal Canadian Mounted Police (RCMP) and made recommendations that led to the creation of the Canadian Security Intelligence Service (CSIS) in 1984, issued

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37 P.C. 2006-293, para. (p).

a number of research papers and monographs as part of its process.[38] Other commissions of inquiry have also undertaken ambitious research agendas.[39]

Research papers were particularly important, given the breadth of this Inquiry's mandate. A broad range of expertise drawn from a variety of academic disciplines was needed to address this mandate. The Commission was fortunate to be able to retain the majority of Canada's leading experts in many of these areas. The Commission was also able to retain a number of leading international experts to provide research of a more comparative nature. The comparative research was undertaken to determine if Canada could learn from the best practices of other democracies in many of the areas related to the Commission's mandate.

The research papers were written independently on the basis of available public sources. They were also written in a timely manner so that they could be made available to the Parties and Intervenors during the Commission's hearings. The researchers did not have available to them all the evidence that was called throughout the Inquiry. This allowed for the expeditious preparation of the papers. It also recognized that it was the mandate of the Commissioner, who presided over all the hearings, and not the researchers, to draw conclusions based on the evidence heard at the Inquiry. The recommendations of the independent researchers did not necessarily represent those of the Commission. Indeed, the papers were designed in part to formulate tentative proposals that could be tested and challenged by Parties and Intervenors at the Inquiry.

In almost every case, the experts who wrote the reports were called to testify in the Inquiry's proceedings with a preliminary version of their papers being disclosed in advance to the Parties. Such a process has not been the norm for commissions of inquiry. Nevertheless, it proved to be useful as a vehicle to test and challenge the ideas and proposals put forth by the researchers. There was also a concern that the Commissioner should be able to see the research produced for him challenged and defended in a public forum.

Canadian research into terrorism-related issues has generally been relatively sparse.[40] A decision was made to translate and publish the research studies and release them in four volumes with the Report. One of the functions of a public

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38 For example, see the research studies published by the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. J. Ll. J. Edwards, *Ministerial Responsibility for National Security as It Relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (Ottawa: Supply and Services Canada, 1980); C.E.S. Franks, *Parliament and Security Matters* (Ottawa: Supply and Services Canada, 1980); M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980).

39 Recent examples are The Commission of Inquiry into the Sponsorship Program and Advertising Activities (2006) and The Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar. Among the series of background papers published by the Arar Inquiry is *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services, 2006).

40 On some of the challenges, see Martin Rudner, "Towards a Proactive All-of-Government Approach to Intelligence-Led Counter-Terrorism" and Wesley Wark, "The Intelligence-Law Enforcement Nexus" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation.

inquiry is to make information available to the public and to build an accessible and permanent foundation for further research into the area.

The four volumes of research studies published at the same time as the Report are organized thematically. Each contains an introduction which summarizes the content of the papers. The first volume examines the threat of terrorism, threat assessment and RCMP/CSIS cooperation.[41] The second volume deals with terrorism financing and charities.[42] The third volume examines the challenges of terrorism prosecutions, including witness protection.[43] The fourth volume, written by the Commission's Director of Research (Legal Studies), Kent Roach, focuses on the relationship between intelligence and evidence.[44]

2.2 Managing the Proceedings and Inherent Challenges

At the outset of the Commission proceedings, the Commissioner expressed the hope that the Inquiry could proceed effectively and efficiently, noting that the Commission would be judged by its effectiveness and not by its length.[45] As stated in the Arar Report, "…in order to be effective, a public inquiry must also be *expeditious*."[46] The expeditious conduct of an inquiry can contribute to significantly diminishing the cost of the inquiry to the public. Further, it allows the Inquiry to remain relevant and "…makes it more likely that members of the public will be engaged by the process and feel confident that their questions and concerns are being addressed."[47] In the present Commission, while the events inquired into were removed in time, it remained important to attempt to avoid unnecessary interruptions and delays to allow ongoing public engagement in the issues once the public interest in this matter was revived. Furthermore, given the delay between the events and the Inquiry, the families deserved to obtain the long overdue answers they had been seeking as quickly as possible.

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41 The first volume contains the following papers: Bruce Hoffman, "Study of International Terrorism"; Michael A. Hennessy, "A Brief on International Terrorism"; Peter M. Archambault, "Context is Everything: The Air India Bombing, 9/11 and the Limits of Analogy"; Martin Rudner, "Towards a Proactive All-of-Government Approach to Intelligence-Led Counter-Terrorism"; Wesley Wark, "The Intelligence-Law Enforcement Nexus"; and Jean-Paul Brodeur, "The Royal Canadian Mounted Police and the Canadian Security Intelligence Service: A Comparison Between Occupational and Organizational Cultures."

42 The second volume contains the following papers: Nikos Passas, "Understanding Terrorism Financing"; Anita Indira Anand, "An Assessment of the Legal Regime Governing the Financing of Terrorist Activities in Canada"; David G. Duff, "Charities and Terrorist Financing: A Review of Canada's Legal Framework"; Mark Sidel, "Terrorist Financing and the Charitable Sector: Law and Policy in the United Kingdom, the United States and Australia"; and Kathleen Sweet, "Canadian Airport Security Review."

43 The third volume contains the following papers: Yvon Dandurand, "Protecting Witnesses and Collaborators of Justice in Terrorism Cases"; Robert M. Chesney, "Terrorism and Criminal Prosecutions in the United States"; Bruce MacFarlane, "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis"; and Kent Roach, "The Unique Challenges of Terrorism Prosecutions."

44 Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence.* A summary of this study is also contained in the third volume.

45 Opening statement by the Commissioner, Transcripts, June 21, 2006.

46 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006),p. 282
[Emphasis in original] [*Arar Report*].

47 *Walkerton Report,* p. 473.

Regrettably, the Commission's ability to conduct its hearings expeditiously was complicated by the delay of more than 20 years in establishing this Inquiry. In addition to depriving the families for many years of the answers they deserved and of the opportunity to have their stories heard publicly, the time that had transpired since the bombing of Air India Flight 182 introduced a layer of additional complexity to the Commission's process. The fact that the Government had allowed such a significant amount of time to elapse before calling an inquiry was in large part responsible for making the process more difficult, lengthier and more costly than it otherwise needed to have been. A vast amount of documentation accumulated over the years which then had to be reviewed and analyzed in order to find and select relevant documents. The dated files were more difficult to retrieve and search. Some documents, notably those in the possession of the Department of Foreign Affairs and International Trade (DFAIT), have been lost or destroyed. Some individuals involved in crucial events have died. Others have had their memories of events fade or even disappear. In the end, the Commission had to rely to a large extent on a documentary record that was difficult to assemble and understand, without always being able to obtain first-hand evidence from live witnesses.

The documents, when available, often constituted the best and sometimes the only evidence that could be relied on, since they recorded the events as they happened, with no alteration resulting from the passage of time. However, significant time and effort were required to reconstitute a narrative ranging over 20 years, in many cases without the benefit of the memories or explanations of the individuals involved, and on the basis of documents that were not always self-explanatory. To prepare and present comprehensive evidence about all facts and events would have required years of Inquiry hearings. To address this and the added complexities resulting from the Inquiry's broad mandate, which called for the examination of a wide range of complex issues, the Commission had to devise special procedures. Commission dossiers and an episodic approach to the evidence were used to make sense of the factual, historical and other relevant evidence and to relate it to the Terms of Reference. This combination of tools helped sharpen the focus and maximize the efficiency of the Commission's approach to its work.

Commission dossiers contained a concise statement of facts based on other examinations of the circumstances surrounding the Air India bombing,[48] as well as on other reliable public sources.[49] Their main purpose was to provide a factual introduction to the specific subject matter to be dealt with and to set out relatively uncontroversial facts to allow the Inquiry hearings to focus on the heart of the more complex or controversial issues relevant to each topic. The evidence heard by the Commission related to events occurring over many years and could not always be presented chronologically if it was to be related to the substantive issues examined. The dossiers could be used to situate the

48 The Commissioner could accept these as conclusive or assign them the weight he deemed appropriate.

49 As set out in Rule 42 of the *Rules of Procedure and Practice*, the dossiers could contain a "…statement of evidence, facts or conclusions together with the sources or basis for the evidence, facts or conclusions that Commission counsel proposes that the Commissioner adopt…".

evidence heard within a broader context and to provide a better appreciation of its relevance.[50] As a result, it was possible to present evidence relating to specific events or issues occurring in different time periods without losing sight of the surrounding circumstances and context. Substantive links between apparently separate and unrelated events could be made and trends and patterns could more easily be identified. Further, the dossiers provided an appreciation of the previous state of public knowledge which could then be compared with the new information learned during the Inquiry – a comparison that demonstrates that the families were justified in their persistence to demand a public Inquiry in spite of the previous reviews and examinations that had been conducted.[51]

While it was explicitly contemplated that statements made in the Commission dossiers could be refuted by the evidence presented before the Inquiry,[52] the use of dossiers nevertheless contributed to making the process more efficient. The dossiers eliminated the need to present evidence about peripheral or uncontroversial issues. As a result, the Commission's time and resources were not wasted on the resolution of unimportant debates and could be more fully devoted to the most important issues, without losing sight of the broader historical context.

The Commission also adopted a concrete, episodic approach to the actual evidence heard, rather than an abstract or purely narrative approach. For example, Phase I of Stage 2, focusing on the law enforcement and intelligence response to Sikh terrorism, began with the examination of a number of episodes or "critical incidents" that allowed the Commission to trace the manner in which specific pieces of information relevant to threat assessment and response were handled prior to the bombing.[53] This provided concrete examples capable of being used as a prism to examine the general structure of the threat assessment process, the general flow of threat information and the adequacy of the measures put in place to respond to the threat. The 1985 regime could thus be examined with a view to identifying specific deficiencies and to understanding the changes, if any, necessary to correct the deficiencies and prevent the recurrence of any identified failures. This episodic approach was used to an even greater extent for the evidence relating to the investigation into the Air India bombing. Given the time period involved and the quantity of material

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50 See, generally, the explanations provided by Lead Commission Counsel Mark J. Freiman in his Opening statement, Transcripts, vol. 1, September 25, 2006, pp. 5-6 and in his Opening statement, Transcripts, vol. 15, February 19, 2007, p. 1381.

51 In some cases, specifically with respect to factual and historical evidence, the summary of publicly available materials contained in the dossiers was considerably supplemented by the documentary record and evidence heard before the Commission, in light of the limited amount of materials previously available. See, in particular, Exhibit P-102: "Dossier 2: Terrorism, Intelligence and Law Enforcement – Canada's Response to Sikh Terrorism", February 19, 2007.

52 See Opening statement by Mark J. Freiman, Transcripts, vol. 15, February 19, 2007, pp. 1381-1382. With respect to Dossier 2, it was stated that no position was taken by Commission counsel as to the correctness of the various positions adopted and conclusions reached by persons and institutions, as documented in publicly available materials, which were set out in the Dossier.

53 See generally, the explanations provided by Lead Commission Counsel Mark J. Freiman in his Opening statement, Transcripts, vol. 20, April 30, 2007, pp. 1869-1870. Freiman noted that one of the episodes, the Parmar warrant critical incident, also related to the specific process which was used to fill a known information gap.

available, the presentation of a detailed narrative would have been impractical and inefficient. Instead, a number of episodes or incidents that occurred during the course of the investigation were examined in detail during the hearings because they spoke directly to the issues at the heart of the Inquiry's mandate and they illustrated both the serious challenges encountered and the practical consequences which resulted.[54]

The episodic approach to the evidence, in addition to contributing to making the inquiry process as focused and efficient as possible, sought to capture the issues as they presented themselves rather than to look for complete historical evidence. This allowed for the creation of order out of chaos by relating the factual evidence to the substantive issues to be examined. It enabled the Commission to review concrete illustrations in a manner that would not have been possible if a detailed mining of all documents had been undertaken. The critical incidents examined during the Inquiry hearings provided the Commission with an appreciation of how the general theoretical issues and challenges manifested in practice, how they were dealt with and what concrete consequences resulted. This contributed to focusing the Inquiry by ensuring that the examination of any deficiencies and the formulation of any recommendations to address those deficiencies remained grounded in reality, and took into account the real difficulties faced by the members of the security intelligence and law enforcement communities engaged in the prevention and investigation of terrorism.

2.3 Special Procedural Challenges

In addition to the inherent challenges associated with the nature of the Inquiry's mandate and, most importantly, with the passage of a significant amount of time since the events, several specific procedural issues posed additional challenges for the Commission. In some cases, those issues impacted on the substance of the evidence that could be heard and required the use of creative solutions to ensure that all relevant matters would be addressed. In other cases, most notably that of NSC claims, the issues had a significant impact on the Commission's ability to proceed efficiently and expeditiously.

2.3.1 The Importance of Public Hearings

Because of the redaction reconsideration process, which the Government ultimately agreed to engage in, it was possible to hold the Inquiry hearings in public. As a result, a considerable amount of new information could finally be revealed to the public. Contrary to what may have initially appeared to many of those closely involved with this Inquiry,[55] the holding of *in camera* hearings was not necessary in order to discharge the Commission's mandate. The only *in camera* hearing held in the course of the 85 days of Stage 2 hearings was one brief hearing in November 2007, respecting a motion by Government that

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54 Statement by Mark J. Freiman, Transcripts, vol. 46, September 17, 2007, p. 5515.

55 See, for example, the Opening statement by Barney Brucker, Transcripts, vol. 12, November 6, 2006, p. 1065 and Opening remarks by Barney Brucker, Transcripts, vol. 15, February 19, 2007, p. 1377.

certain matters not be heard in public.[56] Some affidavit evidence was filed by the Government, but no oral evidence was heard. In the end, Commission counsel and Government counsel were asked to pursue discussions that resulted in an agreement on the evidence that could be filed. "Admissions" addressed to the content of a number of specific documents were filed and a lengthy Agreed Statement was entered covering the entire content of the information that could be made public about "Mr. A".[57] A similar process of filing an Agreed Statement or Chronology containing summaries of documents had been used in the spring of 2007 for the "November 1984 Plot Chronology". The general approach adopted by the Commission was to resort to such summaries or admissions only where the production of original documents remained impossible without extensive redactions that would render them meaningless, and where the information included in the summaries was considered sufficient for purposes of advancing the Inquiry within the terms of the mandate.

While it is possible in the context of a Commission of Inquiry to hear and receive some evidence *in camera* and while the Terms of Reference for this Commission specifically provide for this contingency,[58] the fundamental nature of a public inquiry must remain, as the name indicates, public. It is essential that the proceedings of a public inquiry "…be as transparent, accessible and *open to the public* as possible."[59] After all, "…one of the main purposes of an Inquiry is to enable concerned citizens to learn firsthand what occurred …"[60] The "…public desire to learn the truth"[61] will generally be fully satisfied only through a process that is completely transparent and that involves hearings fully accessible to the public. As indicated by Commissioner John Gomery:

> By following the public hearings, [concerned citizens] are able to arrive at informed opinions as to who might be held responsible for any errors or mismanagement that might have occurred affecting what the *Inquiries Act* calls "the good government of Canada". The first role of the Commissioner is to conduct hearings that serve to facilitate the understanding of the public…[62] [Emphasis added]

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56 See Statement by Mark J. Freiman outlining the issues at stake, Transcripts, vol. 12, November 6, 2007, pp. 8996-8997. An *in camera* hearing was also called on June 20, 2007 but could not proceed as a result of the Commission's inability to offer absolute assurances to the witnesses that their evidence would never become public: Remarks by the Commissioner, Transcripts, vol. 45, June 20, 2007, pp. 5481-5482.

57 See Opening remarks by the Commissioner, Transcripts, vol. 75, November 14, 2007, p. 9371 and Opening remarks by Mark J. Freiman, Transcripts, vol. 75, November 14, 2007, pp. 9373-9375.

58 P.C. 2006-293, para. (m)(i)-(iii).

59 *Arar Report*, p. 282 [Emphasis in original].

60 John H. Gomery, *Fact Finding Report*, Commission of Inquiry into the Sponsorship Program and Advertising Activities, p. 10 [*Gomery Report*].

61 *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 175 (Cory J.).

62 *Gomery Report*, p. 10.

Justice Samuel Grange, who presided over the Inquiry into Certain Deaths at the Hospital for Sick Children, discussed the important role of inquiries in informing the public and the value of the presentation of evidence in public, even apart from the other benefits associated with public inquiries. He wrote:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries, they are *public* inquiries… I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.[63] [Emphasis added]

Allowing the public to learn all the facts which will form the basis of the Commissioner's conclusions and recommendations and to witness the unfolding of the process is therefore crucial. As indicated by Commissioner Dennis O'Connor in the Arar Report:

> Openness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision.[64] [Emphasis added]

These fundamental principles should only be derogated from in truly exceptional cases, where real harm could be done to legitimate interests through the disclosure of information. The information sought to be kept secret should be as limited as is possible, and the premise should always be that hearings are to be held in public unless it is absolutely impossible.

In this Inquiry, the public nature of the hearings was particularly important in light of the fact that the families, those most affected by the events that made the Inquiry necessary, had been promised a full public inquiry. The Terms of Reference for the Commission recognize the importance of granting the families of the victims an "…opportunity for appropriate participation" in the Inquiry.[65] Under the circumstances, and in light of the burden the families bore as a result of the bombing and of the efforts they made for over 20 years to ensure that

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63 S.G.M. Grange, "How should lawyers and the legal profession adapt?" in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry,* Dalhousie Law Journal, vol. 12 (1990), 151, pp. 154-155.

64 *Arar Report*, p. 304.

65 P.C. 2006-293, para. (f).

a public inquiry would take place, "appropriate participation" required nothing less than receiving a full opportunity to hear and see the evidence. Had this evidence been heard *in camera*, the families and their counsel would have been excluded.[66] Any summaries of the *in camera* evidence issued by the Commission would have been subject to vetting by the Government, which could have again asserted National Security Confidentiality (NSC) claims that would have prevented portions of the information from being made available to the families and to the public. Counsel for the families would have been unable to cross-examine Government witnesses testifying about crucial issues. Given that most of the information the Government sought to redact was 15 to 20 years old and related to historical events with little connection to the present security context, this type of proceeding was not necessary, and would neither have led to meaningful participation by the families nor to the "appropriate participation" contemplated by the Terms of Reference.

Further, the Commission was mandated to inquire into and make recommendations about broad policy issues of interest to the public at large. The methods available to the law enforcement and security intelligence communities to combat terrorism and protect human life, as well as the limits placed on those methods as a result of policy decisions or deficiencies in the existing regime, are of interest to all members of the public. Under the circumstances, it was of the utmost importance that not only the families of the Air India victims, but all members of the public be provided with an opportunity to follow the proceedings of the Commission so that they might learn first hand about the evidence presented, and be able to assess the issues and form their own opinion about the facts, the deficiencies identified, if any, and the eventual recommendations meant to improve Canada's ability to prevent and prosecute acts of terrorism.

2.3.2 The Impact of NSC Claims

While in the end it was possible to achieve the goal of holding full public hearings, the NSC issues which had to be addressed throughout the proceedings nevertheless did have a serious impact on the process of this Inquiry. A great deal of time and considerable resources were expended dealing with NSC issues. These issues caused delay in the progress of the hearings, and were the major force behind a delay in the Commission's proceedings for most of the period between November 2006 and the end of April 2007. The NSC claims reconsideration process, which continued throughout the remaining months of Commission hearings, in some cases caused further delays and required adjustments in the hearings schedule to await documents becoming available with fewer redactions and in all cases consumed significant resources both

66 See *Reasons for Decision with Respect to the AIVFA's Request for Directions Regarding Access to Unredacted Documents and In Camera and Ex Parte Hearings* in Annex A of this Volume, which concluded that the Terms of Reference precluded the Commissioner from granting AIVFA counsel access to any *in camera* hearings and unredacted documents, and that, in any event, even if such access had been possible, counsel would have been precluded by law from sharing the information acquired with the families.

for the Commission and the Government legal teams. Those resources had to be diverted to reviewing NSC claims, even though many requests for new documents and information remained pending and much remained to be done to work through and prepare the substance of the evidence to be presented before the Commission.

Further, the final versions of documents often could not be made available to counsel for the Parties as far in advance of the hearings as would have been desirable. This was especially troubling with respect to the victims' families, given the express mandate in the Terms of Reference calling for their "meaningful participation."[67] Because of the time necessary to complete the redaction reconsideration process, the families frequently received the final redacted versions of the documents a few days before the hearings and sometimes only a few hours before. This required counsel for the families to attempt instantly to absorb an important amount of entirely new information. The challenge this represented must be recognized. Since most of the witnesses were present or former Government agents or employees and therefore would have been privy from the start to all of the information initially subject to redaction (as were counsel for the Government), the witnesses and Government counsel had much more opportunity to prepare in advance than did counsel for the families. To make matters worse, because the will say statements containing a description of the witnesses' anticipated evidence and lists of associated documents also had to be vetted for NSC purposes, counsel for the Parties also often did not have the benefit of this information as far in advance of the hearings as would have been desirable. The dedication of counsel for the Parties was of great assistance in overcoming these challenges wherever possible, and in ensuring the meaningful participation of the families in this Inquiry.

Under the circumstances, Commission counsel were called upon to conduct more searching examinations than would otherwise have been necessary to ensure that all relevant issues were explored. While this was, in some respects, different from the role normally assumed by Commission counsel in public inquiries, it was necessary in order to compensate for the challenges associated with the late disclosure of large volumes of documents and information. As indicated by Commissioner O'Connor in the Arar Report, the fact that Commission counsel may, in such circumstances, have to depart from their usual role need not result in their adopting an adversarial role or taking a prosecutorial stance, both of which would be contrary to their duty to lead evidence in an independent and fair manner.[68] In this Inquiry, the occasionally somewhat more active role of Commission counsel was, to the contrary, necessary to ensure that the evidence was presented fairly and completely. In this respect, the role of Commission counsel could best be described as "inquisitorial" rather than "adversarial" and reflects the status of the Commission as an Inquiry.

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67 P.C. 2006-293, para. (f).

68 *Arar Report*, pp. 292-293. In the Arar Commission, the circumstances required the actual cross-examination of witnesses by Commission counsel in the absence of counsel present to represent the interests of other parties.

2.3.3 The Nature of the Government's NSC Claims

Because of their impact on the process of this Inquiry, and because of the challenges they posed for non-government Parties, the nature and extent of the Government's initial NSC claims deserve comment. The extent of the Government's reconsideration of its own claims is helpful in understanding whether the unfortunate consequences of the original NSC claims on the process of the Inquiry could have been avoided. Essentially, a large number of documents that were entirely blacked out in the version initially provided to the Parties ended up being produced with few if any redactions.[69] In the Arar Report, Commissioner O'Connor described a phenomenon he referred to as "overclaiming", which involved the Government maintaining NSC claims over a great deal of information throughout the proceedings of the Commission and then conceding after the fact that the information in question could in fact be publicly disclosed.[70] Commissioner O'Connor explained that the Government engaged in a review of redactions and modified its position with respect to many of its initial NSC claims near the end of the public hearings, or after the hearings were completed. As a result, in the Arar Inquiry some of the information over which the Government initially claimed NSC was eventually disclosed without challenge, but not always in time for the evidence to be heard in public. Unfortunately, the term "overclaiming" also aptly describes the Government approach to NSC claims in the present Inquiry.

The differences between the various versions of redacted documents provided by the Government over the course of the Inquiry leave little doubt about the extent of the unnecessary NSC claims that were initially made. After reconsideration, the Government itself concluded that much of the redacted information could in fact be publicly disclosed without compromising national security.

The February 2007 redactions rendered many key documents meaningless and thus made the conduct of public hearings impossible at the time.[71] Yet, after the Government reconsidered its original redactions, it became possible to conduct all of the Commission's hearings in public, using the very documents that had originally been redacted beyond any potential use. This "overclaiming" continued throughout the Inquiry process. Redaction reconsideration requests continued to be necessary not only for the very first set of redacted documents provided by the Government prior to February 2007, but also for new documents redacted by the Government over the summer and into the fall of 2007 and beyond. Many of the documents provided after the conclusion of the hearings continued to be subject to wide initial NSC claims.

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69 See, for example, Exhibit P-101 CAC0403, re-entered as CAC0403(i) on May 3, 2007 and Exhibit P-101 CAB0073, re-entered as CAB0073(i) on June 18, 2007. The majority of the most striking examples are not referred to here as the very first versions produced by the Government were not entered into evidence in light of their lack of usefulness as a result of the extensive redactions.

70 See, generally, *Arar Report*, pp. 301-303.

71 See Opening statement by the Commissioner, Transcripts, vol. 15, February 19, 2007, pp. 1370-1371.

Since the reconsideration process continued after redacted versions of the documents were entered into evidence,[72] it is now possible to appreciate, at least to some extent, the nature and extent of the overclaiming of NSC by the Government. A few examples of the evolution of the redactions are instructive in this respect.

The Commission heard evidence about CSIS contacts with a person referred to as Ms. E, who eventually testified in the criminal trial of Ajaib Singh Bagri and Ripudaman Singh Malik. The CSIS agent who dealt with Ms. E, William Dean ("Willie") Laurie, had prepared reports about his conversations with Ms. E, where his position and that of his superiors on the issue of whether and when her information should be passed to the RCMP was discussed. Despite the fact that those issues went to the heart of the Commission's mandate and that Laurie had testified extensively in public proceedings before the Supreme Court of British Columbia in the Malik and Bagri trial about the content of the reports,[73] all comments respecting the passing of the information to the RCMP were redacted in full in the versions initially produced by the Government.[74] New versions of the documents had to be entered in evidence on October 15, 2007, after the Government reconsidered and eventually abandoned its NSC claims.[75]

The Commission also heard evidence about the security measures put in place by the RCMP at Pearson and Mirabel airports prior to the Air India bombing. One document contained a grid of the security measures corresponding to various security levels used in 1985. This document was initially produced to the Parties with its contents fully blacked out. These redactions were reconsidered by the Government and, in the end, the document was filed with no redactions at all.[76] Nevertheless, information from this document continues to be blacked out in full in another, identical document in the evidentiary collection.[77]

The Commission requested documents from Air India and Air Canada in connection with the aviation security evidence. Having reviewed the documents, Commission counsel provided copies to counsel for the Government. The Government took the position that information found in those documents, though not provided by the Government to the Commission, had to be redacted pursuant to the *Aeronautics Act*.[78] The Commission agreed to some of the proposed redactions out of an abundance of caution, but was again forced to request reconsideration of portions of the redactions made by the Government, including redaction of information about the 24-hour hold on cargo imposed by Transport Canada following the Air India bombing, which was clearly already

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72 Some of the documents contained in the Evidence Binders entered as Exhibit P-101 on May 1, 2007 had already been subject to the redaction reconsideration process, while others had not.
73 See Trial Transcripts: Exhibit P-244.
74 See Exhibit P-101 CAA0553, CAA0562, CAA0579.
75 Exhibit P-101 CAA0553(i), CAA0562(i), CAA0579(i).
76 See Exhibit P-101 CAA0025.
77 See Exhibit P-101 CAA0027.
78 R.S.C. 1985, c. A-2.

public. The Government finally agreed to lift some of its more egregious claims on the day before the documents were to be entered into evidence[79].

The Commission heard evidence from members of the Integrated Threat Assessment Center (ITAC), who testified about the threat assessments prepared by ITAC. In this context, it was learned that ITAC, where possible, produces unclassified versions of its threat assessments intended for broader circulation. However, the illustrative unclassified threat assessment which was initially provided to the Commission surprisingly emerged from the review process heavily redacted.[80] Another version, completely unredacted this time, was finally entered into evidence after the Government again reconsidered its position.[81]

In addition to these examples, it should be noted that counsel for the Government stated before the Commission on March 5, 2007 that, in response to the Commissioner's February 19th call for more information to be made available to the public, Government agencies not only began reviewing their own NSC claims, but also contacted the Vancouver Police Department and the Government of India to obtain permission to release information provided under caveats.[82] This permission was obtained in many cases, and a large number of the documents that were initially redacted in full were released in the public hearings.[83] The process would have been expedited for all involved if this authorization had been sought and obtained right from the start rather than having the documents initially provided in redacted form.

This apparently reflexive application of third party caveats, without requesting that the caveats be lifted, finds echoes in continuing CSIS practices that are discussed in Volume Three and that have been the subject of critical comment from the judiciary, notably in the *Khawaja* case.[84] In fact, the Attorney General of Canada argued in its Final Submissions to this Inquiry that "…constant requests to lift caveats would demonstrate that CSIS failed to appreciate their importance."[85] This proposition defies logic, as it would rather seem that requests to lift caveats demonstrate Canada's commitment to respecting caveats and to not using third party information without authorization. The fact that the Government, and CSIS in particular, continues to take this position means that in some cases, as was initially the case in this Inquiry, NSC claims are made with respect to third party information without even asking originators for permission to lift the caveat. In this Inquiry, the failure to take this most basic step contributed to

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79 Because the documents were not initially provided by the Government to the Commission, the Government further requested that the Commission physically redact the documents itself, causing further delay for the Parties who were waiting to receive disclosure of the materials.

80 Exhibit P-101 CAF0542.

81 Exhibit P-349.

82 Statement by Barney Brucker, Transcripts, vol. 16, March 5, 2007, pp. 1415-1416.

83 See, for example, the "June 1st Telex," authorized for release by the Government of India (Exhibit P-101 CAA0185) and the "Khurana report," authorized for release by the Vancouver Police Department (Exhibit P-101 CAC0487), which were both crucial documents in these proceedings that were initially redacted in full and later released with practically no redactions.

84 *Canada v. Khawaja*, 2007 FC 490, para 146.

85 Final Submissions of the Attorney General of Canada, Vol. I, para. 487.

slowing down and complicating the process unnecessarily, as well as making it more difficult for other Parties.

The Government's efforts to reconsider its initial NSC claims must be commended.[86] An impressive amount of time and effort was expended by Government officials in the redaction reconsideration process in order to make documents available to the public. Nevertheless, the extent of the reconsideration engaged in also shows that the negative impact on the Inquiry could have been avoided to a large extent if the Government had appropriately limited its initial NSC claims to what was truly necessary. While the consequences of Government overclaiming on the process of the present Inquiry were not as severe as in the Arar Commission (where Commissioner O'Connor indicated that NSC issues not only lengthened the process by approximately 50 per cent,[87] but prevented the Commission from actually hearing in public evidence which could have and should have been heard publicly[88]), the waste of public resources for the present Inquiry was not negligible.

Prior to the Arar Commission, there was no precedent for redacting documents for NSC concerns in the context of a public inquiry.[89] Commissioner O'Connor formulated his comments about NSC overclaiming in the hope that his experience could provide guidance in other cases. He indicated that:

> In legal and administrative proceedings, where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary.[90] [Emphasis added]

Unfortunately, Commissioner O'Connor's efforts in raising the issue for the future had little impact on the Government's approach to NSC claims in this Inquiry. It must be reiterated in the strongest terms that Government NSC claims should never be "an opening bargaining position."[91] There is no room for negotiation strategies in the realm of national security confidentiality, both because the legitimate interests that actually require protection are of the utmost importance and because the principles of public accountability and fairness require that such claims be limited from the outset to what is truly necessary to protect vital interests.

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86 See *Arar Report*, p. 303, where Commissioner O'Connor also recognized this.
87 *Arar Report*, pp. 279-280.
88 *Arar Report*, pp. 301-302.
89 *Arar Report*, p. 302.
90 *Arar Report*, p. 304.
91 *Arar Report*, p. 302.

A significant consequence of NSC overclaiming is that it "…promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality."[92] In many cases, there will be a legitimate Government interest in protecting the identity of informants, in preserving the integrity of ongoing national security investigations and in preserving the confidence of foreign governments who provide information vital to the protection of Canada's national security.[93] When seeking to protect such important interests, it may be understandable that some Government officials may choose "…to err on the side of caution in making NSC claims."[94] However, NSC overclaiming ultimately harms the very interests that national security confidentiality is meant to protect. The less seriously NSC claims are taken, the more breaches are likely to occur.

Further, overclaiming also promotes public suspicion and cynicism toward Government institutions in general. If a significant volume of NSC claims are shown to have been made unnecessarily, there is a risk that members of the public will conclude that the Government is attempting to hide embarrassing information, as opposed to protecting legitimate national interests, thereby undermining public confidence in our national security establishment. In his testimony before the Inquiry, former RCMP Commissioner Giuliano Zaccardelli commented on the tendency to overclassify information which he observed in federal agencies and on its impact on Government:

> **MR. FREIMAN:** […] There's been some reference in our hearings to a culture of secrecy that pervades Ottawa. Do you have any comment on that characterization?
>
> **MR. ZACCARDELLI:** I think it's an accurate characterization.
>
> **MR. FREIMAN:** Accurate or inaccurate?
>
> **MR. ZACCARDELLI:** Accurate. It's accurate. We over classify, we over-redact and then we ultimately get embarrassed by it being shown to not have been necessary so many times. I think it's just in the nature of the beast, and that happens all the time, and it happens continuously before every inquiry that seems to take place. We start from the position of we're not going to share, we're not going to show anything because we don't want to reveal anything and then, ultimately, we have to reveal, and we have to show, and the system gets embarrassed because of some obvious, you know, classifications that were clearly inappropriate and so on.

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92 *Arar Report*, p. 302.
93 See, generally, Opening statement by Barney Brucker, Transcripts, vol. 12, November 6, 2006, p. 1064.
94 *Arar Report*, p. 302.

> And I don't think there's any malice intended by anybody at all when they do this. They honestly believe this is what we have to do. But it's shown in the end that it doesn't work...[95]

The evidence heard before the Inquiry demonstrated that the culture of secrecy, the extensive use of caveats, the exaggerated reliance on the "need-to-know" principle and the over-claiming of national security confidentiality that occurred throughout the pre-bombing threat assessment process and through the Air India investigation itself have been a source of significant conflict among the agencies and a significant hindrance to the criminal prosecutions. This culture of secrecy may well have deprived important actors of crucial information that might have assisted in preventing or solving the Air India bombing. One of the fundamental questions posed by the Terms of Reference for this Inquiry is whether the Government agencies involved in the lead-up to and the aftermath of the bombing have learned the necessary lessons from their past mistakes. The continued overclaiming of NSC observed in the initial stages of this Inquiry, occurring as it did immediately after this very problem was identified in the Arar Inquiry and after the results of the problem could clearly be observed in the Air India case itself, is not encouraging. Nor is it encouraging that aggressive NSC claims continued throughout the hearings in this Inquiry, and even after the conclusion of the hearings. As well, it is not encouraging that Government had not initially requested the lifting of caveats by the originator before claiming NSC over a large portion of materials which could be released in the end, nor that Government nevertheless continues to take the position that requests to lift caveats need not always be made before NSC is claimed.

It must also be noted that, even with the reconsideration process, a number of the redactions that remain appear unnecessary for purposes of protecting national security though, to be sure, the endless hours spent negotiating the lifting of redactions of words and paragraphs, and turning specific references into more generalized ones, did result in most, if not all, of the key information being made available in some form to the public.

It can only be hoped that the Air India bombing and the experience of this Inquiry will encourage the Government to further refine its process for NSC claims to ensure that such claims are more effectively tailored and limited to what is truly necessary to protect Canada's national security.

2.3.4 Identification of Relevant Information

The collection of documents in preparation for the Inquiry posed serious challenges both for the Government and the Commission. In light of the variety and complexity of the subject matters to be inquired into, the number of government agencies and departments involved and the length of time elapsed since the events, it was extremely difficult to discover and isolate the

95 Testimony of Giuliano Zaccardelli, vol. 86, November 30, 2007, p. 11082.

documents relevant to the Inquiry's mandate. The document collection and redaction process was further complicated by the extensive negotiations with the Government relating to identification of relevant documents and information and by the resulting delays in obtaining the necessary materials.

In fairness to the Government officials involved, they faced an extremely challenging task. Many thousands of documents could potentially fall within the ambit of the Terms of Reference,[96] and a large number of those had to be reviewed for relevancy and thereafter for NSC. Under the circumstances, it is not surprising that the Government sought to obtain as much clarification as possible respecting the Commission's interests to assist in narrowing the search parameters to select the most appropriate documents. Government officials were willing to work with the Commission to find creative solutions to overcome the challenges arising from document selection and redaction processes. Helpful discussions with Commission counsel achieved a clearer identification of the most important documents. In some cases, access to government offices was provided and the Commission staff were allowed to review the available documents or databases in order to formulate more specific requests. Knowledgeable staff from the various government agencies was made available to assist the Commission in its review of government files.

However, frequent lengthy meetings and correspondence with counsel for the Attorney General of Canada (AGC) imposed large time and resource requirements, as the Government sought to obtain an increasing level of detail about the scope of Commission counsel's requests for documentary disclosure and about the precise redacted information sought to be reconsidered. Too often, those discussions became an occasion for the Government to argue its views about the relevance to the Inquiry's mandate of the information being requested or being sought to be made public. For example, when information was first requested about what would become known as "the Mr. A. story", which illustrated many of the issues at the heart of the Inquiry's mandate, Government counsel advised in December 2006 that this avenue of inquiry led nowhere and would only result in "…a tremendous waste of time and resources at the expense of matters germane to the Terms of Reference." In another case, a redaction request for extracts of a report respecting protective policing issues in the period immediately preceding the bombing was challenged as not being relevant to the Inquiry.

Such discussions were also common in the context of the NSC vetting process for will say statements, where Government counsel provided comments that addressed not only NSC issues, but also the actual content of the anticipated evidence, including arguments about the relevance, appropriate interpretation or fairness of the evidence which Commission counsel proposed to lead.[97] In some instances, Government counsel requested changes to the will say

96 See Statement by Barney Brucker, vol. 19, March 9, 2007, p. 1769.

97 Those types of comments were received on a regular basis during the "will says" vetting process, while actual NSC issues were seldom raised in that context.

statements that were contrary to what the witnesses had said in interviews, but fit better with Government counsel's view of what the witnesses meant or with their suggested interpretation of what was said.[98]

In addition, an unduly narrow view, not appropriate in the context of a public inquiry, was at times adopted by the Government in its interpretation of Commission requests and of the Government's obligations. In some cases, attempts were made to provide only as much of a response as was absolutely required, taking the narrowest view of the request. Equally disconcerting, Commission counsel were not always advised promptly when documents of interest were located by the Government prior to being specifically requested by the Commission. At times this tardiness simply constituted a minor annoyance. Thus, when discussions began between Government counsel and Commission counsel to create what would become the "November 1984 Plot Chronology", Government counsel used its own set of materials, not previously disclosed to the Commission, to prepare a proposed Agreed Statement and only provided those additional materials to the Commission some weeks later. On other occasions, the consequences were more serious and threatened unfairness to witnesses. Notably, during the cross-examination of Brian Simpson, Government counsel sought to rely on documents that had been identified from the civil litigation file, without providing prior notice of the specific documents upon which they would be relying.[99] Not only was Simpson cross-examined with a view to impugning his credibility on the basis of a description of documents that no one outside of Government and its counsel had previously seen, but the full documentary record turned out, in fact, to include a document that corroborated aspects of his testimony that were being challenged.[100] The Government has tried to explain away its reliance on these previously unseen documents, in part, on the basis that they were included in an RCMP database compiled for purposes of the Air India criminal trial that was made available to Commission counsel in the summer of 2006.[101] This collection consisted of tens of thousands of unindexed documents housed in a document management system that was different from the one the Department of Justice insisted be used by the Commission and that was capable of being searched in only the most rudimentary manner. The Commission does not accept that in effect inviting Commission counsel to sift through this unwieldy mountain of data constituted adequate production of relevant documents let alone effective notice of documents intended to be used to cross examine Simpson.

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98 This situation continued even after concern was expressed by Commission counsel to counsel for the Attorney General, in correspondence dated June 1, 2007.

99 See Remarks by Mark J. Freiman and Loretta Colton, Transcripts, vol. 32, May 23, 2007, pp. 3714-3715; Remarks by Tracey McCann and Anil Kapoor, Transcripts, vol. 33, May 24, 2007, pp. 3865-3869; and Volume Two: Part 1, Pre-Bombing, Section 1.9, Mr. Simpson's Visit to the Air India Aircraft. It should be noted that the civil litigation file contains over a hundred boxes and was only accessible to Commission counsel upon attendance at government premises.

100 See Volume Two: Part 1, Pre-Bombing, Section 1.9, Mr. Simpson's Visit to the Air India Aircraft.

101 Letter from Government counsel dated May 25, 2007.

Even after Commission counsel asked that all documents identified as relevant by Government counsel be provided immediately to the Commission,[102] and the Attorney General of Canada signaled its recognition that all relevant documents in the Government's possession should be disclosed,[103] there were still instances where the Commission received production of documents, or notice of their existence, weeks, and sometimes months, after its interest in presenting evidence respecting their subject matter was known to the Government.[104] In one particularly egregious case, full disclosure did not occur until many months after the close of hearings.[105]

In the end, the Government's attempts to tailor and narrow the Commission's requests further delayed the proceedings and put the Commission in a position where it was obliged to keep going back with additional requests in circumstances where it could not have had knowledge of the complete documentary record in the Government's possession. By slowing down the entire document collection and redaction process, such situations also contributed to increasing the challenges faced by counsel for the Parties who often received the redacted materials at the last minute. Given the requirement for openness, transparency and fairness in the Inquiry process, full documentary production should not be the subject of a game of "Twenty Questions."

The document collection and redaction process is not the appropriate forum to engage in discussions respecting the nature and extent of what information is or is not relevant, in the Government's view, to the Inquiry's mandate. Nor is the process of vetting of will-says to identify National Security Confidentiality (NSC) issues the appropriate forum to discuss the fairness of inferences taken from the evidence or the accuracy of a witness's evidence. Commission counsel are responsible for representing the public interest and for determining the relevant materials and evidence to be put before the inquiry in public hearings. It is crucial that an inquiry be and appear to be independent from the Government into whose actions it must inquire. As stated in the Arar Report, in order to fulfill "…this duty of independence and impartiality, an inquiry must be *thorough* and examine all relevant issues with care and exactitude, to leave no doubt that all questions raised by its mandate were answered and explored."[106] As a practical matter, this requires that the Commission be provided an opportunity to request and review Government documents and information independently in order

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102 Letter from Commission counsel to Government counsel dated May 24, 2007.

103 Letter from Government counsel dated May 25, 2007.

104 Examples include the receipt of documents respecting Tara Singh Hayer in late January 2008, when the Commission's interest in presenting evidence about the agencies' dealings with Mr. Hayer was known to the Government since the summer of 2007 and the last witness who testified on this issue was heard in early December 2007, as well as notification in February 2008 of the existence of a VPD report which could clarify aspects of the evidence of Detective Don McLean, who testified in the spring of 2007, and which was apparently located by the RCMP sometime prior to February 11, 2008, but was only provided to Commission counsel after the RCMP went directly to McLean with the report.

105 See Volume Two: Part 2, Post-Bombing, Section 5.7, The present Commission of Inquiry, under the subheading "Stonewalling", as well as the discussion in Section 2.3.7 of the RCMP's failure to disclose information about Mr. G.

106 *Arar Report*, p. 282 [Emphasis in original].

to make its own determinations about their relevance in a manner that does not delay or hinder the preliminary document collection and redaction process. Disputes and disagreements about Commission counsel's selection should take place in the public hearings, where all parties have an opportunity to present their positions subject to public scrutiny.

Similarly, the process used by the Government to present facts and provide information for the consideration of the Commission and of other Parties must be open and transparent. One incident raised concerns in this respect after the close of the hearings. The Attorney General of Canada's Final Submissions contained a substantial amount of new information regarding civil aviation security that had not been canvassed during the Commission's public hearings. As a result, the Commission requested briefings from Transport Canada, with a view to determining whether some or all of the new information should be reflected in the Commission's report.

In all, three briefings were held with Transport Canada officials to address the new information. These briefings related to current aviation security initiatives generally, and to air cargo security and risk management in particular. Commission counsel subsequently prepared summaries of these briefings with the ultimate objective of disclosing their content to the Parties for comment. Because the briefings had entailed discussion of classified and security sensitive information,[107] the briefing summaries were first provided to the Attorney General of Canada (acting on behalf of Transport Canada and other agencies) for redaction and fact-checking.

The manner in which the Government performed the redaction and fact-checking tasks was unsatisfactory.

When the Attorney General of Canada produced the redacted briefing summaries to the Commission, no mention was made of any factual errors identified in the documents. On its face, each document appeared to be a redacted version of the original: that is, a version identical to the original where any passages subject to NSC claims or claims based on the confidentiality that attaches to aviation security measures were simply blacked out. On this basis, the redacted, but otherwise apparently unaltered briefing summaries were disclosed to the Parties shortly after their receipt by the Commission. The Parties were entitled to assume, as had the Commission, that the final text was the result of agreement between the Commission and the Attorney General of Canada as to the substance of the briefings. But this was not the case.

Without any notice or comment, the Government had undertaken to edit the documents for content. Commission counsel did not notice this fact until after production to the Parties, because of the manner in which the changes were made.

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107 The security-sensitive information discussed at the briefings included aviation security measures made or authorized under sections 4.72 and 4.73 of the *Aeronautics Act*, R.S.C. 1985, c. A-2. Section 4.79 of the Act prohibits unauthorized disclosure of such measures.

It was only in the course of referring to one of the redacted documents that it was noticed that the text on one of its pages appeared oddly positioned. Commission counsel then undertook a detailed line-by-line comparison of the original text and the redacted versions. It was discovered at that point that all three briefing summaries had been substantially altered without the Commission's knowledge or approval. Extensive changes had been made to the original text, in some cases altering the meaning. In one instance, the text was changed so that it not only became an inaccurate reflection of what had been discussed at the briefing, but also constituted an inaccurate statement about a boarding denial under the Passenger Protect Program.[108] Entire portions of text had been added, deleted or modified without any markings to indicate that the documents had been so altered. Indeed, it appears that the Government went to considerable trouble to make the modified summaries look like the originals. Each of the documents had been retyped, using the same format and the same distinctive font as had been used by Commission counsel in the originals.

At one point prior to production, the Attorney General of Canada had made general mention of corrections to one of the documents due to alleged factual errors.[109] No specific details were offered. When the document was later produced as a final product, without any further mention of changes to the text or of concerns with its factual content, this created the false impression that the only changes to the document were the redactions themselves. It was not until the Commission conducted its own detailed analysis and subsequently raised the issue of the unidentified changes, that the AGC then itemized the specific alterations.

The Attorney General of Canada offered a number of reasons why changes to the text were deemed necessary, including disagreements as to factual accuracy, changes to the classification of material discussed at the briefings, changes to the status of aviation security initiatives and even stylistic preferences. However, this cannot explain or justify the lack of notification of the proposed changes. The AGC was free to point out any substantive disagreements it might have had with the contents of the briefing summaries, as it had been invited to do, but the Government was under an onus to clearly articulate the ways in which it wished to alter the documents. As the Attorney General of Canada conceded in subsequent correspondence with the Commission: "…it would have been preferable if delivery of the versions of the briefing summaries had highlighted

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108 At a briefing on May 14, 2008, Commission counsel requested an update on denials of boarding privileges under the Passenger Protect Program. Transport Canada officials replied that there had been no denials of boarding privileges as of that date. An "action box" indicated that Transport Canada had undertaken to inform Commission counsel should any boarding denial take place in the coming months. This information was reflected at page 11 of the briefing summary prepared by the Commission and submitted to the Government for redaction and fact-checking. In the version of the briefing summary that the Government authorized for release to the parties, the relevant portion of the text was changed to indicate that there had been one boarding denial. In fact, a denial of boarding privileges had not occurred until June 2008 – weeks after the briefing took place. The "action box" was completely removed from the text.

109 The document in question was the May 14, 2008 briefing summary.

or otherwise identified changes or deletions made or that correspondence accompanying delivery had indicated that such changes had been made."[110]

The Commission is prepared to accept the Attorney General of Canada's subsequent assurances that there was no intention to mislead or to frustrate the Commission, but it remains troubling that anyone would have thought it open to the Government to attempt to rewrite Commission documents, let alone that such "corrections" would be undertaken without any mention of the alterations.

2.3.5 Resource Issues

Responding to this Inquiry required a significant investment of time and resources for the Government.[111] Documents had to be constantly reviewed for purposes of redaction and reconsideration of NSC claims, which required input from numerous agencies. Meanwhile, new and pending requests for additional information and documents had to be addressed, and this required Government agencies to identify relevant materials among large collections of documents covering activities ranging over 22 years, some of which were not easily retrievable.[112] Requests relevant to other more policy-oriented Terms of Reference, such as terrorist financing, also had to be processed. In addition, witness interviews had to be arranged and attended, and draft will say statements had to be reviewed for NSC purposes.

In spite of the industrious effort of the Government officials involved, the resources at their disposal were apparently insufficient to enable them to meet the Commission's requests in a timely fashion. Documents were often disclosed or redacted late. Examples include a delay of approximately nine weeks between November 2006 and late January 2007 to obtain a response to a request for information and documents from CSIS, and a delay of almost three full months to obtain a first response to a redaction request for documents relating to the Mr. A story, following which extensive negotiations were necessary to produce an Agreed Statement in lieu of the documents.

In addition to the challenges caused by the delay in calling the public inquiry, which resulted in the accumulation of an unmanageable volume of documents and information, the Commission faced serious obstacles to proceeding efficiently and expeditiously, and counsel for the Parties, in particular the victims' families, had to face additional challenges associated with late disclosure resulting from the lack of sufficient resources available to the Government officials in charge of responding to the Inquiry. This resource insufficiency also contributed to increasing the cost of the present Inquiry to the public by making the overall process lengthier and more complex and plaguing it with protracted and unnecessary discussions about the relevance or appropriateness of the

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110 Letter from Government counsel to Commission counsel dated February 13, 2009.

111 For an outline of the various tasks which had to be performed, see Statement by Barney Brucker, Transcripts, vol. 19, March 9, 2007, pp. 1768-1769.

112 Statement by Barney Brucker, Transcripts, vol. 19, March 9, 2007, p. 1768.

Commission's requests, discussions which were in some cases openly driven by the fact that it was simply not possible to mobilize sufficient resources to respond to some of the requests formulated by Commission counsel.[113]

Further, not all Commission requests were processed by the Government prior to the end of the hearings, or in some cases, for months thereafter. As of mid-January 2008, numerous Commission disclosure and redaction requests still remained unanswered, including requests dated July 2007 and October 2007. Not until late March 2008 did those requests finally receive a response. The Commission continued to issue requests in light of its ongoing review of new and existing documents, and responses continued to be provided in a less than timely manner. The last installment of redacted documents was received by the Commission on February 18, 2009, in response to requests made in September and October 2008. It was not until March 2009 that the Government provided a response to another request, outstanding since October 2007, after considerable resources were expended in unnecessary debates over production.

In October 2007, the Commission had requested that a 1985 Transport Canada security audit of Vancouver, Pearson, and Mirabel international airports, conducted immediately after the bombings, be made public. The Attorney General of Canada responded that, because of the limited resources available for the redaction process, consideration of the Commission's request would have to be delayed until November or December 2007. By January 2008, the document had still not been produced and no response had been received from the AGC. Commission counsel followed up on the request, only to be told that Transport Canada now took the position that the document would not be released on the basis of a claim of solicitor-client privilege. It was Commission counsel's view that the audit revealed important details of the inadequate security at some of Canada's largest airports in the spring of 1985, and hence that the production of its contents was important for the Commission's mandate. Although Commission counsel saw no basis for the claim of privilege, in an attempt to reach a compromise, a proposal was made to the Attorney General of Canada in March 2008 that a summary of the document be entered as an agreed statement of fact.

Commission counsel followed up to enquire about the proposal, but no response was received from the Attorney General of Canada until October 31, 2008. At that point, the AGC proposed that the Government would draft its own summary, to be provided within one week. By January 2009, the Government had still not provided any draft summary. Commission counsel again followed up on its request for the public disclosure of either the document itself or a

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113 Government counsel took issue with some of the Commission's requests because of the amount of material which would have to be reviewed. For example, the Government indicated in July 2007 that one request could not be responded to because the RCMP did not catalogue documents according to subject matter and a review of the entire database would be necessary to respond to the request, which could not be accomplished prior to the completion of the hearings. In another case, the large number of CSIS files involved was invoked to refuse to respond to a Commission request, and the Government subsequently indicated that the Commission's attempts to narrow the request were still not helpful practically in assisting to narrow the scope of the search that would have to be done.

mutually acceptable summary. The AGC's response came in February 2009, at which time it indicated that Transport Canada's position had again shifted. Transport Canada was now reluctant to release any summary of the document, as it was now unwilling to waive any portion of the claim of alleged privilege regarding the contents. Following fruitless discussions about the merits of the privilege claim, Commission counsel made one final attempt at compromise by submitting a list of specific extracts from the report that would be disclosed to the public. Transport Canada officials reviewed the extracts and, in March 2009, the Attorney General of Canada conveyed Transport Canada's refusal to authorize the release of any information. Commission counsel responded by informing the Attorney General of Canada that the audit report would be produced to the Parties by way of disclosure forthwith, and that the Government would have to formally assert any objections it intended to raise on the basis of alleged privilege through available legal means.

Immediately thereafter, the Attorney General of Canada informed Commission counsel that the Government would not be asserting any claim of privilege in connection with the audit report. Almost a year and a half after the original request, the Government agreed to the release of the audit report in its entirety, with no redactions.

Counsel for the victims' families were able in March 2009 to provide very helpful written submissions to the Commission regarding this and other tardily disclosed documents, and these submissions were then published on the Commission's website. However, the fact remains that because of the time the Government took to respond to the Commission's request, and to come to a final position about its privilege claim, a key document, that could have been made public prior to the close of the hearings, was not available at a time and in a manner that would have allowed the issues it raised to be dealt with in public hearings.

2.3.6 Representation of Government Agencies

The Attorney General of Canada asked for and was granted Party Standing to act on behalf of the Government of Canada and all affected Government departments and agencies.[114] The Government chose to have only one set of counsel represent all potentially affected departments and agencies, as well as the Government itself.[115]

This means that, as a practical matter, the Attorney General of Canada acted for and attempted to represent the interests of the following:

(a) the Government that called the Inquiry and that asked for the answers to seven mandate questions in the Terms of Reference, mainly touching on the effectiveness of past and/or current practices by government agencies;

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114 *Ruling on Standing*, August 9, 2006 in Annex A of this Volume.
115 *Ruling on Standing*, August 9, 2006, p. 4 in Annex A of this Volume.

(b) the government agencies whose past and present actions and practices were put in question by the Terms of Reference in circumstances where historically there had been differences and disagreements among these agencies in connection with those activities and practices;

(c) present and past individual employees of the Government and its various agencies who had historically participated in the events and activities that are invoked in the Terms of Reference, in circumstances where some had in the past been critical of Government actions or of other agencies;

(d) individual present and past employees of Government and its various agencies who qualify as experts able to provide opinions on activities and practices referred to in the Terms of Reference;

(e) the Minister of Justice, who is responsible for the conduct of the justice system in response to the unique challenge of terrorism prosecutions as referred to in the Terms of Reference;

(f) the Attorney General of Canada as Chief Law Officer of the Crown, whose constitutional duty it is to see to it that the affairs of Government are conducted in accordance with the law and the Constitution of Canada.

In explaining the decision to have all these interests represented by the same set of counsel, counsel for the Attorney General of Canada stated that the Government of Canada would "…attempt to speak with one voice" at this Inquiry, and that it had taken into account the possibility of conflicts.[116]

As a matter of principle, the intricate balancing act that would be necessary to be all things to all these people seems unlikely to be capable of meeting with any measurable success. In practice, such forebodings were amply borne out by the consequences of this unified representation at this Inquiry

It was a foreseeable result of this approach, as had been the case in the Arar Inquiry, that "…when departments or agencies had differences in positions, those differences were not explored by Government counsel."[117] Further, since the vast majority of past and present Government employees who testified before the Inquiry were represented by Government counsel, interagency differences were also not explored by counsel for Government witnesses.

A large portion of the evidence heard in this Inquiry, especially that relating to the investigation that followed the bombing, related to difficulties in interagency

116 Submissions by Barney Brucker, Transcripts, July 18, 2006, p. 3.

117 *Arar Report*, p. 291. The same approach had been adopted by the Government in its response to the Arar Commission.

cooperation, in particular between the RCMP and CSIS. Evidence of significant disputes and disagreements between CSIS and the RCMP in the course of the Air India investigation was heard, and the facts surrounding these events were examined in detail. It was clear from some of the testimony heard and mostly from the documentary record, that these two agencies had, at least in the past, taken markedly different and diverging positions with respect to the significance of the issues at stake and the very facts surrounding the disputes.[118] Given the clear differences of views between CSIS and the RCMP, the Commission would have benefited from having the evidence presented by witnesses from one agency tested by counsel representing the other agency. While the evidence in this Inquiry was heard in public, and Parties with interests different from those of the Government agencies were present,[119] the agencies would no doubt have been in the best position to vigorously test and challenge some of the evidence related to matters in which they were directly involved and of which they had first-hand knowledge. That was obviously not the approach taken on behalf of Government at this Inquiry.

Commission counsel were able to explore some of the interagency differences, but were limited because of their duty to lead evidence in an independent and even-handed manner.[120] While Commission counsel did find it necessary at times to take a more active role as a result of the challenges associated with the redaction reconsideration process, and in light of the unified representation of all government agencies, they could not advocate vigorously for the position of one particular agency in order to test and contradict the claims of another agency, and they should not have been expected to perform this function.

Although public inquiries are not "…strictly speaking, an adversarial process", in general, the Commissioner "…has the advantage of hearing evidence tested through cross-examination by those with competing points of view."[121] Having parties with divergent and opposing interests testing the evidence and making representations before the Inquiry about the interpretation of documents and testimony allows the Commission to benefit from a broad range of views before coming to its own conclusions based on the evidence. Because of the Government decision to "speak with one voice", vigorous testing of the evidence respecting interagency conflicts was made more difficult and the evidence was much less revealing.[122]

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118 See Volume Two: Part 2, Post-Bombing, Chapter V, The Overall Government Response to the Air India Bombing.

119 In the Arar Inquiry, Commission counsel had to be instructed to cross-examine Government witnesses in order to ensure that their evidence could be tested, since much of their evidence was heard *in camera*, with no parties with interests different from the Government's interests present or represented and with one team of counsel representing all Government agencies: *Arar Report*, p. 291.

120 *Arar Report*, p. 292.

121 *Arar Report*, p. 292.

122 It is not for this Commission to pronounce on the existence of a conflict of interest between the agencies which would have made representation by the same counsel impossible. That is a matter properly addressed by the agencies and the Government within the confines of the solicitor-client relationship. The present comments are meant only to address the impact on the Inquiry process of the Government decision to have all agencies represented by the same counsel.

Further, also because of the Government decision to speak with one voice, the Commission was not presented with a clear statement of the agencies' official positions about contentious issues. At times this unified representation had an impact on the Commission's ability to evaluate factual issues. To take one clear example, in the past CSIS had alleged that the RCMP had used its information without authorization in an application to intercept private communications in connection with the Air India investigation,[123] even though in the application the RCMP claimed that such authorization had been granted by CSIS.[124] Though conflicting evidence was heard about this issue, the Final Submissions of the Attorney General of Canada provide no indication of the current position of the agencies. In fact, it is even difficult to ascertain the Government's ultimate position on this issue, as conflicting statements are made in different sections of the submissions.[125] As a result, the Commission has not been advised whether the conflict between the RCMP and CSIS positions has now been resolved and, if so, how.

More importantly, the Government's position about issues central to the Commission's mandate, such as interagency cooperation and the use of security intelligence as evidence, remains unclear, again because of the contradictory statements made in the Final Submissions. On the one hand, the Attorney General of Canada points out that current cooperative efforts by CSIS and the RCMP will not resolve the legal difficulties associated with the use of intelligence as evidence, clearly implying that change is necessary to improve interagency cooperation.[126] On the other hand, the Attorney General of Canada argues that neither disclosure law nor the *Canada Evidence Act* provisions providing for the protection of sensitive information should be modified in any way.[127] If it is the case that government agencies have different positions on those issues because of their different roles and expertise, it would have been helpful for the Commission to receive clear statements and explanations of the agencies' positions, rather than being presented with contradictory submissions on behalf of the Government as a whole.

It should also be noted that the general message contained in the Attorney General of Canada's submissions on the policy issues raised by the Terms of Reference appears to be that the *status quo* has successfully met all of the relevant policy challenges, that no changes are advisable or that any changes

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123 Exhibit P-101 CAA0609, p. 17, where CSIS indicates they have "no record" of being told in advance by the RCMP when their information was used in a September 1985 affidavit.

124 Exhibit P-101 CAA0324(i), para. 49.

125 On the one hand, the Attorney General points out that "…whether due to a miscommunication or not, [RCMP] officers understood they had permission from Joe Wickie [a CSIS employee] to use the CSIS material in the Affidavit" [Final Submissions of the Attorney General of Canada, Vol. I, p. 132, fn 398], and on the other hand, the Attorney General indicates that CSIS Headquarters had not authorized the use of its information in the affidavit and that "…it is possible that [CSIS] BC Region had indicated a willingness to obtain permission from [CSIS] HQ on behalf of the RCMP" [Final Submissions of the Attorney General of Canada, Vol. I, para. 368]. The Government does not specify whether it takes the position that there was, in fact, a miscommunication, nor discuss whose understanding was correct.

126 See Final Submissions of the Attorney General of Canada, Vol. I, paras. 449-452.

127 See Final Submissions of the Attorney General of Canada, Vol. III, paras. 101-113.

would be premature, except for a limited number of witness protection issues.[128] This position is difficult to square with the Attorney General of Canada's role as representing the Government that called the Inquiry with the ostensible purpose of soliciting advice on addressing what it considered to be difficult but pressing policy challenges. It is somewhat surprising in that context to be told by the Government's lawyers that there is little if anything that can or should be changed.

This raises an additional important issue: what exactly is being referred to as the "Government" that is attempting to speak with one voice? The Commission is obviously not entitled to go behind issues of representation by counsel and for that reason in this chapter references to "Government" are intended to designate the originator of the instructions acted on in the context of this Inquiry by the Attorney General of Canada through its lawyers. Based on the experience of the Commission, this "Government" in fact consists of the accumulation of positions and institutional interests of the departments and agencies that played or continue to play a role in the Air India narrative. The inability of this "Government" to speak consistently, or at times at all, when these institutional interests diverge suggests that there is no single directing mind speaking on behalf of what most people would understand as the "Government." In this respect, the situation resembles that described in Volume Three, where Canada's anti-terrorism response appears to consist of the sum of the efforts of individual departments, agencies and institutions, each of which largely continues to operate "independently" (which often means within its own silo) and without overall direction.

There certainly did not appear to be any overall direction or "whole of Government" perspective in Final Submissions on behalf of the Government that suggested to the Commission that had been created by the Government to advise it about necessary changes to practice and procedure or to the operation of institutions, that no changes were needed to the legal and procedural *status quo*. Nor did there seem to be much coherence between the request of the Government that constituted the Commission to advise it of possible shortcomings in the behaviour of departments and agencies in both the pre-bombing and post-bombing eras, and the positions adopted at this Inquiry by the Attorney General of Canada on behalf of the Government which involved a systematic and consistent denial of any mistakes or deficiencies on the part of the Government agencies involved.[129] It will also not escape the notice of the reader that there is an added ironic dissonance between, on the one hand, the suggestions in the Attorney General of Canada's submissions that the Commission should avoid assigning blame and reevaluating past decisions in detail with the benefit of hindsight[130] but should rather concentrate on its

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128 Final Submissions of the Attorney General of Canada, Vol. III, paras. 81, 100, 101-113, 115, 176, 197, 207, 244-245.

129 See Volume Two: Part 2, Post-Bombing, Chapter V, The Overall Government Response to the Air India Bombing.

130 Final Submissions of the Attorney General of Canada, Vol. I, paras. 18-19; Opening remarks by Barney Brucker, Transcripts, vol. 15, February 19, 2007, p. 1386.

mandate to provide "forward looking recommendations" to avoid problems in the future,[131] and, on the other hand, the submission of the Attorney General of Canada that nothing at this present time is in need of change.

It is also worth noting that where the Report, and especially this chapter, refers to the "Attorney General of Canada", the intended denotation is the entity that carries out the instructions formulated by the "Government" that is trying to speak with one voice. It is not intended to refer to one individual, but rather to an institutional function. Any comments about the "Attorney General of Canada" or its submissions are not intended to reflect on the personal conduct, ethics or integrity of the individual lawyers in the Department of Justice through whom the Attorney General of Canada provided legal representation in the proceedings of this Inquiry. To the contrary, it must be emphasized that these individuals conducted themselves throughout with admirable integrity and professionalism in often stressful circumstances as they did their best to discharge what to the Commission appears to be an almost impossible assignment given the disparate interests of their "unified" client.

There is no doubt that agencies, no less than individuals, are entitled to representation by counsel who will present their actions and represent their interests in their best light. Where one set of counsel is appointed to do this for a variety of agencies with historically divergent perspectives and understandings, the task becomes unmanageable and risks trivializing the real differences that separate the agencies and compromising the benefits that might be expected from the separate representation of competing viewpoints.

2.3.7 Ongoing Investigations

The criminal investigation into the bombing of Air India Flight 182 continues to this day. As a result, the Commission had to ensure that no information would be made public in the process of the Inquiry that could in any way jeopardize the ongoing investigation. While the families had been waiting too long to receive answers and the Commission therefore had to do everything possible to provide those answers, the families and the Canadian public also have an interest in seeing those responsible for the Air India bombing finally brought to justice. The Terms of Reference recognized this through a requirement that the Inquiry be conducted in a manner that did not jeopardize ongoing criminal investigations or proceedings.[132]

It was inevitable that in the course of the document collection and witness interview process, some information would be learned that might potentially have an impact on the ongoing criminal investigation. Commission counsel were instructed to exercise the utmost care in this respect, and to ensure that the ongoing investigation would not be jeopardized as a result of any new information made public in the context of the Inquiry. It was also important

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131 Final Submissions by the Attorney General of Canada, Vol. I, paras. 1, 20, 248; Opening remarks by Barney Brucker, Transcripts, vol. 15, February 19, 2007, p. 1386.

132 P.C. 2006-293, para. (q).

that information that may have otherwise already been public not be used in a manner that could jeopardize the ongoing investigation. Commission counsel worked with Government counsel to find creative solutions to allow for the information necessary to fulfill the Commission's mandate to be made public without revealing information that could, if disclosed, negatively affect the investigation. In some cases, where focusing on certain episodes or events might arguably have risked interfering with the investigation, it was possible to lead evidence about different episodes to illustrate the same issues. At other times, it was possible to remove some sensitive details and identifying information, or otherwise generalize information, whether already in the public domain or not, in such a way that the relevant point was made without disclosing details or linkages in a manner that might have a negative effect on the investigation. As a result, the challenges associated with the parallel existence of an ongoing criminal investigation and a public inquiry were, in the end, capable of being overcome.

Nevertheless, one area of concern did arise when it was learned that on several occasions, specific aspects that the Government or its agencies characterized as part of the ongoing investigation only began to be actively pursued *after* Commission counsel made inquiries on the subject. Another serious concern arose when additional redactions were sought on the basis of what was described as a risk of jeopardizing a new investigative avenue that had just been opened when an important individual, Mr. G, contacted the RCMP to offer cooperation. In fact, Mr. G had contacted the RCMP to indicate that he wanted to testify at this Inquiry. The RCMP began discussions with him and asked him to postpone his plans to make direct contact with the Inquiry. Instead of advising the Commission that Mr. G wanted to testify, the RCMP invoked his offer of cooperation to attempt to shield information from public disclosure.[133]

However, bringing those responsible for the bombing to justice must always remain a priority, and every possible avenue of investigation should be explored, regardless of the timing or the reasons for the initial probing. Thus, the Commission continued to adopt the same general approach of avoiding the release of any information that might compromise the investigation, no matter when – or why – any specific aspect of the investigation commenced.[134]

While the imperative not to interfere with any aspect that the RCMP identified as part of the ongoing investigation inevitably leaves some loose ends and unexplored possibilities, on the whole it was possible to obtain and make public the information necessary to fulfill this Inquiry's mandate without jeopardizing the investigation. Where this was not possible, other information was found to illustrate the same themes and issues. At all times, the Commission attempted to remain mindful that its role was to address seven specific historical and policy issues, not to "solve" the bombing of Air India Flight 182.

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133 See Volume Two: Part 2, Post-Bombing, Chapter V, The Overall Government Response to the Air India Bombing.

134 The Commission did not attempt to discover whether Commission counsel's inquiries had any impact on the decisions to begin to pursue certain aspects of the investigation at particular times.

2.3.8 Witness Interviews

To ensure that potential Government witnesses would be as candid as possible in interviews with Commission counsel, it was agreed that the interviews would remain "off the record" and confidential. It was therefore understood that the statements made by the witnesses during those interviews would not be put to them during their testimony in the hearings and that those statements would not be revealed to third parties by Commission counsel. It was felt that this approach would be conducive to making as much information as possible available to Commission counsel. Understandably, some potential witnesses would feel more comfortable in private and could freely express some personal views or share anecdotal information respecting personal interactions which they would not feel comfortable revealing in public hearings. The airing of such information and opinions in public might not have been strictly necessary to fulfill the Commission's mandate. Nonetheless, it was felt that this added context would better position Commission counsel to evaluate the evidence that did need to be called and to understand the significance of the information contained in the documents collected.

Overall, this approach was successful in making more information and context available to Commission counsel. However, in some cases, Government witnesses not only avoided repeating the opinions previously expressed in interviews, but actually presented contrary and incompatible opinions or positions while testifying in the public hearings. Because of the initial agreement with Government, Commission counsel were prevented from exploring the reasons for the change of views on the witnesses' part or from probing further into possible differences between the institutional positions of the Government or its agencies and the opinion of individuals working within those institutions. This raised particularly serious concerns in connection with the evidence relating to the current regime for national security investigations and to the current level of interagency cooperation. Documentary or other evidence that might provide additional information or background was not generally available with respect to those matters, in light of the risk of compromising ongoing investigations or operations. As a result, the contradictions between opinions expressed in interviews and in public hearings, and the apparent incompatibility between institutional positions and personal views, remained largely incapable of exploration.

None of the statements made by witnesses in interviews have been used as the basis for any of the conclusions or recommendations in the Report, and the content of these statements will remain confidential. However, since the initial agreement with Government was not meant to allow witnesses to present different and incompatible versions of events without explanation, the advice of Commission counsel respecting blatant incompatibilities between the interview statements and the public evidence was considered relevant to

the assessment of the degree of reliance that could be placed on the evidence respecting certain matters.[135]

2.4 Conclusion

In the end, it was possible to fulfill the mandate of the Commission and to inquire into all of the matters set out in the Terms of Reference. It did prove possible to conduct the Inquiry in accordance with the principles of thoroughness, fairness and independence, as well as in accordance with the fundamental principles of openness and transparency. However, as a result of the factors discussed above, the process was not always as expeditious as initially had been hoped.

All those who were involved in the Inquiry faced significant challenges and all, including Commission counsel, at times made errors in their sincere but unrealistic attempt to meet ambitious deadlines that were intended to give the public, and especially the families, the timely answers they deserved. The procedural challenges encountered in the Inquiry often – but not always – resulted from positions taken by the Government agencies involved, especially with respect to NSC claims. This by no means implies any bad faith or misconduct on the part of the Government counsel who appeared before this Inquiry. On the contrary, Government counsel acted honourably and seemed to attempt to the best of their abilities to carry out their instructions in a manner that recognized their ethical and professional obligations. Wherever responsibility for some of the problems outlined in this chapter might lie, it should not be laid at the feet of the diligent individuals who consistently strove to represent their clients as well as was possible under extremely difficult circumstances.

Despite the difficulties and setbacks, the most important objectives of the Commission were accomplished with the cooperation of all Parties and counsel involved. In the end, it was possible to hold the Inquiry hearings in public and to provide answers that can at last be openly shared with the families and with the Canadian public.

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135 The Government, having been made aware of concerns about specific contradictions between witness interviews and certain portions of the evidence presented before the Inquiry, nevertheless chose to rely on such "contradicted" evidence in its final submissions in at least one instance.