COMMISSION OF INQUIRY
INTO THE INVESTIGATION OF THE
BOMBING OF AIR INDIA
FLIGHT 182

FINAL SUBMISSIONS OF THE INTERVENOR,

B'NAI BRITH CANADA

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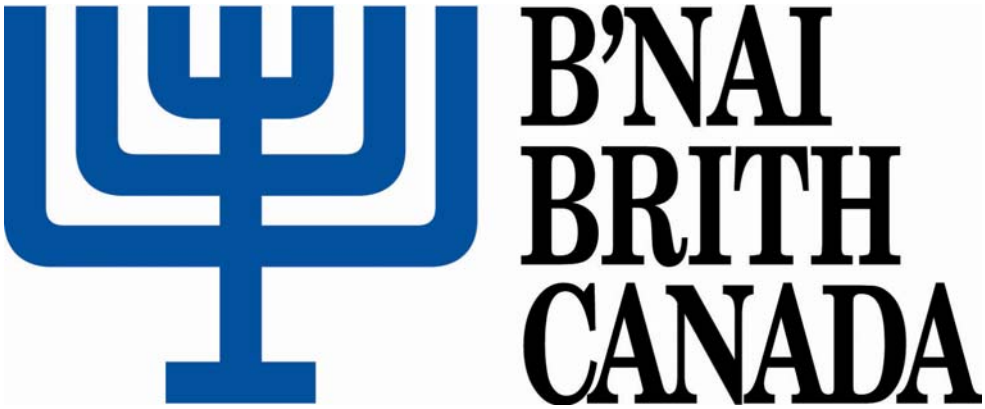

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I. INTRODUCTION

(a) A Canadian Tragedy

1. On June 23, 1985, a suitcase bomb planted by terrorists exploded aboard Air India Flight 182 en route from Toronto and Montreal to London, England and New Delhi, killing all 329 men, women and children aboard. An hour later, another suitcase bomb carried by Canadian Pacific Flight 003 exploded as it was being transferred to Air India Flight 301 at Narita Airport in Tokyo, Japan, killing two baggage handlers and injuring four others.[1]

2. Today, the Air India bombing remains the deadliest case of terrorism in Canadian history. Until September 11, 2001, it was the deadliest case of airline terrorism in world history.

3. The Air India bombing was unlike the major cases of aviation terrorism up to that point, such as the 1970 "Hijiack Sunday" perpetrated by the Popular Front for the Liberation of Palestine. The Air India bombing was distinctly "Canadian". The terrorists plotted and launched their attack from Canada. The flights targeted by the terrorists originated in Canada. The luggage containing the bombs was processed through Canadian airports. And the vast majority of the victims were citizens of Canada. As Bob Rae pointed out in his report, *Lessons to be Learned*:

> Let it be said clearly: the bombing of the Air India flight was the result of a conspiracy conceived, planned, and executed in Canada. Most of its victims were Canadians. This is a Canadian catastrophe, whose dimension and meaning must be understood by all Canadians.[2]

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[1] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *The Families Remember, Phase I Report* (Ottawa: Public Works and Government Services Canada, 2008), online: http://www.majorcomm.ca/en/reports/phase1/phase1report.pdf at p. 1 ("*Families Remember*"); *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), online: http://www.publicsafety.gc.ca/prg/ns/airs/_fl/rep1-en.pdf at p. 1 ("Rae Report").

[2] Rae Report at p. 2.

4. Despite the distinctly Canadian character of this tragedy, the Air India bombing was not understood by Canadians as "Canadian". As this Commission determined in its Part 1 report, *The Families Remember*:

> Canada and Canadians in general did not immediately recognize it as a terrorist attack against Canadians. That acceptance was long in coming. Indeed, the first public appearance by a Canadian prime minister at the memorial service in Ireland did not occur until 2005.[3]

5. Indeed, it was only after the events of September 11, 2001 – over 15 years after the Air India bombing – that the Government of Canada passed the *Anti-Terrorism Act*.[4]

6. In their remarkable and poignant testimony before this Commission, family members of the victims doubted whether even today the Air India bombing is accorded its proper significance in Canadian history.[5] They also questioned whether the ethnicity of the victims played any role in what many saw as the sub-standard response of the Canadian government to bombing or the ambiguous place of the bombing in Canadian national memory.[6] The Commission shared this concern:

> A question that lingers among the families and other Canadians is *If Air India Flight 182 had been an Air Canada flight with all fair-skinned Canadians, would the government response had been different?*[7]
>
> [Commissioner Major to Bob Rae:] What you describe as a reaction among the families is one that is hard not to share with them; that is the fact that if it had been an Air Canada plane, and Anglo-Saxons, things would have been different.[8]

7. The Intervenor, B'nai Brith Canada ("B'nai Brith"), shares this concern.

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[3] Families Remember at p. 2.
[4] *Anti-Terrorism Act*, S.C. 2001, c. 41 (the "ATA").
[5] See, for example the Statement of Susheel Gupta (Transcript: September 26, 2006) at p. 226.
[6] See, for example the Statement of Deepak Khandelwal (Transcript: September 25, 2006) at p. 91.
[7] Families Remember at pp. 3-4.
[8] Statement of Bob Rae (Transcript: October 4, 2006) at p. 561.

8. Canada's failure to take the appropriate lessons from the Air India bombing and adequately address the issue of terrorism, which has since become the scourge of the 21st Century, makes this Commission's forthcoming report to the Government of Canada so important.

(b) B'nai Brith Canada

9. Founded in 1875, B'nai Brith is a human rights organization anchored in the Canadian Jewish community. Through its constituent agencies, the Institute for International Affairs and League for Human Rights, its mandate is to protest the abuse of human rights, confront hate and hate speech against minorities and advocate on behalf of communities in distress at home and abroad. Its mission is the promotion of human rights broadly, informed by the experience of the Jewish community.[9]

10. Unfortunately, the Canadian Jewish community knows all too well the dangers, distress and anguish caused by international terrorism. For decades, Jews in multiple countries have been targeted by terrorists. In Canada, the Jewish community and its institutions, including B'nai Brith, have been targets for incitement to hatred and terrorism. Bomb threats against Jewish schools in Canada are commonplace.[10] Trained in an Al Qaeda terrorist training camp in Afghanistan, Ahmed Rassam, convicted for attempting to blow up Los Angeles International Airport, further confessed to targeting "a neighborhood in Canada where there was an Israeli interest."[11] On May 17, 2004, United Talmud Torah day school in Montreal was actually firebombed.

11. Given the Jewish community's position as a target community for terrorism, in Canada and abroad, counter-terrorism law and policy has been and continues to be one of B'nai Brith's key policy concerns.

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[9] Exhibit P-91, B'nai Brith Canada, *A Review of Canada's Anti-Terrorism Act*, Presentation to the House of Commons Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, and to The Senate of Canada Special Committee on the Anti-Terrorism Act (Toronto: September 2005) at p. 1 ("B'nai Brith Parliamentary Submissions").
[10] Affidavit of Anita Bromberg, Sworn July 7, 2006 at paras. 11-13.
[11] B'nai Brith Parliamentary Submissions at p. 2.

12. Another priority of B'nai Brith is to combat hate and hate speech. As such, B'nai Brith publishes an annual audit of anti-Semitic incidents in Canada. In 2006, B'nai Brith reported 935 anti-Semitic incidents, of which 30 were violent.[12]

13. These two problems – hate and terrorism – are interconnected, and indeed, hate is a prerequisite for terrorism. It is only when the "other" is demeaned, defamed and dehumanized to a requisite level that a terrorist can justify their murder in furtherance of a religious or political cause. In his evidence regarding religious terrorists' Manichean blaming of the "other" for a perceived injustice, Professor Bruce Hoffman told the Commission:

> And this leads to almost the pre-occupation with the elimination or at least the infliction of wholesale violence on anyone who is not a member of that religious sect or indeed amongst people consider apostates or insufficiently religious or traitors to that sect.[13]

14. B'nai Brith's recognized experience in combating hate and the protection of human rights led to its being granted party standing in the Commission of Inquiry on War Criminals in Canada presided over by the Honourable Justice Jules Deschênes and the Commission of Inquiry into the Deployment of Canadian Forces to Somalia presided over by Mr. Justice Gilles Létourneau. As well, B'nai Brith has intervened in and been party to dozens of cases affecting the Canadian Jewish Community or involving issues within its expertise before all levels of courts across Canada, including the Supreme Court of Canada.[14]

15. In 2002, B'nai Brith brought an application to the Federal Court for judicial review of the Government of Canada's decision not to list all associated entities of Hezbollah on the terrorist list maintained pursuant to the *Anti-Terrorism Act*.[15] Although then Foreign Minister Bill Graham initially defended the Government's decision on the

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[12] League for Human Rights of B'nai Brith Canada, *2006 Audit of Antisemitic Incidents: Patterns of Prejudice in Canada* (Toronto, 2007), online: http://www.bnaibrith.ca/pdf/audit2006.pdf, pp. 2-3.
[13] Testimony of Bruce Hoffman, Transcript: March 9, 2007, at p. 1794.
[14] Affidavit of Anita Bromberg, Sworn July 7, 2006, Exhibit S-17, at paras. 7-8, 9-10.
[15] *B'nai Brith Canada v. Attorney General of Canada et al.*, Court File No.: T-1977-02 (F.C.T.D.).

basis that the militant organization also performed "social and political work", less than one month after B'nai Brith's application was filed, the Government reversed its decision and listed all of Hezbollah's wings.[16]

16. This Commission granted B'nai Brith standing as an Intervenor to provide submissions on all seven of its Terms of Reference.[17]

(c) Effective Protection from Terrorism: A *Charter* Right

17. Since 1985, B'nai Brith has repeatedly called for this Commission to be set up so that Canada can learn the required lessons. As late as September 2005, B'nai Brith repeated its calls for a Commission of Inquiry into the bombing of Air India Flight 182 in its submissions on the *Anti-Terrorism Act* to Parliament.[18]

18. Other than the calling of this Commission, there has been little to no positive news in Canada regarding the issues that confront this Commission since B'nai Brith made that appeal. Indeed, if anything the situation has become even worse. In June of 2006, 17 men were arrested in Brampton, Ontario on charges of plotting to attack targets in Canada.[19] In February of 2007, the House of Commons voted 159 to 124 not to extend the powers of preventive arrests and investigative hearings subject to a sunset clause in the *Anti-Terrorism Act*,[20] depriving law enforcement of required tools.

19. In his evidence before this Commission, Professor Martin Rudner of Carleton University was pessimistic about the current safety of Canadians and Canadian national

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[16] See "Group goes to court to get Hezbollah banned" CBC News Online (29 November 2002), online: http://www.cbc.ca/canada/story/2002/11/29/bnaibrith021129.html; "Ottawa relents, bans Hezbollah charities" CBC News Online (11 December 2002), online: http://www.cbc.ca/canada/story/2002/12/11/hezbollah_021211.html.

[17] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Rulings on Standing (9 August 2006), Appendix I: Rulings on Standing, s. 5, online: http://www.majorcomm.ca/en/reasonsforrulingsonstanding/#bnaibrithcanada.

[18] B'nai Brith Parliamentary Submissions at p. 1.

[19] See, for example, Colin Freeze, "Terror suspects appear in court" *Globe and Mail* (3 June 2006), online: http://www.theglobeandmail.com/servlet/story/RTGAM.20060603.wwarrants0603_4/BNStory/National/home.

[20] Juliet O'Neill and Andrew Mayeda, "MPs reject extending anti-terror provision" *Ottawa Citizen* 27 February 2007, online: http://www.canada.com/topics/news/story.html?id=e516837d-cf49-486b-a762-883f0c4e8d01.

infrastructure based on a lack of an "all-government leadership" to make counter-terrorism a top priority:

> **MR. SHORE:** Just a last question; in that context, Dr. Rudner, would you describe Canadians as being vulnerable as a result of the fact that that is not being addressed as aggressively as it should be?
>
> **PROF. RUDNER:** Highly vulnerable and this would include, on the radiological side, the problem of dealing with our facilities of a nuclear sort which are being or should be decommissioned and dealt with. It's moving very slowly. The targeting of our pipelines, oil refineries and other plants; not that the people who are responsible aren't doing their job; they're doing their job. What they are not getting is the kind of all-government leadership which says that "their job is vital and they need the resources and the capabilities and the human resources, the manpower" to ensure that they do precisely what the SPP and national security policy and the law require them to do, and that's where we fall short.[21]

20. B'nai Brith believes that this status quo is completely inadequate, inappropriate and not sustainable.

21. Counter-terrorism law and policy is and should be, as Professor Rudner stated, supported by an "all-government leadership". This all-government leadership must put the security of citizens of Canada at the forefront of government priorities within the framework of the *Charter of Rights and Freedoms*. Indeed, given that terrorists target innocent civilians to draw attention or otherwise further their political or religious agenda, terrorism itself can be a grave violation of human rights. Moreover, but for the fact that it is committed by non-state actors, acts of terror fit the classic definition of a crime against humanity.[22]

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[21] Testimony of Martin Rudner, Transcript: 10 December 2007, p. 12279.

[22] The definition of "crime against humanity" is defined in subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 as "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international

22. Effective counter-terrorism law and policy is not just another policy area for government. The first order of business of the Government of Canada must be to protect its citizens. Everything from health care to the regulation of economic activity and even the administration of justice is secondary to the central function of protection. B'nai Brith views the protection of Canadians and other innocent civilians in Canada from terrorism as mandated by section 7 of the *Charter of Rights and Freedoms,* which affords everyone the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[23] Accordingly, if Government, the RCMP and CSIS fail to devote adequate resources and priority to counter-terrorism and a terrorist act results, the *Charter* is breached in a profound and tragic way.

(d) B'nai Brith's Submissions

23. B'nai Brith hopes that this Commission and its Final Report will help the Government of Canada realize its obligations to protect Canadians under the *Charter* by proposing concrete policy recommendations that will help craft a more effective counter-terrorism law and policy. As part of this task, B'nai Brith also hopes that the Commission will be able to correct the wrong that was done to the surviving family of the victims following the bombing of Air India Flight 182 – the minimization of the significance of the bombing. Through its Report, the Commission can help educate Canadians about the bombing and its place as a dark and notorious chapter in Canadian history.

24. A key function of a public inquiry is public education. In reviewing the practice and procedures of the Krever Commission on the Canadian Blood System in 1987, Justice Peter Cory, on behalf of the Supreme Court of Canada stated:

> Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent

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law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission."

[23] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

> commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.
>
> The inquiry's roles of investigation and education of the public are of great importance.[24]

25. In these submissions, B'nai Brith makes a series of specific recommendations, based on its particular expertise and interest, to the Commission to aid in its important task of educating both the Government and Canadians to develop a more effective and robust counter-terrorism law and policy. These submissions do not exhaustively treat all the evidence before this Commission, nor do they make recommendations on every possible issue before this Commission. Instead, they highlight issues and make recommendations on those most pressing to Canadian national security, as seen from B'nai Brith's unique perspective.

26. The remainder of these submissions will be divided into seven sections, one for each of the Commission's Terms of Reference, followed by a conclusion.

27. Before proceeding to address the Terms of Reference, however, B'nai Brith's first recommendation aims to aid the Commission in appropriately educating Canadians about the tragedy.

> **Recommendation No. 1:**
>
> **The Commission should, with permission from the family members, post on its website the evidence from Stage 1 of the Inquiry in both official languages. The Commission should also consider posting the evidence heard in Stage 2 in both official languages.**

28. The evidence of family members of the victims, bravely offered in Stage 1 of this Inquiry can serve the very useful educational purpose of educating the Canadian public and policymakers about the horrors of terrorism. B'nai Brith is unaware of any more

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[24] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at paras. 30-31.

fulsome historical record of the human toll exacted by terrorism in this country. As memories of the October Crisis of 1970 fade, the transcripts of the Stage 1 evidence, if available on the Inquiry's website will help remind Canadians that terrorism is not something that only affects people in other places, such as Israel, India, Northern Ireland, New York, Washington or Pennsylvania, but something that has affected and continues to affect people right here in Canada.

29. As its budget allows, the Commission should also consider posting the evidence in Stage 2 of the Inquiry on its website in both official languages. In doing so, it will provide Canadian scholars studying terrorism and counter-terrorism law and policy with an extremely valuable, raw resource in the form of first-hand witness testimony as well as expert witness opinion regarding the state of terrorism law and policy today.

II. ASSESSING AND RESPONDING TO THE TERRORIST THREAT

30. The first Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *if there were deficiencies in the assessment by Canadian government officials of the potential threat posed by Sikh terrorism before or after 1985, or in their response to that threat, whether any changes in practice or legislation are required to prevent the recurrence of similar deficiencies in the assessment of terrorist threats in the future*

(a) Expert Help to "Connect the Dots"

31. The bombing of Air India Flight 182 did not come out of thin air. It took manpower and planning on the part of the terrorists. The Canadian Security Intelligence Service (CSIS) was aware of the terrorist threat, or at least the general possibility of violence by militant supporters of an independent Khalistani state, at least one year prior to the bombing.[25] Professor Wesley Wark of the University of Toronto indicates that the problem was not intelligence collection, since CSIS was apparently on the right track to uncover information regarding terrorist plots, it was an inability of the Canadian

[25] Exhibit P-102, *Dossier 2: Terrorism, Intelligence and Law Enforcement – Canada's Response to Sikh Terrorism* (Ottawa: Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, 19 February 2007), p. 3.

intelligence "system" to adequately process the raw data into actionable intelligence because of an incomprehension of the range of the threat Sikh terrorism posed:

> The worst kinds of intelligence failures are when you get close. We had the right -- so it seems -- suspects in view. We were on to them. We were on to a sense of conspiracy. We understood the threat and the danger. We just couldn't translate that sufficiently through an intelligence collection program, into a policy of preemption or prevention or doing something that could block the conspiracy in time.
>
> […]
>
> We were trying to put the information that we had into a -- into an assessment package that would allow for good decision making and good policy response, but it seems that we were unable to do so. We didn't fully appreciate the range of threats that Sikh terrorism might pose that -- the range of targets that it might operate against; the range of measure that we might need to take to prevent terrorist outrages 1 in this country. And, again, the rub here is that we probably got close to success, but not close enough, and those are the worst kinds of intelligence failures, when you see the possibilities of success and you just can't get there.[26]

32. Even apart from the institutional gulfs that blocked effective cooperation between CSIS and the Royal Canadian Mounted Police (RCMP), there was a failure on the part of those manning Canada's intelligence services to connect the dots to adequately assess the range of threats posed. This failure to "connect the dots" is similar to the failure uncovered by the 9/11 Commission in its report regarding the terrorist attacks of September 11, 2001. In the *9/11 Report*, the 9/11 Commssion detailed a number of reports that made their way up the intelligence reporting chain without joining the dots that could have foreseen the specific threat:

> As [CIA Director George] Tenet told us, "the system was blinking red" during the summer of 2001. Officials were alerted across the world. Many were doing everything they possibly could to respond to the threats.

[26] Evidence of Wesley Wark, Transcript: 5 March 2007, p. 1496-1497.

> Yet no one working on these late leads in the summer of 2001 connected the case in his or her in-box to the threat reports agitating senior officials and being briefed to the President. Thus, these individual cases did not become national priorities. As the CIA supervisor "John" told us, no one looked at the bigger picture; no analytic work foresaw the lightning that could connect the thundercloud to the ground.[27]

33. In both cases, there was a failure of "imagination" to predict the devastation plotted by the terrorists. Regarding the September 11, 2001 attacks, there was a failure to imagine that terrorists would hijack planes to use on a suicide mission. In the case of the Air India bombing, it was a failure to recognize that terrorists would blow up an aircraft outright or otherwise kill innocent civilians in the absence of demands that constituted the failure. As Bob Rae pointed out in his report, before the Air India bombing, the emphasis both in Canada and internationally was on conventional terrorist hijacking.[28]

34. This failure to connect the dots is all the more unacceptable considering the remarkable accuracy of the intelligence that was collected, but not necessarily transmitted up the reporting chain or otherwise translated to actionable. For example, the Vancouver Police Department knew and informed the RCMP that someone boasted at a meeting of Sikh extremists on June 12, 1985 that something would happen in "two weeks".[29] Superintendent Axel Hovbrender, who at the time was a member of the Vancouver Integrated Intelligence Unit stated that when he was informed of the comments, he felt they reflected just "another hothead beating his chest and saying, 'You watch.'"[30]

35. Most shocking, former Lieutenant Governor of Ontario, James Bartleman, who at the time was a security analyst at the Department of External Affairs testified that during the week prior to the bombing, he came across a "a document which indicated that Air India was being targeted that weekend, specifically the weekend of the 22nd, 23rd." Mr.

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[27] National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: Barnes & Noble, 2004) at p. 277 (the "9/11 Report").
[28] P-35, *Rae Report*, pp. 8-9.
[29] Evidence of Don McLean, Transcript: 1 May 2007, pp. 1986-1987.
[30] Evidence of Axel Hovbrender, Transcript: 24 May 2007, p. 3921.

Bartleman took the document to an *ad hoc* meeting on Sikh terrorism that he had set up and presented it to an RCMP superintendent or inspector who confirmed he had seen it and told Mr. Bartleman that "he didn't need me to tell me how to do his job."[31] Mr. Bartleman's evidence regarding the reaction of the RCMP officer fits within the pattern of a system-wide inability to properly process terrorism-related intelligence.

36. One way to address the inability or failure of the intelligence system to adequately process raw information into actionable intelligence was suggested by Professor Rudner, who suggested an increase in cooperation between experts studying terrorism and information gatherers.[32] In other words, to think "outside the box", CSIS or the RCMP may need to get help from analysts who actually operate in and have information from "outside the box." The Department of National Defence already does this.[33] In the Air India bombing, the problem was not lack of intelligence, but a lack of imagination. The system could not adequately process the intelligence, connect the dots and conclude that a suitcase bomb may be placed on an Air India flight originating in Canada.

37. Retaining experts on counter-terrorism and terrorist groups, untainted by the hive of classified information or intelligence community groupthink, to help develop responses to specific terrorist threats, movements and agendas could add value and help "connect the dots".

38. Another way to correct the imaginative deficiency would be to strengthen ties with all of Canada's minority communities.

Recommendation No. 2:

This Commission should recommend that the Government of Canada institute formal police-expert and police-community partnership programs, with adequate funding provided. In the police-expert program CSIS, the RCMP as well as Provincial and Municipal police authorities investigating terrorist threats would partner with experts on terrorist groups/movements under investigation to help process intelligence. In the police-community program, police would

[31] Evidence of James K. Bartleman, Transcript: 3 May 2007, p. 2109.
[32] See Evidence of Martin Rudner, Transcript: 10 December 2007, pp. 12274-12277.
[33] *Ibid.* at p. 12276.

strengthen and deepen their ties to minority communities, building trust and information networks.

(b) The Language Barrier

39. One area that appears to have not had sufficient resources allocated was the translation from Punjabi of suspect audio surveillance tapes. In his letter to C/Supt. F.G. Palmer dated November 30, 1987, CSIS Director General of Counter Terrorism J.S. Warren confirmed that there "was a backlog of tapes in September 1985 which consisted of approximately 80 to 85 tapes." These tapes were not reviewed until September or October 1985. Moreover, when the CSIS translator went on leave for two weeks in June 1985, there was no replacement.[34]

40. Prof. Sherene Razack of the University of Toronto characterized the failure to prioritize the translation of the tapes from Punjabi as "an ethnocentric, if not a racist approach to threat assessment."[35] B'nai Brith echoes Prof. Razack's assessment. Terrorists do not necessarily communicate in Canada's two official languages. The fact that intelligence collected in Canada requires translation when it is being collected is not an excuse for the failure to scrutinize the audio surveillance communications in a timely fashion. If the RCMP, CSIS or a provincial or municipal police service has suspected terrorists under surveillance who communicate in a language other than French or English, the police force should have translators on staff or the resources to second translators. Ideally, the RCMP could maintain a corps force of translators that can be shared amongst the rest of Canada's police forces. Alternatively, police forces should be provided funding adequate to hire translators as the need arises in terrorism investigations.

41. Such steps would eliminate the ethnocentric failure to assess terrorist threats from sources such as recordings in Punjabi.

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[34] Exhibit P-101, Letter from J.S. Warren to C/Supt. Palmer (30 November 1987), CAA Binder vol. 7, Tab 0609, at p. 2-3.

[35] Exhibit P-387, Sherene H. Razack, "The Impact of Systemic Racism on Canada's Pre-Bombing Threat Assessment and Post-Bombing Response to the Air India Bombings" (12 December 2007), at pp. 16-17.

Recommendation No. 3:

This Commission should recommend that the RCMP maintain a corps of police translators for use in terrorism investigations. This translator corps should be shared by RCMP with CSIS as well as provincial and municipal police forces as the need arises. Alternatively, the Commission should recommend that police forces, at the very least, be provided with budgets adequate to hire translators immediately when confronted with terrorist suspects speaking in languages other than French or English.

(c) Non-Discriminatory Treatment of Terrorism Investigations

42. This Commission has heard allegations of racism from family members of the victims, and others, regarding the way the Air India investigation was handled. Ujjal Dosanjh, a moderate Sikh who spoke out against extremism, was beaten in 1985 and whose constituency office was firebombed in 1999 also echoed the charge of racism. Mr. Dosanjh, who served as Premier of British Columbia and is currently a Member of Parliament told the Commission:

> Well, first of all, if you had assaults, six or seven, -- several assaults, several threats -- threats through the mail slots; threats on the telephone answering machines; severely beaten poets and journalists; threats to kill a broadcaster's child; if you had that in a community in a 15-mile radius I believe something more would have been done.
>
> It wasn't done -- not because of any deliberate omission on the part of anyone, and I've made that very clear. I think it wasn't done because nobody comprehended. Just as Air India, as Judge Major said, "People felt it wasn't happening to Canadians," the same way those assaults and those threats people felt -- in power, out of power, they felt those weren't really happening to Canadians. **They were happening to some brown guys that were arguing with each other, that we don't understand.**
>
> And that's a feeling sir -- I mean, I'm not -- I have no empirical data to give you, I'm simply telling you. And I'd be less than candid with Canadians if I said I didn't have that feeling. I overcome it everyday when I deal with everybody in my life but -- because I know Canadians --

> the vast majority of them are fair, just and compassionate and that's why I've been able to get where I've been able to get. If they weren't that, I'd never be elected in the first place.[36]

43. In her paper to the Commission, Prof. Razack defined systemic racism in the following manner:

> collective, unintentional practices whereas individual racism is linked to the behaviour of individuals and is often considered intentional. In practice, however, the distinctions between systemic and individual, cover and overt, and intentional and unintentional are messy. In the first instance, systems involve people. Secondly, motivation is notoriously hard to discern, either in individual behavior or when it shapes systems that disadvantage groups.[37]

44. B'nai Brith believes that systemic racism was a factor in the investigation of Sikh extremism. To paraphrase Mr. Dosanjh, B'nai Brith believes that the system would have reacted differently if it had not been perpetrated by and against "some brown guys".

45. The Canadian Jewish community has become accustomed to discriminatory assessment of terrorist threats. For example, in an interview on October 26, 2001, then Deputy Prime Minister John Manley addressed the need to aggressively fight terrorism following the events of September 11, 2001. However, he was quoted as excluding suicide bombing by Palestinian militant groups against Israeli civilians because of a perceived legitimacy in Palestinian national goals. Manley was quoted as stating, "Whatever else you might say about September 11, I'm not aware that it was a claim for some kind of territory on Manhattan Island. These are very different situations."[38]

46. There can be no excuse for terrorism and terrorism investigations must be engaged in on a non-discriminatory basis. This issue may be remedied by the adoption of

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[36] Evidence of Ujjal Dosanjh, Transcript: 22 November 2007, p. 10211 (emphasis added).
[37] Exhibit P-387, at p. 3.
[38] "Manley's Unworthy, Problematic Comments," Editorial, *The Canadian Jewish News* (1 November 2001).

a formal law enforcement policy by the Minister of Public Safety and the police forces involved in terrorism investigations.

Recommendation No. 4:

This Commission should recommend that the Government of Canada, the RCMP, CSIS and Provincial and Municipal police forces adopt a formal policy stating that counter-terrorism law and policy, including investigations will be administered on a non-discriminatory basis.

(d) Early Engagement: Criminalization of Incitement

47. In applying for a warrant to intercept the communications of Talwinder Singh Parmar, Raymond Kobzey of CSIS (currently with the RCMP) wrote the following:

> A second more sinister aspect of Parmar's preaching is the fact that he's advocating the use of violence and terrorism by Sikhs against the Government of India in retaliation for the assault on the Golden Temple complex.[39]

48. According to Mr. Korbzey, Mr. Parmar's incitement to violence included calls for Sikhs to kill 50,000 Hindus and blow up embassies.[40] These incitements to terrorism were used as a ground to authorize CSIS to put Mr. Parmar under surveillance, it was certainly not enough to effect an arrest warrant. It was only after September 11, 2001 that terrorism itself was made a specific criminal offence under the *Anti-Terrorism Act*. The *Anti-Terrorism Act* however lacks a provision that would serve to criminalize incitement to terrorism. B'nai Brith believes that the addition of a provision creating an offence for incitement to commit terrorism to the *Anti-Terrorism Act* is appropriate and overdue.

49. The limiting of harmful speech in this regard has several precedents notwithstanding the protection of free speech pursuant to section 2 of the *Charter*. The *Criminal Code* currently criminalizes acts of publicly inciting hatred against an identifiable group[41] and spreading false news to cause injury likely to cause injury or

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[39] Exhibit 101, Warrant Application, CAB vol. , Tab 144
[40] Evidence of Raymond Kobzey, Transcript: 23 May 2007, p. 3752.
[41] *Criminal Code*, R.S.C. 1985, c. C-46, s. 319.

mischief.[42] In balancing the right to free speech with the harm caused by Holocaust denial, the Supreme Court of Canada noted that the Holocaust itself began with words and lies intended to cause harm:

> The tragedy of the Holocaust and the enactment of the *Charter* have served to emphasize the laudable s. 181 aim of preventing the harmful effects of false speech and thereby promoting racial and social tolerance. In fact, it was in part the publication of the evil and invidious statements that were known to be false by those that made them regarding the Jewish people that lead the way to the inferno of the Holocaust. The realities of Canada's multicultural society emphasize the vital need to protect minorities and preserve Canada's mosaic of cultures.[43]

50. The Air India bombing and the attacks of September 11, 2001 illustrate how devastating the effects of incitement to violence can be. Like inciting hatred against identifiable groups and spreading false news intended to cause injury, incitement to terrorism should be criminalized. It would provide law enforcement agents in Canada with a tool that would allow them to deal with terrorists and those who encourage them in early stages before the damage is done.

Recommendation No. 5:

This Commission should recommend that the Government of Canada, add the offence of incitement to terrorism to Part II.1 of the *Criminal Code*.

III. EFFECTIVE POLICE COOPERATION IN COUNTER-TERRORISM INVESTIGATIONS

51. The second Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *if there were problems in the effective cooperation between government departments and agencies, including the Canadian Security Intelligence Service and the Royal Canadian Mounted Police, in the investigation of the bombing of Air India Flight 182, either before or*

[42] *Ibid.*, s. 181.
[43] *R. v. Zundel*, [1992] 2 S.C.R. 731 at 820.

> *after June 23, 1985, whether any changes in practice or legislation are required to prevent the recurrence of similar problems of cooperation in the investigation of terrorism offences in the future*

(a) Amending the *CSIS Act*

52. This Commission heard evidence that cooperation between CSIS and the RCMP in terrorism investigations, from the Air India investigation to the present is seriously flawed and in need of a legislative and policy reform. For example, former RCMP Superintendent Lyman Henschel testified that despite liaising with CSIS regarding the Air India investigation and despite CSIS informing him that "disclosure to the force would be no problem",[44] CSIS did not inform him that it had audio surveillance tapes of suspect Talwinder Singh Parmar's phone conversations.[45] The tapes were later destroyed, hampering the RCMP's investigation and the later prosecution of suspects in the matter.

53. In a memo dated February 9, 1996, RCMP Deputy Commissioner Gary Bass wrote that "Had CSIS cooperated fully from June 23 onward, this case would have been solved at that time." When asked if he continued to agree with that assessment, Deputy Commissioner Bass stated that he might have worded it, "Had the structures been in place that permitted CSIS to cooperate fully."[46]

54. Former RCMP Commissioner Guiliano Zaccardelli was highly critical of the relationship that developed between CSIS and the RCMP regarding information sharing. Despite the long passage of time since the Air India bombing and even the September 11, 2001 attacks, according to Commissioner Zaccardelli, the information-sharing relationship remains broken. One problem that Commissioner Zaccardelli pointed to, as did many others, is the wording of subsection 19(2) of the *CSIS Act* which provides CSIS with too wide a discretion to pass on information regarding criminal offences to police. Subsection 19(2) of the *CSIS Act* provides as follows:

> The Service **may** disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this

[44] Evidence of Lyman Henschel, Transcript: 17 September 2007, at p. 5524.
[45] *Ibid.* at p. 5525.
[46] Evidence of Gary Bass, Transcript: 3 December 2007, at p. 11293.

> Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,
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> (*a*) where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken;
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> (*b*) where the information relates to the conduct of the international affairs of Canada, to the Minister of Foreign Affairs or a person designated by the Minister of Foreign Affairs for the purpose;
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> (*c*) where the information is relevant to the defence of Canada, to the Minister of National Defence or a person designated by the Minister of National Defence for the purpose; or
>
> (*d*) where, in the opinion of the Minister, disclosure of the information to any minister of the Crown or person in the federal public administration is essential in the public interest and that interest clearly outweighs any invasion of privacy that could result from the disclosure, to that minister or person.[47]

55. In the words of Commissioner Zaccardelli:

> When you look at the actual legislation and the interpretation that's been given to that legislation, that's where we have the problem. The legislation and the way it is interpreted has not been -- has not enabled the agencies to effectively and efficiently carry out their mandates when the exchange of information is inhibited by what, at times, is very narrow interpretations of the various sections which allow for the flow of information or the retention of certain information as happens sometimes, in particularly with CSIS.
>
> […]
>
> That word ["may"] has caused -- is really at the centre of the problem because if you interpret "may" in a narrow way then you have the problems that were created -- that have historically been at the centre of the issue .[48]

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[47] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 19 (emphasis added).
[48] Evidence of Giuliano Zaccardelli, Transcript: 30 November 2007, at pp. 11023-11024.

56. B'nai Brith submits that because of the narrow interpretation of the word "may" during the Air India investigation, which, as Commissioner Zaccardelli reminds us continues to the present day, section 19 of the *CSIS Act* should be amended to replace the word "may" with the word "shall" in terrorism-related matters[49] to ensure that police are provided with timely information concerning terrorist investigations.

Recommendation No. 6:

This Commission should recommend that Parliament amend the *CSIS Act* to add subsection 19(2.1) which would replace the word "may" with "shall" in terrorism investigations to ensure that CSIS discloses information it obtains relevant to terrorist activities.

The proposed wording of subsection 19(2.1) in this regard would read as follows:

> **The Service shall disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information, where the information may be used in the investigation or prosecution of an alleged contravention of any offence contained in Part II.1 of the *Criminal Code*, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken.**

(b) New Institution: A Canadian Counterterrorism Centre

57. Today, CSIS and the RCMP have different specific mandates.[50] Whereas the RCMP engages in investigation for the purposes of law enforcement and CSIS is Canada's lead national security intelligence agency reporting to the Minister of Public Safety. These different mandates have led to each organization operating within "silos" – two different organizations with two different cultures. Although the specific mandates and cultures of each institution remain different, Commissioner Zaccardelli points out, the key objective of each remains the same – "the objective of all of us is to keep Canada

[49] Contained in Part II.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.01-83.32.
[50] Both mandates were the jurisdiction of the RCMP until separated pursuant to the recommendations of the MacDonald Commission.

safe and secure."[51] This holds true for all other provincial and municipal police forces who investigate terrorism.

58. The flow of information must be a two-way street, with the RCMP and other police forces receiving the national security intelligence to help prosecute suspected terrorists; and CSIS receiving evidence obtained in criminal investigations that can help the Government of Canada protect national security. To achieve this goal and overcome the "silo" culture, Commissioner Zaccardelli suggests "a new governance structure."[52] He suggests having people from each organization work within the other and an overarching structure that would coordinate cooperation on issues of terrorism.[53] In his opinion, CSIS could benefit by having consultation with RCMP members and Crown prosecutors regarding what is needed for law enforcement.[54]

59. The 9/11 Commission in the United States grappled with a similar issue when confronted with the multiple agencies collecting and using terrorism-related intelligence, such as the FBI, CIA and National Security Agency. Similar to the concept of information kept in silos, the US developed "misunderstood and misapplied" procedures for information sharing between agencies that came to be referred to as "the wall".[55] To deal with this issue, the 9/11 Commission recommended the establishment of a National Counterterrorism Center to act as a centre for joint operational planning and joint intelligence, staffed by personnel from each relevant agency.[56]

Recommendation No. 7:

This Commission should recommend that the Government of Canada establish a Canadian Counterterrorism Centre, headed by a Counterterrorism Executive Director who reports directly to Clerk of the Privy Council, and staffed by personnel from CSIS, the RCMP, Provincial and Municipal Police Forces, Public Safety Canada, the Communications and Security Establishment (CSE), Financial

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[51] Evidence of Giuliano Zaccardelli, Transcript: 30 November 2007, at p. 11025.
[52] *Ibid.* at p. 11029.
[53] *Ibid.* at pp. 11047-11048.
[54] *Ibid.* at p. 11057; Exhibit P-101, RCMP/CSIS Modernization 1005: Commissioner's Briefing & Talking Points, 17 October 2005, CAA Binder Set, vol. 12, Tab 1043 at p. 8.
[55] 9/11 Report, at p. 79.
[56] *Ibid.* at p. 403.

Transactions and Reports Analysis Centre of Canada (FINTRAC), the Canadian Border Services Agency (CBSA), Foreign Affairs and International Trade Canada, the Department of Justice Canada and Provincial justice ministries. One of its key priorities should be to act as a clearinghouse for all represented agencies to share counterterrorism intelligence and evidence.

60. B'nai Brith believes that the establishment of a Canadian Counterterrorism Centre, similar to the National Counterterrorism Center in the US, would help develop the institutional change required to help improve the cooperation between CSIS, the RCMP, Provincial and Municipal police forces as well as government agencies investigating, prosecuting and coordinating policy regarding terrorism. This Canadian Counterterrorism Centre would be reflective of an "all-government leadership" and act as a clearing house to coordinate counterterrorism enforcement. It should be staffed by personnel from CSIS, the RCMP, Provincial and Municipal police forces, relevant Federal ministries as well as Federal and Provincial Crown lawyers. It would further coordinate secondment between the represented organizations, as needs arise. Its goal would be to coordinate elements of all agencies involved in aspects of counterterrorism, keep stock of all ongoing activities and ensure that agencies share information that could help the others with their own mandates. The Canadian Counterterrorism Centre could also help coordinate resource allocation such as partnerships with the academic sector and translators.[57]

61. The creation of a Canadian Counterterrorism Centre would also be consistent with the findings and recommendations of Commissioner O'Connor in the Arar Commission Report regarding RCMP-CSIS cooperation regarding information pertaining to national security.[58]

62. The Canadian Counterterrorism Centre should be headed by an Executive Director with the status of a Deputy Minister or Assistant Deputy Minister who reports

[57] See section II of these Submissions.
[58] See Recommendations 1-3 of 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), online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf at pp. 364-365.

directly to the Clerk of the Privy Council. This would put the Executive Director at least on par with the RCMP Commissioner, the Director of CSIS, and the Inspector General of CSIS, all three of who should be members of the Canadian Counterterrorism Centre's executive committee.

IV. EVIDENTIARY CONCERNS

63. The third Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *the manner in which the Canadian government should address the challenge, as revealed by the investigation and prosecutions in the Air India matter, of establishing a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial*

64. This Commission has heard disturbing evidence regarding the erasure of audio surveillance tapes containing recordings of conversations of suspected Sikh terrorists by CSIS. It has also heard evidence that cooperation between CSIS and the RCMP regarding information sharing continues to be problematic. B'nai Brith understands the dichotomy between "security intelligence" collected by CSIS from public and secret sources vital to the protection of national security and evidence, collected by the RCMP and other police services in the hope that it will be used to prosecute criminal offences.[59]

65. CSIS Director Jim Judd testified that post-September 11, 2001, CSIS retains audio surveillance tapes longer than 30 days, although it is not clear for how long.[60] Technology has changed and recordings are no longer stored on bulky analog tapes but on hard drives. CSIS policy should change to provide that intelligence related to terrorism is never destroyed, so that Canada is never again in a position of having destroyed evidence or potential evidence in a terrorism investigation.

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[59] See Exhibit P-309, Kent Roach, "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence" (21 November 2007) at pp. 1-2 ("Roach, Unique Challenges").

[60] Evidence of Jim Judd, Transcript: 6 December 2007, at p. 11875.

Recommendation No. 8:

This Commission should recommend that CSIS issue a policy stating that it will no longer destroy intelligence received related to terrorism investigations.

66. B'nai Brith also repeats its earlier recommendation for a Canadian Counterterrorism Centre, to act as the clearinghouse for intelligence in the possession of CSIS that could be of value to a criminal prosecution, and evidence in the possession of police that could help CSIS avert a threat to national security.

67. During the trial of Ripudaman Singh Malik, Ajaib Singh Bagri and Inderjit Singh Reyat, Justice Josephson ruled that the CSIS tape erasures violated the accuseds' section 7 *Charter* disclosure rights and that "all remaining information in the possession of CSIS [was] subject to disclosure by the Crown in accordance with the standards set out in *R. v. Stinchcombe*."[61] Prof. Roach points out that other terrorism prosecutions have experienced "difficulties and delay" as the accused take proceedings to obtain disclosure of national security intelligence or other secret information.[62] Indeed, the scope of the application of the *Stinchcombe* principles has grown far too broad, putting two elements in terrorism cases at risk – 1) the risk to criminal convictions because of "inadequate" disclosure; and 2) the risk of disclosure of information whose secrecy is necessary for the national security of Canada. As recently as January 30, 2008, two judges, Chief Justice Allan Lufty of the Federal Court and Justice Douglas Rutherford of the Ontario Superior Court of Justice were quoted by the *Globe and Mail* as criticizing late disclosures made in terrorism-related cases before their courts.[63]

68. Unlike the situation in Canada, the United Kingdom has passed legislation to specifically define the types of information the Crown must disclose in a terrorism prosecution. Section 3 of the *Criminal Procedures and Investigations Act 1996 (U.K.)* indicates that the Crown must disclose material to the accused if it is of the opinion that

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[61] *R. v. Malik*, [2002] B.C.J. No. 3219 (B.C.S.C.) at para. 14.
[62] Exhibit P-309, Roach, "Unique Challenges", at p. 5.
[63] Omar El Akkad, "Terror Suspect Arrested in his Shower" *Globe and Mail* (30 January 2008), online: http://www.theglobeandmail.com/servlet/story/RTGAM.20080130.wkhawaja30/BNStory/National/home.

that the material undermines the prosecution. B'nai Brith is of the opinion that the UK legislation carefully balances the accused's right to know the case against him or her and the state's requirements to protect sensitive and/or secret national security intelligence from the public forum.

Recommendation No. 9:

This Commission should recommend that the Government of Canada introduce legislation to define the scope of what information is required to be disclosed to the accused in terrorism cases pursuant to *Stinchcombe* and should limit that disclosure to only (a) information upon which the Crown will rely; and (b) information which could reasonably seen as undermining the prosecution.

V. TERRORIST FINANCING

69. The fourth Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations*

70. The officer in charge of the National Security Criminal Operations Branch of the RCMP, Superintendent Rick Reynolds informed the Commission that in 2001, Canada was primarily recognized as more of a source of terrorist funding than a target.[64] Prof. Rudner describes terrorist financing as the fifth activity in the "Terrorism Cycle", following long-term strategic planning, recruitment, training and the establishment of communication between terrorist networks.[65] According to Prof. Rudner, terrorist financial transactions consists of:

> fund-raising and money transfers… including informal *halwas*, to wherever these organizations seek their deposit or use. It is noteworthy as well that certain high-value, compressed forms of wealth like diamonds, narcotics or

[64] Evidence of Rick Reynolds, Transcript: 1 October 2007, p. 6827.
[65] Exhibit P-373, Martin Rudner, "The Terrorism Cycle Outline", Tab 1, pp. 1-3.

> other contraband are also shipped with trusted couriers surreptitiously to their intended destinations. Groups and individuals associated with terrorist networks are reputed to have engaged in organized criminal activities, extortion and incitement to raise funds for militant organizations.[66]

(a) Integration of FINTRAC Terrorist Tracking with Police/CSIS Operations

71. Canada traces suspicious financial transactions through the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). Included in FINTRAC's mandate are the collection of reports on suspicious financial transactions, the provision of law enforcement financial intelligence, and the enhancement of public awareness of terrorist financing. It is not a police agency and operates at arm's length from CSIS, the RCMP and other police forces. For his part, Superintendent Reynolds indicated that he would prefer to work "cooperatively with FINTRAC as opposed to deal with them at arms-length."[67]

72. B'nai Brith believes that the lack of coordination and cooperation between FINTRAC and the RCMP (as well as other police forces investigating terrorism) could be greatly ameliorated by the creation of a Canadian Counterterrorism Centre, where representatives of FINTRAC would serve alongside representatives of other stakeholder agencies, as outlined in Recommendation No. 7 of these submissions. Although FINTRAC's autonomy could be compromised to the chagrin of financial institutions, the intrusion would be limited to terrorism-related issues. Moreover, the real and present danger of terrorism outweighs any concerns about autonomy.

(b) Introducing Civil Liability to the *Anti-Terrorism Act*

73. The *Anti-Terrorism Act* introduced a definition of terrorist activity and the offence of terrorist financing to Canadian law. It further provided that a list of terrorist entities be maintained. However, there are no provisions that would specifically allow a victim of terrorism to recover civil damages in a Canadian court. B'nai Brith believes not only that

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[66] *Ibid*., pp. 3-4.
[67] Evidence of Rick Reynolds, Transcript: 1 October 2007, p. 6889.

victims should have the right to seek civil damages against terrorist groups in Canadian courts, but also that because terrorism is a violation of international law, that Canadian courts should assume universal jurisdiction to hear such cases, in a similar fashion as provided for in the United States pursuant to the *Alien Tort Claims Act*.[68]

74. Such a provision would allow a victim claimant to sue a terrorist group or individual regardless of whether or not the victim-claimant, the alleged terrorist or terrorist group are or were located in Canada and allow criminal prosecutions for terrorist acts committed anywhere in the world. It must be emphasized that Canada already assumes universal jurisdiction over war crimes and crimes against humanity pursuant to the *Crimes Against Humanity and War Crimes Act*. The extension of universal jurisdiction to civil and criminal liability flowing from terrorism offences in the *Criminal Code* is a very logical next step.

75. Furthermore, a retrospectivity clause should be added to the provisions of the *Anti-Terrorism Act* to ensure that historical terrorism offences be prosecuted and continue to carry exposure to civil liability. This feature is particularly significant considering how long before the enactment of the *Anti-Terrorism Act* the Air India bombing occurred. The retrospectivity clause should specify that criminal and civil liability attach to wrongdoing committed prior to the enactment of the legislation so long as the wrongdoing was an offence at international law or under the general principles of law recognized by the community of nations at the time it was carried out. Such a proviso would ensure that the retrospective application falls under section 11(g) of the *Charter of Rights and Freedoms*.

Recommendation No. 10:

This Commission should recommend that the Government of Canada introduce a provision to the *Anti-Terrorism Act* to the effect that (a) terrorist activity is a matter of universal jurisdiction for Canada; (b) victims of terrorism may bring a civil action for damages against terrorist offenders; and (c) civil and criminal liability will attach to terrorism offences committed prior to the enactment of the legislation.

[68] 28 U.S.C. § 1350. The *Alien Tort Claims Act* reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty in the United States.

(c) Holding State Actors Civilly Liable

76. Unlike covert schemes where charitable contributions are earmarked by the donor or collector towards a terrorist organization, some sources of terrorist finance are open and notorious. For example, Prof. Nikos Passas of Northeastern University points out that the Al-Aqsa Martyrs Brigade is financed by Iran through the Arab Bank.[69] Indeed, without financial support from sovereign states, many terrorist organizations would not be able to function. If a state finances or otherwise supports a terrorist organization, it should also be liable for damages to victims of terrorism in Canadian courts. To that end, B'nai Brith supports passage of Bill S-218, which would provide an exception to state immunity for sponsorship of terrorism-related incidents.[70]

77. The United States provides for such a lifting of sovereign immunity in terrorism claims, although there is no universal jurisdiction.[71]

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[69] Exhibit P-320, Nikos Passas, Presentation: Terrorist Finance and its Control, p. 31.
[70] For a discussion regarding Bill S-218, see Submissions of Ed Morgan, Transcript: 1 October 2007, pp. 6901-6904 and Exhibit P-91, B'nai Brith Submissions to Parliament, p. 14.
[71] 28 U.S.C. § 1605(a)(7) provides as follows:

> **(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> […]
>
> **(7)** not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> **(A)** if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 App. U.S.C. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and
> **(B)** even if the foreign state is or was so designated, if—
>
> **(i)** the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> **(ii)** neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Recommendation No. 11:

This Commission should recommend that Parliament consider legislation based upon Bill S-218, which provides that victims of terrorism bring a civil action for damages against state sponsors of terrorism, notwithstanding their sovereign immunity.

(d) Provincial Regulation of Charities

78. The use and abuse of charity is a feature of terrorist financing and, under the *Constitution Act, 1867*, the regulation of charities is a provincial jurisdiction. The Federal Government is involved because donors to Canada Revenue Agency (CRA)-registered charities are entitled to tax credits under the *Income Tax Act*.[72]

79. However, apart from regulation at the CRA tax incentive level, provincial regulation of charities has neither been uniform nor a priority. The situation regarding lax enforcement allows anyone positing as a charity to collect under the guise of being a "charity", despite not incorporating or even being a legitimate charity. As Prof. David Duff of the University of Toronto points out:

> For the most part, nothing is being done [by the provinces] now.
>
> So an organization can say, "We're a charity and collect funds," and if they're not issuing receipts and they're not filing -- haven't applied for registered status, they don't have any of the federal regulatory system in place, but they could still be presenting themselves as charities, passing themselves off as charities.
>
> And I'm not sure whether there's been any prosecution. I mean, what system is in place to sort of say, "Well, you're purporting to be a charity, but you're not charity." Obviously, there's a need for regulating that because, you know, that's another way to obtain funds. You can't access the fiscal benefits, but you can certainly obtain funds and

[72] R.S.C. 1985, c. 1 (5th Supp.). See Evidence of Donna Walsh, Transcript: 3 October 2007, pp. 10893-10894.

> present yourself and gain the legitimacy of being a charity by passing yourself off as such.[73]

80. It is not reasonable to expect that all persons seeking to raise money from unsuspecting (or informed) donors will register with the CRA and be subject to its accountability regime. The Provinces must step up and realize the risk the current lax enforcement of charitable registration has created in terms of terrorist financing. For his part, Ujjal Dosanjh has suggested that a joint federal-provincial working group adopt a uniform code for dealing with registration and regulation of charitable entities to ensure proper enforcement and accountability.[74] Convening such a joint working group would be a positive first step to correcting this regulatory weak spot.

Recommendation No. 12:

This Commission should recommend that the Government of Canada convene a joint federal-provincial working group to adopt uniform regulations to address the lack of regulation of the charitable sector and to especially address the need to regulate not-for-profit organizations current not subject to reporting requirements.

(e) Delisting Terrorist Entitites

81. The *Anti-Terrorism Act* has a low threshold for delisting a terrorist entity once so designated by the Governor General in Council on the recommendation of the Minister of Public Safety and Emergency Preparedness. Subection 83.05(2) of the *Criminal Code* states

> On application in writing by a listed entity, the Minister shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity.[75]

82. B'nai Brith believes that the because of the ongoing nature of the threat from terrorist groups in Canada, the test should be amended to provide that where reasonable

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[73] Evidence of David Duff, Transcript: 29 November 2007, pp. 10909-10910.
[74] Evidence of Ujjal Dosanjh, Transcript: 21 November 2007, p. 10178.
[75] *Criminal Code*, s. 83.05(1).

circumstances exist to refuse the request to de-list, the Minister shall not recommend that an applicant be de-listed.

Recommendation No. 13:

This Commission should recommend that Parliament amend the *Criminal Code* to add subsection 83.05(2.2) to read as follows:

> **In an application under subsection (2), where there are reasonable grounds to refuse the request by a listed entity to no longer be a listed entity, the Minister shall refuse to recommend to the Governor in Council that the applicant no longer be a listed entity.**

VI. WITNESS PROTECTION

83. The fifth Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases*

84. In a then secret memorandum dated July 10, 1991, John Stevenson of CSIS recorded that a source knew "something" about the Air India bombing but refused to testify at trial because he or she feared that if they testified, their children would be murdered.[76] RCMP S/Sgt. Bart Blatchford further recalled that fear of reprisals that had come up in his witness interviews conducted in 1990.[77]

85. Geoffrey Frisby, a former RCMP officer and coordinator of the Witness Protection Program in Alberta informed the Commission how onerous he found the realities of participation in the program:

> When I was a coordinator, I testified that I wouldn't want my worst enemy -- I didn't say I wouldn't put my worst enemy in the program but I wouldn't want them to, because of what they have to go through.[78]

[76] Exhibit 101, CAF Binder Set, vol. 7, Tab 425, Top Secret Memorandum, 10 July 1991, pp. 2-3.
[77] Evidence of Bart Blachford, Transcript: 17 October 2007, p. 7790.
[78] Evidence of Geoffrey Frisby, Transcript: 31 October 2007, p. 8854.

86. Given the hardship imposed on Witness Protection Program participants, as disclosed by a person who actually ran the program, it is not difficult to see why it is not necessarily an attractive option for witnesses in criminal cases, even where the witnesses might otherwise face incarceration. More effort needs to be exerted at changing the rules of evidence to provide adequate safeguards that would provide security to the witness and eliminate the hardship a life in the Witness Protect Program entails.

87. In studying the issue of witness protection, the Council of Europe of the European Union specifically recommended providing anonymity to witnesses by allowing them to testify behind a screen and without disclosing personal details.[79] Prof. Yvon Dandurand of the University College of the Fraser Valley points out that perhaps common law jurisdictions like Canada are too quick to discard the idea of witnesses testifying anonymously. As he points out, permitting witnesses to testify behind a screen may be appropriate provided the nature of the threat against them and/or the value of their evidence.[80] Entitlement to immunity should be based on the severity of the crime, the quality of the evidence the witness possesses and the risk to the witnesses' personal safety, as well as the safety of the witness' family. Because of terrorism's devastating impact on innocent civilians, terrorism related prosecutions should, at first instance, entitle witnesses the ability to testify anonymously.

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[79] Council of Europe, Committee of Ministers, Recommendation No. R(97)13, Concerning Intimidation of Witnesses and the Rights of the Defence, online: http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/1_standard_settings/Rec_1997_13.pdf. Recommendations 10-13 provide as follows:

> 10. Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.
>
> 11. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that:
> - the life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened; and
> - the evidence is likely to be significant and the person appears to be credible.
>
> 12. Where appropriate, further measures should be available to protect witnesses giving evidence, including preventing identification of the witness by the defence, for example by using screens, disguising the face or distorting the voice.
>
> 13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.

[80] Evidence of Yvon Dandurand, Transcript: 29 October 2007, pp. 8604-8605.

Recommendation No. 14:

This Commission should recommend that the Government of Canada enact legislation that would allow innocent witnesses with important evidence in terrorism cases to be provided the opportunity to testify anonymously.

VII. TERRORISM MEGA-TRIALS

88. The sixth Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges, including whether there is merit in having terrorism cases heard by a panel of three judges*

(a) "Mega-Trial" Juries

89. The Commission has indicated that this Term of Reference refers specifically to the challenges encountered in the prosecution and trial of Ripudaman Singh Malik, Ajaib Singh Bagri and Inderjit Singh Reyat, presided over by Justice Ian Josephson of the British Columbia Supreme Court.[81] The Commission Dossier on this issue further points out the enormous scope of the trial: three defendants, eight counts each, 217 trial days, 12 rulings on issues of law, one guilty plea, two acquittals, dozens of lawyers representing the Crown, the accused and even the Court, and a judgment containing 1,345 paragraphs.[82]

90. Although this Commission has not defined the term "mega-trial", it has suggested that mega-trials can be identified by factors prescribed by the Steering Committee on Justice Efficiencies and Access to the Justice System, such as number of accused, number

[81] Exhibit P-300, Commission of Inquiry into the Bombing of Air India Flight 182, The Management of Terrorist Mega-Trials, Backround Dossier for Term of Reference (b)(vi), p. 5.
[82] *Ibid.*, pp. 10-11.

of counts, complexity and amount of evidence and investigative methods used.[83] The Steering Committee recommended that the Chief Justice of a provincial superior court should designate a case as a mega-trial based on these factors.[84]

91. Given the tremendous demands mega-trials impose on judges, juries, and counsel, B'nai Brith believes that changes are warranted to respond to the stresses and to ensure that the integrity and administration of justice are not at risk. If a mega-trial proceeds with a jury, juries will have to be compensated accordingly, not at the current nominal rate. As well, regardless of whether the trial proceeds with or without a jury, a provision should be made that allows the trial to proceed in front of a panel of three judges, where the Chief Justice designates the case to a mega-trial.

92. Although the trial before Justice Josephson lasted almost two years, there was no jury hearing that case. However, until the accused agreed to trial before a judge alone in 2003, the trial was expected to proceed before a jury.[85] Almost all of the offences contained in the *Anti-Terrorism Act* entitle the accused to the right to a trial by jury.[86] Justice Josephson himself is quoted as stating that he would have preferred a jury to deliver the verdict in the verdict in the trial because, "there's better acceptance of a verdict from a jury in the community, whether they convict or acquit."[87]

93. Yet the system is not adequately set up for a jury to handle the responsibilities of being the trier of fact in a terrorism mega-trial. In a case where a jury sat for a terrorism "mega-trial" under the current system, jurors would be making huge personal sacrifices with improper compensation. Indeed, jury compensation ranges from initial payments of $20 per day in British Columbia and New Brunswick to $90 per day in Quebec,[88] Regardless of the career sacrifice that attendance at a long mega-trial would entail, jurors and their families, in most cases, undergo serious financial losses. Provision should be

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[83] Department of Justice Canada, Final Report on Mega-trials of the Steering Committee on Justice Efficiencies and Access to the Justice System (2004), online: http://www.justice.gc.ca/en/esc-cde/mega_e.pdf.
[84] *Ibid.*, p. 3.
[85] *Ibid.*, p. 15.
[86] *Ibid.*, p. 16.
[87] Exhibit P-300, Background Dossier for Term of Reference (b)(vi), p. 49.
[88] *Ibid.*, pp. 135-136.

made to ensure that in terrorism mega trials, because of the long duration of the trial and other sacrifices, jurors be entitled to adequate payment.

94. Furthermore, given the potential for intimidation of invasion of privacy that jurors are exposed to in a mundane criminal trial, steps must be taken to ensure that jurors' personal information is protected from public disclose and disclosure to the accused in any potential terrorism mega-trial. In the *Boucher* case, Boilard J. found that section 631 of the *Criminal Code*, which determines how juries are empanelled, prevented jurors and prospective jurors from remaining anonymous.[89]

95. Section 20 of the Ontario *Juries Act* goes even farther, allowing public access to the jury roll. In the *Jacobson* case, Ferguson J. used the inherent jurisdiction of the Court to issue an order restricting disclosure of jurors' identities.[90]

96. Ensuring that jurors and prospective jurors in terrorism mega-trials are not intimidated and protecting the integrity of their decision-making requires reform. In the Boucher case, the Crown commissioned a survey with Leger and Leger of 1000 individuals, which showed that 82% of people surveyed feared reprisals if required to be a juror at the trial of the leader of a criminal organization.[91] Even if no threats ever materialize against jurors, the perception of increased risk could affect decision making. Therefore, the *Criminal Code* should be amended to allow for jury anonymity in designated terrorism mega-trials.

Recommendation No. 15:

This Commission should recommend that Parliament amend the *Criminal Code* to provide for the possibility of juror anonymity in terrorism mega-trials, designated as mega-trials by the Chief Justice of the Provincial Superior Court. As well, the Government of Canada should take all steps necessary to make funds available to pay jurors reasonable sums for their service.

[89] *R. c. Boucher*, [1998] A.Q. no 3533 at paras. 41-43 (S.C.)
[90] *R. v. Jacobson* (2004), 74 O.R. (3d) 303.
[91] Exhibit P-300, Background Dossier for Term of Reference (b)(vi), pp. 27-28.

(b) "Mega-Trial" Judges: Panel of Three

97. The sixth Term of Reference asks the Commission to specifically address whether or not a panel of three judges should be employed in terrorism mega-trials. Without abrogating from the accused's right, if applicable and exercised under section 11(f) of the *Charter* to a trial by jury, where a case is designated as warranting a mega-trial, B'nai Brith believes that a panel of three judges should be considered in order to alleviate the heavy burdens of administration and ruling on law in such a case.

98. There is precedent for panels of three judges hearing important or large cases. As the Commission notes in its Dossier, notwithstanding containing a right to trial by jury, Ireland has provisions in its constitution to constitute a "Special Court" to deal with offences where "ordinary courts are inadequate to secure the effective administration of justice."[92] Pursuant to the *Offences Against the State Act, 1939*, the Attorney General of Ireland is empowered to direct a trial to proceed to a Special Court before a panel of three judges without a jury where an accused is charged with specific types of offences.[93]

99. In Israel there are two courts of first instance, Magistrates' Court and District Court. In criminal matters, Magistrates' Court has jurisdiction to try offences that carry a maximum prison term of seven years. More serious offences are tried in District Courts, which hold residual jurisdiction to handle at first instance any matter not assigned by statute to Magistrates' Court or the Supreme Court. Although Magistrates' Courts usually sit with a single judge at first instance, they may sit with a panel of three judges if the presiding Magistrate Court judge dealing with the case or the President of the Magistrates' Court directs such a panel. District Courts also convene under a single judge at first instance. However, when adjudicating cases of serious offences, including offences against state security, the President or Deputy President of the District Court may direct the trial to proceed before a panel of three judges.[94]

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[92] *Constitution of Ireland* (1937), s. 38(3.1).
[93] *Offences Against the State Act, 1939*, Ireland Statute No. 13/1939, ss. 38(1), 47(1).
[94] The jurisdiction and empanelling of Magistrates' Courts and District Courts in Israel is found in *Courts Law* (Israel) [Consolidated Version], 5744-1984, ss. 33-53. For a discussion, see State of Israel, The Judicial Authority, The Courts, online: http://elyon1.court.gov.il/eng/system/index.html.

100. Other liberal democracies employ panels of three judges to preside over long, complex and controversial trials. Allowing mega-trials to be presided over by a panel of three judges would certainly go a long way to alleviating the heavy burden on a single judge and allow terrorism mega-trials to be adjudicated more efficiently and fairly.

Recommendation No. 16:

This Commission should recommend that the Government of Canada amend the *Criminal Code* to provide that in terrorism mega-trials, designated as mega-trials by the Chief Justice of the Provincial Superior Court, be presided over by a panel of three judges, whether or not the case proceeds before a jury.

VIII. AVIATION SECURITY

101. The seventh Term of Reference directs the Commission to make findings and recommendations regarding the following:

> *whether further changes in practice or legislation are required to address the specific aviation security breaches associated with the Air India Flight 182 bombing, particularly those relating to the screening of passengers and their baggage*

102. Since the very beginnings of air travel, criminals motivated by greed and terrorists seeking radical political change have made it a target. Long before the Air India bombing and the events of September 11, 2001, Albert Guay planted a bomb in his wife's suitcase before she boarded a flight from Québec City to Sept-Îles, which exploded over the Québec town of Sault-Au-Cochon on September 9, 1949. The explosion downed the Canadian Airlines flight and killed the 23 passengers and crew, including Mr. Guay's wife.[95]

103. Although terrorism is by no means limited to commercial aviation, over the decades, terrorists have consistently targeted air travel through a variety of forms: hijackings, bombings, suicide hijackings, and airport attacks. Even following the events of September 11, 2001, Al Qaeda has shown particular interest in targeting commercial

[95] For a discussion of the bombing of 9 September 1949, see Jeffrey D. Simon, *The Terrorist Trap: America's Experience With Terrorism*, 2nd ed. (Bloomington: Indiana University Press, 2001), pp. 46-48.

airliners. On December 22, 2001, Richard Reid (now known as the "shoe bomber") attempted to detonate plastic explosives hidden in his shoe aboard American Airlines Flight 63 from Paris to Miami, but was subdued by passengers and the crew.[96] In August of 2006, a cell planning to blow up transatlantic flights from the UK to the US was thwarted.[97] Nevertheless, the Commission heard disturbing evidence regarding the airport security standards surrounding the Air India bombing itself and up to the present.

104. This Commission heard evidence that on the evening of June 22, 1985, Serge Carignan of the Sûreté du Québec was requested to proceed to Mirabel Airport outside Montreal to have his bomb sniffing dog search luggage on a departing Boeing 747. When Mr. Carignan arrived at Mirabel, he was informed by an RCMP officer that the plane he was supposed to inspect was an Air India flight and that it had already departed. After having his dog sniff three suitcases left behind from the departing flight, Mr. Carignan went home.[98] Mr. Carignan wondered to the Commission why the flight was permitted to depart when he had been called to inspect its luggage with his dog and stated his belief that if he was provided with an opportunity to search the plane, his dog would have detected the explosives.[99] Clearly the inability to connect the dots, which was explored earlier in these submissions extends to an inability to hold connections between dots when connected. Mr. Carignan's evidence was shocking because it confirms the precision of the threat that was assessed by authorities on outgoing Air India flights and on Flight 182 in particular, and confirms a gross disregard to the provision of security adequate to match the known threat.

(a) Turning "Myth" into Reality

105. Despite our long history with aviation sabotage, from the Guay bombing to Air India, and our knowledge that air travel remains a terrorism target in general, even today there remain serious concerns about the state of security at Canada's airports. In January

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[96] "Shoe bomb suspect 'one of many'" BBC News (26 December 2001), online: http://news.bbc.co.uk/1/hi/uk/1729022.stm.
[97] Bob Sherwood & Stephen Fidler, "MI5 tracked group for a year" *Financial Times* (10 August 2006), online: http://www.ft.com/cms/s/0/cbed2e12-28b5-11db-a2c1-0000779e2340.html.
[98] Evidence of Serge Carignan, Transcript: 9 May 2007, pp. 2665-2669.
[99] *Ibid.*, p. 2671.

of 2003, the Standing Senate Committee on National Security and Defence published a disturbing report entitled "The Myth of Security at Canada's Airports."[100] The Report highlighted serious issues and concerns regarding every aspect of airport and airline security, from cabin crew training, to customs and immigration control, to security breaches in restricted areas of airports.

106. Even more disturbing than the assessment in 2003, were the very recent remarks of Senator Colin Kenny, who chaired the Senate Committee on National Security and Defence. According to the *Toronto Star*, Senator Kenny stated that since the Committee's report, little has been done to implement the suggestions. He was particularly concerned about the lack of screening of airport employees, a lack of security in the supposedly secure areas of airports and in personnel who work near the planes.[101]

107. Senator Kenny testified before this Commission that his greatest concern was an attitude of complacency on the part of officials at the Department of Transport.[102] He further identified the lack of screening of non-passengers who access airports to be the Committee's biggest concern.[103]

108. The Committee followed up its initial 2003 report with a "Canadian Security Guide Book" last year.[104] It took issue with the fact that very few of its recommendations from 2003 were implemented in the five years following its issue. It went on to identify 15 new recommendations:

1) Increasing the police presence and cooperation of different police agencies at airports; ameliorating background checks for airport employees; improving security in restricted areas;

2) Checking the legitimacy of flight and ground crews;

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[100] Exhibit P-171, Standing Senate Committee on National Security and Defence, "Report: The Myth of Security at Canada's Airports" (2003).
[101] Sando Contenta, "Airport Security a 'Con Game'" *Toronto Star* (14 January 2008), online: http://www.thestar.com/News/article/293749.
[102] Evidence of Colin Kenny, Transcripts: 1 June 2007, p. 4672.
[103] *Ibid.*, p. 4687.
[104] Exhibit P-172, Standing Senate Committee on National Security and Defence, "Report: Canadian Security Guide Book" (2007).

3) Screening of airmail and other cargo;

4) Screening checked baggage;

5) Requiring bulletproof cockpit dividers;

6) Alerting crew members to the presence of any Aircraft Protection Officers aboard;

7) Provision of security training for maintenance workers;

8) Transferring jurisdiction over airports from Transport Canada to the Department of Public Safety and Emergency Preparedness Canada;

9) Creating a fail safe system to fill gaps in air cargo security;

10) Searching of vehicles and private aircrafts operating at airports;

11) Increasing security measures at smaller airports;

12) Ensuring that the Canadian Transportation Safety Authority has access to intelligence relevant to aviation security;

13) Making public "intrusion" tests that measure airport preparedness for a security breach;

14) Accounting by the Government of Canada regarding the "air travelers' security charge"

15) Accounting by the Government of Canada regarding all security expenditures.[105]

109. B'nai Brith commends both of the Committee's reports and finds it astonishing that not only have most recommendations from both reports not been implemented, there

[105] *Ibid.*, Appendix III: Index of New Recommendations, pp. 91-94.

has also been no substantial response from the Government of Canada regarding the recommendations. As Senator Kenny told the Commission:

> And, so the Committee is -- the Committee intends to continue with pressing these issues until the government provides a response to the questions that we've put here. To date, the response, if you read the report and you read the government answers, the government's response is spotty. That is the kindest reply I can make about it. Their response is spotty. And we believe that we have a duty to ensure that our airports are safe, given the history of the tragedies we've seen.[106]

Recommendation No. 17:

This Commission should recommend that the Government of Canada adopt all recommendations made by the Standing Senate Committee on National Security and Defence in its January 2003 Report, "The Myth of Security at Canada's Airports" and its March 2007 Report, "Canadian Security Guidebook: An Update of Security Problems in Search of Solutions".

(b) El Al Security

110. Israel's national airline, El Al flies out of Pearson Airport in Toronto. As Prof. Reg Whitaker of the York University pointed out, El Al maintains enhanced security features when it flies out of Canadian airports.[107]

111. Although the Commission was unable to secure testimony from representatives of El Al, many of its enhanced security aspects are generally known in the public, including asking intrusive questions when checking in, performing risk and behavioural profiling on passengers, running names through police databases from around the world, putting checked baggage through a pressure chamber to check for explosives, and having

[106] Evidence of Colin Kenny, Transcript: 1 June 2007, p. 4698.
[107] Evidence of Ken Whitaker, Transcript: 1 June 2007, p. 4607.

multiple air marshals on flights.[108] Indeed, El Al security is widely acknowledged to be the gold standard for aviation security.

112. There is no reason why Canada cannot learn from El Al's experience and there is no reason why Canadians traveling to all destinations should not be as secure as those traveling to Tel Aviv on a particular airline. In the aftermath of September 11, 2001, El Al set up a commercial security consulting wing to train security agents of other airlines. To help Canadian airports and Ministry of Transport officials deal with the security gaps identified by the Senate Standing Committee, El Al should be consulted.

Recommendation No. 18:

This Commission should recommend that the Government of Canada consult with El Al security consultants on how to close the security gaps identified in Canadian airports by the Standing Senate Committee on National Security and Defence.

IX. CONCLUSION: LEARNING THE LESSONS

113. Maureen Basnicki lost her husband in the terrorist attacks on New York City on September 11, 2001. Apart from the grief of losing her husband, Ms. Basnicki, a former Air Canada flight attendant, faced horrible challenges. She was issued and reissued death certificates when it appeared her husband's body was lost at Ground Zero and then when body parts were found.[109] Despite the fact that US forgave taxes owing by victims of September 11, 2001, Ms. Basnicki received a letter addressed to her husband from the Government of Canada "demanding payments of taxes that were in arrears and threatened to seize … if the taxes weren't paid."[110] She also testified that she received no help from the Government of Canada, incurred $200,000 in legal fees, and the only government agency offering help, the Ontario Office for Victims of Crime, was having difficulty in

[108] Eric Silver, "Flying under the eagle eyes of El Al's famed high security" *New Zealand Herald* (15 August 2007), online: http://www.nzherald.co.nz/section/2/story.cfm?c_id=2&ObjectID=10396216.
[109] Evidence of Maureen Basnicki, Transcript: 7 November 2006, pp. 1268-1269.
[110] *Ibid.*, p. 1271.

identifying her and other 9/11 victim family members because of the operation of privacy legislation.[111]

114. Occurring 15 years following the tragic events of June 23, 1985, Ms. Basnicki's experience does not reflect a Canada that responds appropriately to acts of terrorism against Canadian citizens.

115. Furthermore, it is unclear if even those in elected to high office appreciate the threat of terrorism or the impact of their own actions. Last year, the *Vancouver Sun* reported that Paul Martin and other senior politicians openly solicited the support of the International Sikh Youth Federation in his 1990 Liberal leadership bid, even following then Minister of External Affairs Joe Clark's warnings about the group.[112] This allegedly occurred five years following the Air India bombing. Even more recently, politicians from across the political spectrum attended a rally in Montreal where Hezbollah flags were waiving.[113] Ujjal Dosanjh testified that MPs and their staff must be better in tune to groups' agendas before attending their events.[114]

116. Clearly, the Canadian counterterrorism system is not working well if after a disaster like the Air India bombing, political leaders continue to associate themselves or not be diligent enough to disassociate themselves from supporters of terrorism. Vigilance and an "all-government leadership" in tune with the real risks is what is required.

117. In short, Canada is not a country immune to terrorism. On the contrary, Canada has a long and unfortunate history of terrorist incidents and aviation sabotage, from the Guay bombing in 1949, to the October Crisis of 1970, to the Air India bombing of 1985, to the events of September 11, 2001, in which 24 Canadians were murdered.[115] Yet

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[111] *Ibid*., p. 1273.
[112] Kim Bolan, "Ex-PM Sought Support of Terrorist Group" *Vancouver Sun* (20 February 2007), online: http://www.canada.com/vancouversun/news/story.html?id=a9c35e65-4482-4b7d-9074-482470952f01&k=8573&p=1.
[113] Mike Blanchfield, "Israeli ambassador denounces MPs for marching 'under Hezbollah flag'" *Ottawa Citizen* (10 August 2006), online: http://www.canada.com/ottawacitizen/news/story.html?id=1fe37eb3-0908-4dc3-99fb-c076cea69e17.
[114] Evidence of Ujjal Dosanjh, Transcript: 21 November 2007, pp. 10185-10186.
[115] Speech, "Prime Minister Harper honours 9/11 victims and restates Canada's commitment to fighting terror" (11 September 2006), online: http://pm.gc.ca/eng/media.asp?id=1312.

despite our own history, as the evidence of the family members indicates, and as the evidence of Ms. Basnicki, Senator Kenny, Commissioner Zaccardelli and others further confirm, as a country, we have not yet learned how to respond to threats and acts of terrorism in an appropriate fashion. According to the evidence this Commission heard, we have not yet learned the lessons that need to be learned from the Air India bombing.

118. This Commission has the opportunity to make important recommendations to the Government of Canada that can hopefully improve Canadian counter-terrorism law and policy. B'nai Brith hopes that these submissions and the recommendations contained herein help the Commission in this all important task.

119. The Commission's forthcoming report will be an excellent opportunity to begin the process of collective learning from one of the darkest episodes in Canadian history. It will come late – over 20 years after the event. However, it may not be too late.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 31, 2008

"Adam S. Goodman"
Adam S. Goodman

"Jayashree Goswami"
Jayashree Goswami

APPENDIX

B'NAI BRITH RECOMMENDATIONS

Recommendation No. 1:

The Commission should, with permission from the family members, post on its website the evidence from Stage 1 of the Inquiry in both official languages. The Commission should also consider posting the evidence heard in Stage 2 in both official languages.

Recommendation No. 2:

This Commission should recommend that the Government of Canada institute formal police-expert and police-community partnership programs, with adequate funding provided. In the police-expert program CSIS, the RCMP as well as Provincial and Municipal police authorities investigating terrorist threats would partner with experts on terrorist groups/movements under investigation to help process intelligence. In the police-community program, police would strengthen and deepen their ties to minority communities, building trust and information networks.

Recommendation No. 3:

This Commission should recommend that the RCMP maintain a corps of police translators for use in terrorism investigations. This translator corps should be shared by RCMP with CSIS as well as provincial and municipal police forces as the need arises. Alternatively, the Commission should recommend that police forces, at the very least, be provided with budgets adequate to hire translators immediately when confronted with terrorist suspects speaking in languages other than French or English.

Recommendation No. 4:

This Commission should recommend that the Government of Canada, the RCMP, CSIS and Provincial and Municipal police forces adopt a formal policy stating that counter-terrorism law and policy, including investigations will be administered on a non-discriminatory basis.

Recommendation No. 5:

This Commission should recommend that the Government of Canada, add the offence of incitement to terrorism to Part II.1 of the *Criminal Code*.

Recommendation No. 6:

This Commission should recommend that Parliament amend the *CSIS Act* to add subsection 19(2.1) which would replace the word "may" with "shall" in terrorism investigations to ensure that CSIS discloses information it obtains relevant to terrorist activities.

The proposed wording of subsection 19(2.1) in this regard would read as follows:

> **The Service shall disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information, where the information may be used in the investigation or prosecution of an alleged contravention of any offence contained in Part II.1 of the *Criminal Code*, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken.**

Recommendation No. 7:

This Commission should recommend that the Government of Canada establish a Canadian Counterterrorism Centre, headed by a Counterterrorism Executive Director who reports directly to Clerk of the Privy Council, and staffed by personnel from CSIS, the RCMP, Provincial and Municipal Police Forces, Public Safety Canada, the Communications and Security Establishment (CSE), Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), the Canadian Border Services Agency (CBSA), Foreign Affairs and International Trade Canada, the Department of Justice Canada and Provincial justice ministries. One of its key priorities should be to act as a clearinghouse for all represented agencies to share counterterrorism intelligence and evidence.

Recommendation No. 8:

This Commission should recommend that CSIS issue a policy stating that it will no longer destroy intelligence received related to terrorism investigations.

Recommendation No. 9:

This Commission should recommend that the Government of Canada introduce legislation to define the scope of what information is required to be disclosed to the accused in terrorism cases pursuant to *Stinchcombe* and should limit that disclosure to only (a) information upon which the Crown will rely; and (b) information which could reasonably seen as undermining the prosecution.

Recommendation No. 10:

This Commission should recommend that the Government of Canada introduce a provision to the *Anti-Terrorism Act* to the effect that (a) terrorist activity is a matter of universal jurisdiction for Canada; (b) victims of terrorism may bring a civil action for damages against terrorist offenders; and (c) civil and criminal liability will attach to terrorism offences committed prior to the enactment of the legislation.

Recommendation No. 11:

This Commission should recommend that Parliament consider legislation based upon Bill S-218, which provides that victims of terrorism bring a civil action for damages against state sponsors of terrorism, notwithstanding their sovereign immunity.

Recommendation No. 12:

This Commission should recommend that the Government of Canada convene a joint federal-provincial working group to adopt uniform regulations to address the lack of regulation of the charitable sector

and to especially address the need to regulate not-for-profit organizations current not subject to reporting requirements.

Recommendation No. 13:

This Commission should recommend that Parliament amend the *Criminal Code* to add subsection 83.05(2.2) to read as follows:

> **In an application under subsection (2), where there are reasonable grounds to refuse the request by a listed entity to no longer be a listed entity, the Minister shall refuse to recommend to the Governor in Council that the applicant no longer be a listed entity.**

Recommendation No. 14:

This Commission should recommend that the Government of Canada enact legislation that would allow innocent witnesses with important evidence in terrorism cases to be provided the opportunity to testify anonymously.

Recommendation No. 15:

This Commission should recommend that Parliament amend the *Criminal Code* to provide for the possibility of juror anonymity in terrorism mega-trials, designated as mega-trials by the Chief Justice of the Provincial Superior Court. As well, the Government of Canada should take all steps necessary to make funds available to pay jurors reasonable sums for their service.

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This Commission should recommend that the Government of Canada adopt all recommendations made by the Standing Senate Committee on National Security and Defence in its January 2003 Report, "The Myth of Security at Canada's Airports" and its March 2007 Report, "Canadian Security Guidebook: An Update of Security Problems in Search of Solutions".

Recommendation No. 18:

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COMMISSION OF INQUIRY
INTO THE INVESTIGATION OF THE
BOMBING OF AIR INDIA
FLIGHT 182

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