

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

**SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA IN
RESPONSE TO SUPPLEMENTARY SUBMISSIONS OF FAMILIES
GROUPS, AIVFA, FAMILY INTERESTS PARTY AND AIR INDIA
CABIN CREW ASSOCIATION, ET AL CONCERNING ADDITIONAL
DOCUMENTARY DISCLOSURE**

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1. Commission counsel has introduced as exhibits, additional documents to supplement the public record of this Inquiry. Many of these documents were provided to Commission counsel by counsel for the Attorney General in response to requests for clarification and further information in regard to the Commission's Terms of Reference pertaining to aviation security.¹

2. On November 17, 2008 Commission counsel conducted a briefing for counsel for the families and counsel for the Attorney General in respect of additional documents and information documents the Commission had gathered pertaining to the aviation security aspect of their mandate. Subsequent to that briefing the families were invited to make supplementary submissions on the documents and information provided at the briefing if so advised.² They did so although in some cases the submissions extend into other of the Commission's Terms of Reference. The Commission has also afforded this opportunity to the Attorney General of Canada to respond to those supplementary submissions.

3. It is a common theme in the supplementary submissions delivered by the families that the documentary disclosure by Commission counsel subsequent to the adjournment of the public evidentiary hearings has cast previous testimony of present and former government witnesses in a new light and that the documents ought to have been made available to counsel earlier in order that witnesses

¹ Terms of Reference paragraph b.vii

² Supplementary submissions were delivered by counsel for 3 groups of families, AIVFA, the Family Interests Party, and the Air India Cabin Crew Association and associated Indian nationals. They are collectively referred to in these submissions as the "families".

could have been cross examined and submissions made on the contents of the documents.

4. With some limited exceptions in relation to current initiatives concerning aspects of aviation security the additional documents identified by the families in their supplementary submissions do not raise new issues. Rather they illustrate themes extensively canvassed in the evidence presented by Commission counsel in the public hearings. At best these documents are an amplification of previous evidence.³

5. Similarly the submissions of the Attorney General of Canada delivered in March, 2007 addressed the various issues raised in the additional documents. Except to the limited extent referred to in subsequent paragraphs, nothing will be served by a reiteration of those submissions.

6. The Terms of Reference of the Inquiry, among other things, authorized the Commissioner to adopt any procedures and methods he may consider expedient for the proper conduct of the Inquiry and to conduct consultations in relation to the Inquiry as he sees fit.⁴

³ For example, one document, the ADDY report, PP#4230 referred to in the AIVA additional submissions at paragraph 12, concerned CSIS warrant procedures, a topic covered extensively in the oral and documentary evidence introduced during the hearings.

⁴ Terms of Reference, paragraphs d and e

7. In accordance with such authority Commission counsel, in carrying out their mandate, requested, received and reviewed voluminous documentation from departments of the Canadian government and various other sources, including open sources, interviewed numerous persons both in and outside of government, retained experts, and conducted research. In addition they presented evidence through witnesses in public hearings during which many of the documents that had been gathered were introduced as exhibits.

8. Commission counsel must synthesize all of the information gathered and produce a comprehensive and digestible report to the Governor in Council containing recommendations designed to avoid past mistakes and address future challenges. It falls to Commission counsel to effectively manage the inquiry process and to select from the information assembled that to be presented as evidence during the public hearings in order to address the issues posed by the Terms of Reference. They do not have an infinite time frame available in which to do so.

9. It should not be forgotten that this Inquiry required a canvass of thirty years of history. The vast amount of documentary and other information over that period relevant to the Inquiry's broad and sweeping terms of reference and the time available in which to assemble the information, review it for national security concerns and present the information through public hearings did not permit every document to be made available to the public before the hearings took place.

10. Collectively the additional submissions filed by the families reference 34 documents provided by government to Commission counsel. 27 of the 34 documents referenced in the additional submissions of the families were available to Commission counsel during the hearings. Commission counsel chose to deal with the issues identified in those documents through other evidence including other documents and oral testimony presented during the hearings.⁵

11. The remaining 6 of the 34 documents collectively referred to in the additional submissions of the families consist of summaries prepared by Commission counsel of three briefings provided by various Transport Canada officials to Commission counsel, who were accompanied on one occasion by Dr. Leiss, as well as 3 documents provided by Transport Canada to supplement the briefing held May 14, 2008.⁶

12. Government departments co-operated with Commission counsel in taking an expansive view of the Terms of Reference. Aviation security is the subject of on-going policy development and legislative and regulatory change. Commission counsel requested further information in respect of some of these

⁵ Government departments through counsel for the Attorney General of Canada provided numerous documents to Commission counsel other than those referenced by the families' groups in their supplementary submissions. Of the 34 documents referenced in the supplementary submissions of the families groups, 20 were provided to Commission counsel in unredacted form between September 29, 2006 and May 11, 2007. An additional 5 of those 34 documents were provided to Commission counsel in unredacted form between June 8 and October 18, 2007 and 2 more provided in unredacted form in January, 2008. One document, PP#4230, the Addy report was delivered to CC in June 2008.

⁶ The Briefing Summaries PP#s 4393, 4438 and 4439 and documents PP #s 4412, 4424 and 4425

developments and was accommodated by means of briefings and documents provided to them which gave Commission counsel a window into development of current initiatives. These initiatives, like other government policy, will be the subject of debate in consultative legislative and other fora better suited to deal with these matters than this inquiry.⁷

13. Notwithstanding these general submissions, the Attorney General will address some specific matters raised by the families' supplementary submissions.

Monitoring of Civil Aviation Security

14. There is little doubt that the monitoring of Air India's security operations at Pearson Airport by Transport Canada in the six months between their commencement in January 1985 and the bombing was minimal: the only inspection recorded was that conducted in January 1985 shortly after Air India commenced its operations at that airport.

15. It does not follow from this that Transport Canada neglected to monitor air carrier compliance with security programs. The Attorney General reiterates the submissions set out at paragraphs 56 to 71 of Volume II of his Final Submissions.

⁷ For instance, the Submissions of the Family Interests Party at paragraphs 47 to 50 in regard to the Passenger Protect Program concern the circumstances of Mr. Al Telbani. The decision and emergency directive of the Ministry of Transport dated June 4, 2008 in regard to Mr. Al Telbani is currently the subject of a proceeding for Judicial Review in the Federal Court.

16. The evidence discloses at least three reasons for the limited monitoring. First, inspectors were few and resources were apparently very limited. No evidence was led concerning competing priorities, budgets or the monitoring of other carriers at Pearson and elsewhere. In the absence of such evidence, there is no basis to conclude that policy decisions made before the bombing were inappropriate.

17. Second, Transport Canada lacked the legal authority to effect changes to deal with any problems that might have been found. Regulatory standards were minimal at the time and there was no basis to compel carriers to comply with, let alone exceed, the provisions of their security plans. Transport had already recognized the problem and legislative changes were to come into force just a few days after the bombing which would strengthen enforcement options.

18. Third, in 1985 detailed regulation and aggressive enforcement were not yet standard practice. Instead, Transport Canada required carriers to develop and adhere to their own security programs.

19. Air India's security program provided that unaccompanied baggage must be associated with a bona fide passenger before being loaded and that checked baggage from no-show passengers must be offloaded. The program's emergency procedures further provided that all unaccompanied baggage should

be held for 24 hours or inspected physically and checked baggage of a “no show” not be loaded in the first place.

20. Further, prior to commencing operations at Pearson, Air India amended its security plan to add new measures, including the examination of checked baggage by x-ray machine and/or the PD-4 sniffer before loading.

21. In short, responsibility for carrying out these measures rested with Air India. Had Air India done so, or carried out the supplementary measures laid out by its head office in the June 1 telex, the bombing might have been avoided.

22. The Attorney General of Canada reiterates the submissions made at paragraphs 147 to 152 and 181 to 202 of Volume II of his final submissions.

Risk Management Procedures

23. The Attorney General agrees with the submission made by the AIVFA at paragraph 52 of the AIVFA Supplementary Submissions. Transport Canada has been using a risk-based approach to setting transportation security priorities for several years by using formalized strategic and operational-level risk assessment methodologies. The Department continues to monitor and assess various risk based methodologies, working with other Departments, Agencies and International partners in an effort to continually improve and enhance its risk based processes.

24. Commission counsel has introduced into evidence an affidavit sworn August 20, 2008 by Dr. Leiss who testified before the Inquiry on December 7, 2007.⁸ The Affidavit does little more than reaffirm his testimony on that occasion, in particular in regard to the June 1st telex. The Attorney General of Canada submits that the submissions set out at paragraphs 466-470 of Volume II of his final Submissions remain applicable. Little weight should be given to the Affidavit. Dr. Leiss was called as an expert in risk communication, risk perception and risk management. He is not an expert in aviation security and has insufficient knowledge of the circumstances surrounding aviation security standards and practice in 1985.

25. Moreover, Dr. Leiss' opinion in regard to the June 1 telex is the product of some 25 years of hindsight. Before accepting that opinion, the Commissioner should consider such other matters as the reaction of other governments and authorities around the world to this telex, any assessments of its significance made by the Government of India and Air India, the reasons for their apparent lack of response to the telex and the reasons why Air India did not give it to Transport Canada. The Commissioner heard no evidence on these contextual points. The Attorney General respectfully submits that without that evidence, it would be inadvisable to rely on the opinion of Dr. Leiss.

⁸ Ex P-433

CATSA Performance Measurement

26. Transport Canada and CATSA agreed upon common performance standards in April 2007. Transport Canada has been monitoring the performance of CATSA against these standards since that time.

Project SPAWN⁹

27. With respect to the findings of Project SPAWN, the Government has adopted a five-point plan to drive organized crime from Canadian airports. The Government is:

- (1) exploring legislative initiatives to enhance search and seizure methods;
- (2) strengthening the information-sharing agreement between Transport Canada and the RCMP;
- (3) reviewing existing security clearances and examine possible new clearance levels;
- (4) revoking any security clearance when the RCMP has provided evidence that an individual may pose a security risk; and,
- (5) working toward strengthening legal provisions for organized crime, ensuring that serious offences are met with serious penalties.

Response to the Bombing

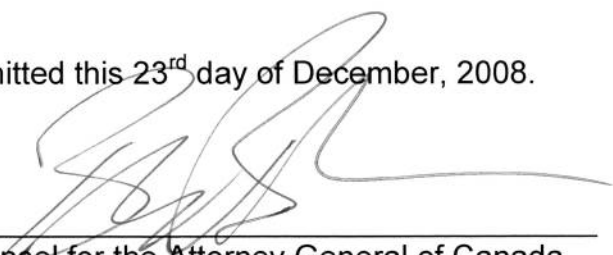
28. It is apparent that there is some misconception as to purpose of this Commission. It is not to assign blame. It is rather to learn lessons from the past

⁹ The focus of Project Spawn concerned activities of organized crime at major Canadian airports particularly in respect to theft, smuggling and importation of drugs and narcotics. Any connection between the Spawn report and the Inquiry's Terms of Reference is most remote.

in order that we might improve the future.¹⁰ Transport Canada quickly learned many lessons and adopted many innovative security measures that continue in force today. In this regard the Attorney General refers the Commission to paragraphs 268 to 281 of Volume 2 of his March 2007 submissions.

29. The Government of Canada looks forward to the Commissioner's Report.

All of which is respectively submitted this 23rd day of December, 2008.



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¹⁰ For instance, see submission of the Air India Cabin Crew Association and associated Indian nationals at page 7.