

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

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1. These are the supplementary submissions of the Family Interests Party, and in particular, its members Mrs. Lata Pada, Mr. Satrajpal (Fred) Rai, Ms. Lorna Kelly, and Mr. Kalwant Mamak to the new evidence released by the Commission of Inquiry into the Bombing of Flight 182 (the "Inquiry" or the "Commission") since the close of hearings.

2. The new evidence, which was released between October 7 and November 17, 2008, via email and in a briefing held by the Commission on November 17, 2008, relates to several different areas relevant to the civil aviation security regime, both as it exists today, and as it existed in 1985. Specifically, the new evidence released raises issues in relation to the following specific areas of aviation security:

- (i) Security Failures: Air India
- (ii) Passenger-Baggage Reconciliation
- (iii) Security Failures: Canada
- (iv) Air Cargo
- (v) Passenger Protect Program
- (vi) CATSA

3. Given the importance of this Inquiry for the Family Interests Parties and for Canadians in general, the input of parties with standing is important. The Commission acquired and examined most of this new evidence in private briefings carried on at the time without the knowledge of the parties or their counsel. The parties were provided with this new evidence several months after the Commission received it. The parties have not had an opportunity to examine witnesses about these documents or to pose questions in writing. The public hearings ended almost ten months ago and the parties have been told that there is now insufficient time available for presentation in further hearings.

4. Had all parties been able to participate several months ago when the Commission received this evidence - or, better still, had the evidence been presented openly and transparently through witnesses at the hearings, - these supplementary submissions might not have been

necessary. The parties might have received the answers to questions which will now remain unanswered, and their position on the evidence would have been presented in what were intended to be final submissions last February.

## **CIVIL AVIATION SECURITY: 1985**

### *Security Failures: Air India*

5. In her statement given on September 10, 1985 by Dorothy Gilbert, the manager of Terminal 2 at Pearson International Airport concluded that Air India "did not have a consistent approach to security."<sup>1</sup> In fact, she admitted that Air India had not provided instructions in relation to security procedures on Air India flights. Further, Air India supplied a different security agent monthly and each agent gave different instructions in relation to screening: "one would tell us to check everyone and another would tell us not to check children senior citizens."

6. Indeed, the statement of Holger Kordts, the Burns Security branch manager at the Toronto International Airport confirmed that, when pressed for time, Air India would rush through three or four older passengers.<sup>2</sup> He also confirmed that Air India never provided any formal, written instructions on how to secure Air India flights. The security employees were never told to look for security numbers on baggage tags or to count the number of bags, but rather to just look for the destination tag.

7. Also, as stated in the original submissions of this Family Interests Party, it was apparent from the evidence released during the hearing that the reporting structure for Air India's security was confused and, as a result, no one appeared responsible for the security of Flight 182. This was confirmed by the recently released statements of Messrs. Menezes, Yodh, and Vaney.

8. Mr. Menezes, the area sales manager for Air India in Eastern Canada in 1985, stated that the reporting structure of Air India was as follows: Mr. Puri was the general manager in Canada and his assistant and airport manager for Mirabel was Mr. Sarwal.<sup>3</sup> While Mr. Sarwal was on vacation, Mr. Yodh came in from New York to replace him. Accordingly, on June 22, 1985, Mr. Yodh was responsible for traffic handling which included the checking in of

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<sup>1</sup> Statement of Dorothy Gilbert, September 10, 1985, Doc. CAF 0801.

<sup>2</sup> Statement of Holger Kordts, Doc. CAF0756.

<sup>3</sup> Statement of Derek Menezes, July 5, 1985, Doc. CAF0793.

passengers and baggage as well as the loading of the plane. Mr. D'Souza, however, was the chief security officer that night, and Mr. Yodh did not have authority to overrule him.

9. In his statement given on July 18, 1985, Mr. Yodh states that he was a traffic supervisor on June 22, 1985 and that, contrary to Mr. Menezes' statement, he was not designated to replace Mr. Sarwal at Mirabel.<sup>4</sup> Mr. Yodh stated that he did not know if an airport manager had been appointed to replace Mr. Sarwal that night. Instead, it was Mr. Menezes who was responsible for Air India security at Mirabel. Mr. Yodh also states that Mr. Vaney was "responsible for Air India flights at Toronto International Airport on June 22, 1985" but that Mr. D'Souza was responsible for security of Air India Flights 181/1982 that night. In the same breath, he also says that Burns Security was "in charge".

10. Also, a report of the Royal Canadian Mounted Police ("RCMP") dated November 4, 1985 states that, when interviewed, Mr. Vaney insisted that he was not in charge of Air India's operations on June 22, 1985.<sup>5</sup> Rather, Mr. Vaney posited that Mr. Yodh was the manager responsible for Flight 182. The person interviewing Mr. Vaney was unable to explain the inability of Air India personnel to identify the individual who handled the responsibilities of the airport manager on June 22.

11. This obvious confusion and blame-shifting was noted by a 1985 report of the RCMP in relation to an interview with Mr. Vaney.<sup>6</sup> In that interview Mr. Vaney insisted that he was not "in charge" on June 22, 1985. Instead, in obvious contradiction with the statement by Mr. Yodh, Mr. Vaney insisted that it was Mr. Yodh who was responsible for the management of the airport that night. The RCMP report, not surprisingly, concluded that

It appears that there is some confusion with respect to who was in charge or airport manager on June 22, 1985. It may well be that no one was acting in this capacity on June 22, 1985 through poor communication and/or misunderstanding of assigned duties.<sup>7</sup>

12. This new evidence confirms the conclusion that Air India's security reporting and decision making structure was dangerously disorganized. It is clear that no one took

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<sup>4</sup> Statement of Divyeng Yodh, July 18, 1985, Doc. CAF0795.

<sup>5</sup> RCMP Report, November 4, 1985, Doc. CAF0803.

<sup>6</sup> RCMP Report, October 31, 1985, Doc. CAF0802.

<sup>7</sup> *Ibid.*

responsibility for the security of Air India Flight 182. Perhaps if they had, the bombing could have been avoided.

### *Passenger-Baggage Reconciliation*

13. Passenger-baggage reconciliation was one of the largest gaps in the international aviation security regime in 1985. Very few airlines were reconciling baggage at the time, and, as a direct result, the bomb which ultimately destroyed Air India Flight 182 was placed on board the plane.<sup>8</sup>

14. In this Family Interests Party's original submissions, we concluded that Air India fell short in allowing the bag of M. Singh to be put on the plane and in failing to protect the passengers of Flight 182. Air India's security plan did not deal with the situation created by the baggage of M. Singh but it should have. Had Air India's security plan provided for passenger-baggage reconciliation at the time, Mr. Singh's baggage would not have been interlined, and the bombing of Flight 182 would have been prevented.<sup>9</sup>

15. Also in the original submissions of this Family Interests Party, we concluded that, after the bombing, Air India was the first airline to implement passenger-baggage reconciliation. Canada, based on recommendations of the *Seaborn Report*, was the first member of the International Civil Aviation Organization to require passenger-baggage reconciliation on all domestic and international flights.

16. However, evidence released since the close of hearings shows that CP Airlines was implementing passenger-baggage reconciliation in Toronto in 1985. A comprehensive audit of CP Airlines done in March/April 1984, more than a year before the bombing, shows that during high threat situations, CP Air successfully developed and applied a passenger-baggage match system.<sup>10</sup> According to the audit, "they found it worked very well and there was definitely no bag put on the aircraft unless the passenger was on the aircraft." CP Air's Regulations also

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<sup>8</sup> Transcripts, Vol. 37, May 31, 2007, p. 4411 (Mr. Wallis).

<sup>9</sup> Canadian Aviation Safety Board, *Aviation Occurrence Report to the Kirpal Commission*, (1986) pp. 56-57.

<sup>10</sup> Comprehensive Audit, CP Airlines (March/ April 1984), Doc. CAF0759.

provided that unaccompanied baggage should not be carried except in exceptional circumstances where a passenger has missed a connecting flight.<sup>11</sup>

17. There was significant evidence in Air India's possession in 1985 that warned of a high threat situation. For example, in July 1984, Air India had information a person had volunteered to carry a bomb in his accompanied baggage with a view to blowing up an Air India plane to draw attention to the demands of Sikh separatists.<sup>12</sup> In October 1984, another telex referred to the increasing threat from Sikh extremists and warned that extremists intended to hijack an Indian aircraft every month."<sup>13</sup>

18. On May 21, 1985 a further telex was received by Air India which reported that terrorists were planning violent activities for the second week of June, and there was a possibility that civil aviation would be a target.<sup>14</sup> On June 1, 1985 Air India received a telex indicating that sabotage attempts from Sikh extremists by way of "time-delay devices, etc. in the aircraft or registered baggage" was likely. The telex stated that "Sikh extremists are planning to set up suicide squads who may attempt to blow up an aircraft by smuggling in of explosives in the registered or carry-on baggage or any other means."<sup>15</sup>

19. Therefore, Air India could have implemented a passenger-baggage reconciliation program similar to CP Air's and it could also have warned CP Air of the heightened threat environment. Rajesh Chopra, the Duty Officer for Air India in Delhi in 1985, however, admitted in his testimony that an airline that would interline baggage, such as CP Air, would not have been advised of the threats to Air India.<sup>16</sup> Had it done so, the evidence indicates that CP Air would have implemented its passenger-baggage reconciliation program. As part of this program CP Air would have attempted to reconcile the baggage of M. Singh and, when no accompanying passenger was identified, CP Air would not have put the bag on Flight 182.

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<sup>11</sup> CP Air Regulations, Doc. CAF0761, p. 5.

<sup>12</sup> Air India Telex, July 30, 1984, Doc CAA0084

<sup>13</sup> Air India Telex, October 5, 1984, Doc. CAA-0097.

<sup>14</sup> Air India Telex, May 21, 1985, Doc. CAA0161.

<sup>15</sup> Air India Telex, June 1, 1985, Docs. CAA0174 and CAA0185.

<sup>16</sup> Transcripts, Vol. 43, June 14, 2007, p. 5333 (Mr. Chopra).

*Security Failures: Canada*

20. The original submissions of this Family Interests Party concluded that Canada's aviation security officials made a serious mistake in failing to heed the warnings of the heightened threat environment surrounding Air India. The evidence released since the close of the hearings confirms that Canada was aware that its aviation security regime in the early to mid 1980s was lacking.

21. In 1984, Transport Canada's assessment of civil aviation security noted that even with a formal program for the security of Canadian air carriers and airports had been in place for fifteen years, there was an unstructured approach to the maintenance of that system.<sup>17</sup> The report concluded that:

This unstructured approach has meant that elements of the system are being adequately looked at while there are other areas where there has been duplication of effort and still other situations where there are complete voids of inspecting and monitoring.<sup>18</sup>

22. It was these "voids of inspecting and monitoring" that were at least partly responsible for the failure to prevent the bombing of Air India Flight 182. For example, proper measures were not in place in the mid 1980s to ensure that aviation security personnel received adequate training. Jim Post, a Burns Security employee working with the x-ray machine on June 22, 1985 recalled in an unsigned statement that he had not taken the Transport Canada passenger screening course and was not trained by Burns Security.<sup>19</sup> Rather, in his statement Mr. Post indicates that he "was taken out and dumped in and told to do the job of checking the baggage." Though responsible for screening baggage, including use of the PD-4 sniffer, Mr. Post received no formal training on either.

23. Also, in 1984, if problems with an airport's security program were identified, there was no enforcement mechanism to correct the problem. "An example of this was one airport which had many faults which were identified year after year but efforts at correcting the

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<sup>17</sup> Transport Canada, "Inspecting/ Reviewing Airport and Air Carrier Security" (1984), Doc. #4274, Public Production Set 86, p. 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> Statement of Jim Post, September 5, 1985, Doc. CAF0799.

problems were held up due to other more pressing priorities."<sup>20</sup> At the same time, the branch of Transport Canada responsible for functional reviews of airport security did not always have the expertise necessary to carry out the functional review properly.<sup>21</sup>

24. Further, Canada was aware, as early as 1980, that the main threat to civil aviation was no longer hijacking but instead, sabotage. In the 1980 report, "Evolution of Canadian Civil Aviation Security Program" it is written that, "recent events would indicate that acts of sabotage, rather than hijacking, will be the main threat to civil aviation in the '80s."<sup>22</sup> That report further concluded that "the original objective of a national and uniform security system has not been achieved." (emphasis added) Specifically, in 1980, effective measures were not in place to ensure the proper inspection of aircraft, passengers, baggage and cargo.

#### **RESPONSE OF THE CIVIL AVIATION SECURITY REGIME**

25. There have been many changes in Canada's civil aviation security regime since the tragedy of Air India Flight 182. However, many of the same deficiencies exist today. Though Transport Canada has taken steps to address the issues raised and the recommendations made by the *Seaborn Report*, *Flight Plan* and other similar reports, large gaps in aviation security remain.

#### *Air Cargo*

26. As noted in the original submissions of this Family Interests Party, the issue of air cargo security has been repeatedly identified as a major concern in the Canadian civil aviation security regime since 1985. Specifically the *Seaborn Report* in 1985,<sup>23</sup> the *Rae Report*,<sup>24</sup> *Flight*

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<sup>20</sup> Transport Canada, "Inspecting/ Reviewing Airport and Air Carrier Security" (1984), Public Production Set 86, p. 4

<sup>21</sup> *Ibid.*, p. 11.

<sup>22</sup> Evolution of Canadian Civil Aviation Security Program, 1980, Doc. CAF0766.

<sup>23</sup> Seaborn, *Security Responses Affecting Airports and Airlines in Canada*, (September 24, 1985) at p. 7, Doc. CAF0039.

<sup>24</sup> Public Safety and Emergency Preparedness Canada, *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 Secretariat, 2005) at p. 21.



Plan,<sup>25</sup> the CATSA *Air India Report*<sup>26</sup> and the Senate Committee<sup>27</sup> have all noted that air cargo represents one of the most serious gaps in Canada's aviation security regime.

27. At the time of the hearings, the federal government took the position that screening cargo was not a practical option because the technology for screening cargo was not readily available. Stephen Conrad, Director of Air Cargo Security for Transport Canada, for example, stated that "from a practicality perspective or feasibility perspective, it is extremely difficult to accommodate within our current environment".<sup>28</sup> Mr. Conrad also stated that:

[A] singular approach of saying all cargo must be secured at an airport within the Canadian environment, we didn't see as being a practical approach, given our constraints with technology and the ability or the feasibility of performing all those tasks at the airport within the short timeframe that air cargo has to turn around.<sup>29</sup>

28. Yves Duguay, a witness from Air Canada, also testified that, to the best of his knowledge, Air Canada does not have "access to any technical equipment to screen cargo. We would have to move the cargo towards the terminal to use the equipment that's there in place and used by CATSA. And to the best of my knowledge, we are not using that equipment."<sup>30</sup>

29. However, Dr. Kathleen Sweet, an aviation security expert from the University of Connecticut, testified that the technology was available and that cargo screening could have been implemented many years ago.<sup>31</sup> Also, despite Transport Canada's claims about the difficulty of screening cargo given the state and cost of technology, we are now informed that Transport Canada has been conducting pilot projects to develop enhanced models and technologies for cargo security screening. No information has been provided about how long Transport Canada has been doing this research, but no one has claimed that it began after the hearings concluded.

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<sup>25</sup> Canada, Review of the Canadian Air Transport Security Authority Act – Flight Plan: Managing the Risks in Aviation Security – Report of the Advisory Panel (Ottawa: CATSA Act Review Secretariat, 2006) (Chair: Dr. Reg Whitaker), pp. 48-49.

<sup>26</sup> Canada, *Air India Flight 182: Aviation Security Issues* (Ottawa: CATSA Act Review, 2007) (Chair: Dr. Reg Whitaker), p. 108.

<sup>27</sup> Standing Senate Committee on National Security and Defence, "The Myth of Security at Canada's Airports," (January 2003) p. 10, Standing Senate Committee on National Security and Defence, *Canadian Security Guide Book: Airports* (March 2007), p. 29.

<sup>28</sup> Transcripts, Vol. X, June 13, 2007, p. 5188 (Stephen Conrad)

<sup>29</sup> Transcripts, Vol. X, June 13, 2007, p. 5187 (Stephen Conrad).

<sup>30</sup> Transcripts, vol. X, June 14, 2007, p. 5290 (Yves Duguay).

<sup>31</sup> Transcripts, Vol. 41, June 6, 2007, p. 4991 (Kathleen Sweet).

Why then, did the witnesses from Transport Canada not refer to it, particularly in response to direct questions about the feasibility of cargo screening?

30. According to Transport Canada's website materials:

The Air Cargo Security Screening project will consist of assessing diverse cargo operating environments and testing screening technologies in a controlled laboratory environment. A matrix of appropriate screening models will then be produced that could be used by various industry members. The matrix will also include non-intrusive elements such as x-ray, trace detection and canine for use in screening mail and other special cargo categories that could be damaged by physical inspection.<sup>32</sup>

31. This statement is vague and actually does little to address the concerns about air cargo screening. Because the parties were not provided this information until many months after the hearing, we are unable to ask further questions about it. Some of the questions we might have asked include: Does Canada have access to technology to screen cargo, despite the testimony of Transport Canada witnesses? What is the 'matrix of appropriate screening models'? How many screening models is Transport Canada looking at and what are those models based on? More importantly, why, if Transport Canada was already researching technologies for screening cargo in 2007, did all of Transport Canada's witnesses deny that screening cargo was a viable option for Canada?

32. Also, what is Transport Canada's response to the United States Department of Homeland Security making the "screening of all property, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by a domestic or foreign air carrier," mandatory.<sup>33</sup> The United States is also requiring the creation of a system to

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<sup>32</sup> Transport Canada, Air Cargo Security: Website Materials, Doc. P419. Nick Cartwright, Director of the Security Technology and Emergency Preparedness Branch at Transport Canada also stated that the use of sniffer dogs as a more traditional method of screening cargo was not "readily compatible with the way a dog functions and the way a dog performs better." Transcripts, Vol. X, June 13, 2007, p. 5220 (Nick Cartwright). However, Transport Canada now state that there is a role for sniffer dogs in screening air cargo. According to the summary of the briefing made by Transport Canada to Commission Counsel on July 24, 2008, "because of the diverse nature of cargo (for example, its variable size and the sensitivity of some commodities), canines offer some advantages that other screening processes lack." Summary of Transport Canada Briefing, July 24, 2008, Doc. 4438, Public Production Set 89, p. 5.

<sup>33</sup> Department of Homeland Security. "2006 Final Rule on Air Cargo Security," p. 30478, Doc. P-416. The U.S. Government Accountability Office 2005 Report on Air Cargo Security, for example, includes photographs of air cargo being loaded and inspected using an explosive detection screening system. United States General Accounting

screen 100% of cargo transported on passenger aircraft by 2010 and to implement a level of security comparable to the level of security in effect for hold baggage.<sup>34</sup> According to regulations made under the *Aviation and Transportation Security Act*, the Transportation Security Administration is also required to establish a system to screen, inspect or otherwise ensure the security of all freight being transported aboard all cargo aircraft.<sup>35</sup>

33. The air cargo screening program is only one part of a program referred to as the Air Cargo Security Initiative ("ACS Initiative"). This program, developed by Transport Canada with the support of the Canada Border Services Agency, was begun in 2007 and is scheduled for completion in 2009. The initiative takes a two-pronged approach to air cargo security: (1) hardening of supply chain security; and (2) improving air cargo screening.<sup>36</sup> Air cargo screening is secondary, however, to the Secure Supply Chain Programs. Given all of the concerns about cargo screening, the reason for this is unclear.

34. The Secure Supply Chain Programs require participating freight forwarders, shippers and air carriers to develop or enhance the security program for their operations and register with Transport Canada's Secure Supply Chain Management System. The Initiative introduces two general categories for shippers, freight forwarders and air carriers: regulated and unregulated. There are further specific categories of shippers: unknown, known and registered, as well as categories of air carriers: regulated passenger air carrier and regulated all-cargo air carrier.<sup>37</sup>

35. All cargo that is carried by non-regulated shippers or agents will be subject to 100% screening. Regulated shippers will be required to self-certify that 100% of cargo is secure and has been screened or inspected, or to identify what cargo requires screening or inspection. Non-regulated freight forwarders will be required to screen or identify and maintain the integrity

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Office. "Aviation Security: Federal Action Needed to Strengthen Domestic Air Cargo Security." October 2005. Doc. P417.

<sup>34</sup> Transport Canada, "Air Cargo Security Initiative Update", undated, p. 9. Doc. P422.

<sup>35</sup> United States General Accounting Office. "Aviation Security: Federal Action Needed to Strengthen Domestic Air Cargo Security." October 2005. Doc. P417.

<sup>36</sup> Transport Canada, Air Cargo Security: Website Materials, Doc. P419.

<sup>37</sup> "Air Cargo Security Initiative Update," and "Air Cargo Security Website Materials." According to the briefing of Commission Counsel by Transport Canada in May, 2008, the regulated passenger and cargo carrier program will likely be aligned with those being developed and enhanced in the United States and Mexico. Summary of Transport Canada Briefing, May 14, 2008, Doc. 4393, Public Production Set 88.

of secure cargo received from regulated shippers. Regulated agents will also be required to screen or identify and maintain the integrity of secure and other cargo or refuse shipment. Throughout the process, cargo will be subject to random and targeted screening and inspection.<sup>38</sup>

36. The multiple categories of shippers, agents and air carriers is confusing. For example, as part of the ACS Initiative "known shippers" can become "registered shippers" by undergoing a particular validation process. However, both can be either regulated or unregulated. The "registered shipper" designation has apparently been identified for mutual recognition with the United States category of "known shipper" but is not the same as a "regulated shipper".<sup>39</sup> However, during a briefing for Commission counsel by Transport Canada on July 24, 2008, Transport Canada indicated that the "registered shipper" designation may not be valid in the long term. According to the summary of that briefing provided by Commission counsel:

The "Registered Shipper" may not be a valid designation in the long term. In other words, the shippers are vetted by Transport Canada, not by industry, and a national standard is applied to approve them for recognition. Registered Shippers are placed into a database which is tracked, so there is no need for each company to rely on its own process of approval. It provides a consistent standard.<sup>40</sup>

37. Transport Canada has not provided information about this "national standard" nor was any information about registered shippers provided during the hearings.

38. In addition to the confusion caused by the multiple categories, the Canadian "known" shipper category was heavily criticized in this Family Interests Party's original submissions. Employees of "known shippers" are not necessarily subjected to the kind of rudimentary background checks that airport employees or Canada Post employees undergo. Further, their parcels are not screened when delivered to the terminal.<sup>41</sup> Also, we noted that the Attorney General refused to disclose the government's definition of "known shipper" though we were able to find that information on Transport Canada's own website.<sup>42</sup>

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<sup>38</sup> "Air Cargo Security Initiative Update."

<sup>39</sup> Summary of Transport Canada Briefing, May 14, 2008, Doc. 4393, Public Production Set 88, p. 3.

<sup>40</sup> Summary of Transport Canada Briefing, July 24, 2008, Doc. 4438, Public Production Set 89, p. 5.

<sup>41</sup> The Myth of Security, p. 48.

<sup>42</sup> Transcripts, Vol. 43, June 14, 2007, p. 5295 (Mr. Graham).

39. In 2003, the Standing Senate Committee on National Security and Defence recommended that the reliance on "known shippers" be discontinued and that a protocol be developed for shippers based on proven capacity to guarantee security.<sup>43</sup> Mr. Rodney Wallis also testified that "Now, I've seen lots of things relative to known shippers in Canada and I believe that the interpretation of known shipper in the Canadian sense is totally wrong and it needs to be looked at again."<sup>44</sup>

40. Without further information about the ACS Initiative, it is unclear whether it is responsive to the concerns about "known shippers" or not. For example, how exactly does a "known shipper" become "registered"? What is the validation process? When was this category of "registered" shippers developed? Further, Transport Canada has indicated that, despite the serious concerns raised by the category of "known shipper", it will continue to be used in the short term and possibly longer.<sup>45</sup>

41. Also, there has been no attempt to indicate why more information about "known shippers" was not given during the hearings. Mr. Conrad gave evidence in June 2007 about Transport Canada's air cargo security initiative (referred to at the time of the hearings as the Air Cargo Security Development Project), but made no mention of how "known shippers" would play a role or how the various categories of shippers, freight forwarders and carriers would be managed.<sup>46</sup>

42. The program for regulated passenger and cargo air carriers requires air cargo supply chain companies and others to sign an Air Cargo Security Program Memorandum of Understanding ("MOU"). By signing the MOU the party agrees to participate in the initiative, to implement an Air Cargo Security Plan and permit Transport Canada to conduct inspections. Before completing an Air Cargo Security Plan, participants must also complete an Air Cargo Security Assessment and Characterization Questionnaire. Transport Canada will use the data provided to create a national Registered Shipper List. All cargo, for both regulated passenger

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<sup>43</sup> Standing Senate Committee on National Security and Defence, "The Myth of Security at Canada's Airports," (January 2003) at p. 54.

<sup>44</sup> Transcripts, Vol. 35, p. 4249 (Rodney Wallis).

<sup>45</sup> Summary of Transport Canada Briefing, July 24, 2008, Doc. 4483, Public Production Set 89, p. 5.

<sup>46</sup> Transcripts, Vol. 42, June 13, 2007, pp. 118-121 (Mr. Conrad).

and all-cargo air carriers, will be subject to random or targeted screening and inspection and air carriers are required to screen and "maintain (the) integrity of secure cargo."<sup>47</sup>

43. Again, although Transport Canada witnesses described parts of the government's initiative in terms of air cargo security at the hearing, no mention was made of this MOU nor was a copy provided to the parties. This is particularly surprising, since the standard MOU is dated June 21, 2007, one week after Transport Canada's witnesses testified.<sup>48</sup> The document, however, was not provided until November 7, 2008 and the parties have not been given an opportunity to ask questions about it. When was the document created? When did the parties first sign the MOU? How many parties have signed the MOU? Have there been any breaches of the MOU? What proportion of air cargo carriers have signed the MOU? How many are expected to sign? Are all air cargo carriers expected to sign it?

44. While the ACS Initiative demonstrates a step in the right direction, it falls short in several ways. The description of the Initiative is vague on its face. The timing of the initiative is also uncertain. The government chose to proceed with a voluntary program rather than implementing further regulations to make the program mandatory. The MOU is a non-binding document and, if a participant in the initiative does not comply with the MOU, the participant will be removed from the program without further penalty. There are no fines for non-compliance.<sup>49</sup> The ultimate responsibility for air cargo security remains with the air carriers under this program, yet there does not seem to be any penalty for not maintaining that security.<sup>50</sup> As a result, the level of commitment made by signing this MOU is practically nil.

45. Further, while the regulated agent program for freight forwarders and the regulated shipper program for exporters and manufacturers have been launched, the regulated air carrier and all-cargo air carrier enhancements have not begun. The exact status of programs for air carrier cargo security is unknown to the parties. No final decisions have been made with respect to how the program is going to be funded and the program only deals with air cargo

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<sup>47</sup> "Air Cargo Security Initiative Update," and "Air Cargo Security Website Materials."

<sup>48</sup> Transport Canada Regulated Agent Memorandum of Understanding, Doc. P-423.

<sup>49</sup> *Ibid.*

<sup>50</sup> Summary of Transport Canada Briefing, May 14, 2008, Doc. 4393, Public Production Set 88, p. 4.

leaving Canada. Canada relies on its international partners to do the screening of inbound cargo.<sup>51</sup>

46. All of the above information was provided by Transport Canada after the close of hearings last February despite the fact that much of this information was available before the hearings closed and even at the time that Transport Canada witnesses testified. Mr. Conrad provided this evidence at a private briefing to Commission counsel after the hearings and the parties were not given the opportunity to examine it.<sup>52</sup> As a result, there is now important evidence about aviation security in the Inquiry record that is unchallenged and there are many questions raised which will go unanswered.

#### *Passenger Protect Program*

47. At the close of hearings, no person had been denied boarding on a flight within Canada because his or her name was on the controversial No-Fly List created as part of the federal Passenger Protect Program ("PPP"). However, on June 4, 2008, Hani Al Telbani, a 26-year old master's student on his way to visit relatives in Saudi Arabia, became the first. According to an Emergency Direction issued the same afternoon, "the Minister of Transport, Infrastructure and communities has determined that you pose an immediate threat to aviation security" and the government considers him "an individual who, it can reasonably be suspected, will endanger the security of an aircraft."<sup>53</sup>

48. In addition to lodging a complaint with the Office of Reconsideration, Mr. Al Telbani has also brought an action against the Federal government arguing that the Passenger Protect program is a violation of his *Charter* rights to free movement, privacy and due process. Mr. Al Telbani has never seen the evidence upon which the Federal government has based its conclusion that he is an "immediate threat to aviation security" nor has he had the opportunity to refute it. Further, authorities have made no effort to arrest this man who is alleged to be so dangerous.

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<sup>51</sup> Summary of Transport Canada Briefing, May 14, 2008, Doc. 4393, Public Production Set 88, pp. 3- 4.

<sup>52</sup> *Ibid.* Summary of Transport Canada Briefing July 24, 2008, Doc. 4438, Public Production Set 89.

<sup>53</sup> Macleans articles, September 2008. Docs. P426, P427, P428.

49. The unfortunate situation of Mr. Al Telbani confirms some of the reservations about the PPP expressed in this Family Interests Party's original submissions. For example, it is completely unclear how or why Mr. Al Telbani's name was placed on the No Fly List. Transport Canada has stated that individuals can find themselves on the list if they are or have been (i) involved in a terrorist group, (ii) if they have been convicted of one or more serious and life-threatening crimes against aviation security, (iii) or if they have been convicted of one or more serious and life threatening offences and may attack or harm an air carrier, passenger or crew member.<sup>54</sup> However, the Minister is free to consider other factors as well because his discretion cannot be fettered by these guidelines.<sup>55</sup> As a result, we really have no idea what factors will cause an individual to be denied boarding on a flight because he or she is "too dangerous to fly but too innocent to be arrested."<sup>56</sup>

50. Further, we do not know where the government received its information about Mr. Al Telbani or whether the accuracy of that information was confirmed. Brion Brandt, from Transport Canada, testified that law enforcement and intelligence services will gather information about persons "from any source that's available, including other jurisdictions."<sup>57</sup> Given that other jurisdictions have different privacy protections than Canada or none at all, how do we know that the information being relied on by Transport Canada to prevent Mr. Al Telbani from flying was not obtained in violation of his privacy rights under Canadian law?

51. As described in this Family Interests Party's original submissions, there is no clear and obvious legal or regulatory framework for this program. As stated in the Resolution of Canada's Privacy Commissioners and Privacy Enforcement Officials on the Passenger Protect Program:

The *Aeronautics Act* does not provide a clear or adequate legislative framework to support the Passenger Protect Program as it has been described by Transport Canada in the Regulatory

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<sup>54</sup> Transport Canada, "Passenger Protect Program," (November 26, 2007) online: Transport Canada <[http://www.tc.gc.ca/vigilance/sep/passenger\\_protect/menu.htm](http://www.tc.gc.ca/vigilance/sep/passenger_protect/menu.htm)> Exhibit P-278 , Tab 14.

<sup>55</sup> Transcripts, Vol. 40, June 5, 2007, p. 4876 (Mr. Brandt).

<sup>56</sup> Transcripts, Vol. 40, June 5, 2006, p. 4858 (Dr. Lyon).

<sup>57</sup> *Ibid.*, p. 4875 (Mr. Brandt).



Impact Analysis Statement accompanying the *Identity Screening Regulation*.<sup>58</sup>

52. The government has responded to these criticisms by proposing and publishing certain changes to the *Identity Screening Regulations* and the *Designated Provisions Regulations* of the *Aeronautics Act* last May. Some of the proposed changes include removing any name no longer specified under the PPP from any air carrier system, maintaining a list of airline personnel who have access to the names of persons on the list and designating monetary penalties.

53. There are also proposed amendments dealing with the handling of information by air carriers. Air carriers are currently required to sign an MOU which specifies how the information received as part of the PPP is to be handled. However, because the MOU is voluntary, it cannot be enforced for non-compliance. The proposed amendments, to include parts of the MOU in the regulations, would allow the government to take enforcement action. For example, the proposed amendments to the *Designated Provisions Regulations* provide for enforcement by means of a monetary penalty.<sup>59</sup>

54. As a result, there is now some legislative authority for parts of the program but, generally, the *Aeronautics Act* still does not provide a legislative framework sufficient to support such a highly controversial program. As described by Jennifer Stoddart, the Privacy Commissioner of Canada, the program effectively "derives from a policy that is generally but not specifically based on powers that are contained in the *Aeronautics Act*".<sup>60</sup> Where exactly the government is basing its authority to implement and continue this program therefore remains unclear.

#### *CATSA*

55. The 2005 Report of the Auditor General on Canadian national security concluded that Transport Canada has not established system wide performance standards for CATSA, nor

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<sup>58</sup> Office of the Privacy Commissioner of Canada, "Resolution of Canada's Privacy Commissioners and Privacy Enforcement Officials: Passenger Protect Program," online: Transport Canada <[http://www.privcom.gc.ca/nfl/res\\_20070628\\_e.asp](http://www.privcom.gc.ca/nfl/res_20070628_e.asp)> Exhibit P-278, Tab 9 [*OPCC Resolution*].

<sup>59</sup> Summary of Transport Canada Briefing, May 14, 2008, Doc. 4393, Public Production Set 88, p. 19. 2008 Proposed Amendment to Regulations – Passenger Protect, Doc. P-429.

<sup>60</sup> Transcripts, Vol. 71, November 6, 2007, p. 9075 (Jennifer Stoddart).

has CATSA's overall performance ever been assessed.<sup>61</sup> For example, when Transport Canada inspectors encounter a failure in CATSA's procedures, the only recourse is to write an "enforcement letter", a letter which is ultimately not enforced at all. While an air carrier or airport authority that showed persistent non-compliance would eventually be fined, Transport Canada does not think monetary penalties against CATSA would be appropriate.<sup>62</sup>

56. As a result, the Report concluded that:

We do not believe that Transport Canada's enforcement regime works well in the case of CATSA. No performance goals have been established. The Department's internal studies and analyses are not adequate, and there appear to be no effective sanctions available should education and encouragement fail.<sup>63</sup>

57. The Report recommended that Transport Canada put system-wide performance measures for CATSA in place. In response, Transport Canada indicated that it was developing system-wide qualitative and quantitative measures of performance by screeners and equipment which were to be finalized by early 2006.<sup>64</sup> There is no evidence that this has been done to date.

## CONCLUSIONS

58. The conclusions reached by this Family Interests Party in its original submissions have not changed as a result of the evidence released since the close of hearings. Rather, the new evidence only supports our position that the system as it existed in 1985 was inadequate and, in many ways, it remains inadequate today. While important steps, such as the ACS Initiative, are being taken, many of the enhancements remain unenforceable, simply "under review" and/or in need of further clarification that has not been provided. It has been over twenty years since the bombing of Flight 182, and even longer since Canada first recognized that the aviation security regime was unstructured and inadequate. There is no excuse for such dangerous delay.

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<sup>61</sup> Report of the Auditor General of Canada to the House of Commons, "National Security in Canada – The 2001 Anti-Terrorism Initiative" (April 2005) Doc. P-411, p. 2

<sup>62</sup> *Ibid*, p. 11.

<sup>63</sup> *Ibid*, p. 12.

<sup>64</sup> Report, p. 12.