

Raj Anand

E-mail ranand@weirfoulds.com
Direct Line 416-947-5091
File 12023.00001

WeirFoulds_{LLP}
BARRISTERS & SOLICITORS

February 28, 2008

DELIVERED VIA E-MAIL

The Honourable John C. Major, Q.C.
Commissioner
Commission of Inquiry into the
Investigation of the Bombing of
Air India Flight 182
222 Queen Street
Suite 401
Ottawa, ON K1P 5V9

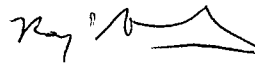
Dear Commissioner:

**Re: Commission of Inquiry into the Investigation of the
Bombing of Air India Flight 182**

I enclose the written submissions on behalf of Lata Pada's group in this inquiry.

Should you have any questions, please do not hesitate to contact me.

Yours truly,



Raj Anand

RA/sn
Encl.

c: Yolanda Saito
April Brousseau

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

WeirFoulds LLP
Barristers & Solicitors
Suite 1600, The Exchange Tower
130 King Street West
P.O. Box 480
Toronto, Ontario M5X 1J5

Raj Anand
(LSUC# 19763L)
April Brousseau
(LSUC# 53935J)

Tel: 416-365-1110
Fax: 416-365-1876

INDEX

<u>Title</u>	<u>Page No.</u>
I. Introduction	3
II. The Bombing of Air India Flight 182	4
Air India Flights 181/182.....	4
Air India's Aviation Security Program.....	6
Forewarning	9
Security Failures: Air India	13
Unauthorized Baggage.....	13
Organizational Chaos.....	14
Failure to Heed Clear Warnings	16
Security Failures: Canada	19
III. Response of the Canadian Aviation Security Regime	20
Passenger and Baggage Screening.....	21
Passenger-baggage Reconciliation.....	23
Cargo	26
Fixed Base Operations	29
Airport Personnel and Access to Secure Areas.....	31
Aircraft Protective Officers.....	35
Technology	36
Intelligence.....	39
Risk Based Threat Assessment	40
IV. Privacy and Human Rights	41
Passenger Protect Program	41
Passenger Profiling	46

	Information Sharing	48
	The Impact of Systemic Racism	50
V.	Governance of the Aviation Security Regime	54
VI.	Conclusion	58
VII.	Recommendations.....	58
	Recommendation #1	59
	Recommendation #2	59
	Recommendation #3	60
	Recommendation #4	60
	Recommendation #5	61

The following final submissions to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 are made by the Family Interests Party, and in particular, its members Mrs. Lata Pada, Mr. Satrajpal (Fred) Rai, Ms. Lorna Kelly, and Mr. Kalwant Mamak.

I INTRODUCTION

1. On June 23rd, 1985 a terrorist bomb exploded on Air-India flight 182. All 329 people on board the Boeing 747 were killed when the plane went down over the Atlantic Ocean, just south of Ireland, off shore of County Cork. Of the 329 victims on Flight 182, 136 were children and 278 were Canadian citizens, making the bombing the largest mass murder in Canadian history. Less than an hour earlier, a second bomb exploded at Tokyo's Narita airport killing two baggage handlers. The bomb had been unloaded from Canadian Pacific flight 003 which had arrived in Tokyo from Vancouver.

2. According to the Rae Report, the bombing of Flight 182, up until the tragedy of September 11, 2001, was the worst encounter with terrorism against the travelling public in world history.¹ It was a terrible tragedy for this country and a very personal tragedy for the family members of all of the victims of Flight 182. Though the bombing happened over twenty years ago, that tragedy has not been, and never will be, forgotten. Day in and day out, the families live with the knowledge that their loved ones died in a senseless act of violence. More important, however, is their awareness that this tragedy could have, and should have, been avoided.

3. This Inquiry was convened in order to ensure that such a tragedy is avoided in the future. It is the Commissioner's responsibility to make findings in a number of areas relevant to the bombing including whether 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. It is up to the Commissioner to make recommendations about

¹ 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 pp. 1-2 [*Rae Report*].

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. It is also within the Commissioner's Terms of Reference to determine if 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.

4. It is the purpose of these submissions to address this issue of aviation security as well as the issue of systemic discrimination as it affected Canada's pre and post bombing responses and to assist the Commissioner in making his findings and recommendations.

II THE BOMBING OF AIR INDIA FLIGHT 182

Air India Flights 181 and 182

5. On June 22, 1985, an East Indian male arrived at the CP Air counter in Vancouver with a ticket under the name 'M. Singh' and requested that his bag be tagged from Vancouver straight through Toronto and Montreal to Delhi. The CP Air ticket agent initially tagged the bag to be off loaded in Toronto since the passenger was waitlisted for Air India Flight 181 from Toronto to Montreal and Air India Flight 182 from Montreal to Delhi. The male argued with the agent until the agent did as he asked, and tagged the bag to interline straight through to Delhi, contrary to CP Air's security plan. The passenger named 'M. Singh' did not board the plane but his baggage was nonetheless loaded on the flight.²

6. Later the same day, an individual attended at the same CP Air counter in Vancouver and presented a ticket for 'L. Singh'. The individual's bag was checked onto CP Air Flight 003 and was interlined through Narita to Bangkok via Air India Flight 301. The passenger did not board the flight but his baggage was also loaded on the flight.³

7. The flight from Vancouver arrived in Toronto on June 22. Baggage screening for Flight 181 began at approximately 2:30 p.m. that day but, because the baggage of 'M. Singh' was interlined straight through Toronto to Delhi, Air India did not attempt to reconcile his baggage

² Commission of Inquiry into the Bombing of Air India Flight 182, *Commission Dossier: Civil Aviation Security*, October 23, 2007, p. 18. [*Commission Dossier*]

³ *Ibid.*, p. 18.

with a passenger. Had 'M. Singh' had a confirmed seat on the flight from Toronto, Air India would have flagged him as a 'no-show' passenger and subsequently off-loaded his baggage according to Air India's security plan. However, he did not have a confirmed seat and so, according to Mr. Chopra, Air India did not know that 'M. Singh's' baggage was on Flight 182.⁴ Instead, the bag was brought directly to the international baggage makeup area without being identified as being associated with a particular passenger on the flight.

8. After about two hours of x-ray scanning of the baggage in Toronto, the x-ray machine broke down. By that time only half to three quarters of the luggage had been screened. After confirming that the machine could not be repaired at that time, John De Souza, a security officer of Air India in 1985, directed the Burns Security personnel to check the baggage using a PD-4 sniffer. Since the Burns Security personnel on duty had never used this device before, Mr. John De Souza gave a brief demonstration. No luggage was physically opened or checked, even though random hand searching of baggage had been recommended in the June 1 telex.⁵

9. Naseem Nanji, a Burns Security guard, was on duty the night of June 22, 1985. According to her statement given on August 2, 1985 she did not receive any training on how to look for a bomb. When the x-ray scanner stopped working approximately half way through the load, she was instructed by an Air India representative to use the sniffer. She said that the sniffer beeped twice when checking one bag but, because it did not make "a long whistling sound" as they were instructed it would, they let the bag pass. Ms. Nanji stated that "I never told Air India about these beeps because no one told us to call them if the 'sniffer' gave a short beep."⁶

10. Flight 181 left Toronto headed for Montreal on the way to Delhi without 'M. Singh' but with 'M. Singh's' luggage on board.

11. The baggage of customers joining the trip in Montreal was scanned by Burns Security using an x-ray machine as well. During this screening process, three bags were identified as suspect. Burns Security staff informed Air India of the suspect bags, and they were

⁴ Transcripts, Vol. 37, May 31, 2007, p. 4404 (Mr. Chopra).

⁵ ORCD – Willowdale. Memorandum to Ottawa Operations Centre (Blake McIntosh), June 24, 1985, Docs. CAE0249 and CAA0118.

⁶ Statement of Naseem Nanji, August 2, 1985, Doc. CAF0159.

told to wait for Messrs. John De Souza and Devon Yodh, officials from Air India arriving in Montreal on the flight from Toronto. Burns Security waited for instructions but, by the time Mr. De Souza arrived to examine the bags, the flight had already left, without the three suspect bags on board.⁷

12. According to Mr. Abid, after he informed Mr. De Souza and Mr. Yodh of the three suspect bags, there was no discussion, at least with him, about pulling the rest of the baggage to check it. This was despite the fact that Mr. Yodh was aware of the x-ray machine breakdown in Toronto.⁸ There was however a reconciliation of the passengers joining at the boarding gate with the passengers listed as confirmed for the flight. Because the passenger named 'M. Singh' had not confirmed his ticket from Montreal to Delhi, Air India did not register a "no-show" at the gate and so did not unload the plane's baggage. Instead, Mr. Yodh authorized the plane to leave, without the three suspect bags onboard, but with the baggage of 'M. Singh'.⁹ The three suspect bags were ultimately determined not to be dangerous. The bag of 'M. Singh', however, proved to be a deadly weapon of mass destruction.

13. Like the fictitious passenger 'M. Singh', 'L. Singh' checked in his baggage in Vancouver on the flight bound for Tokyo but then never boarded the flight. Shortly after 6 a.m. on June 23, while 'L. Singh's' baggage was being off-loaded in Tokyo on its way to connect with the Air India flight, it exploded, killing two baggage handlers and wounding four others.

14. Almost one hour later, the baggage of 'M. Singh' exploded in the forward cargo hold of Air India Flight 182 while it flew near the coast of Ireland. Every person on board was killed.

Air India's Aviation Security Program

15. When asked if there was a deficiency in the Air India security regime in 1985, Mr. Rodney Wallis, an international civil aviation security consultant, responded to the

⁷ Canadian Aviation Safety Board, *Aviation Occurrence Report to the Kirpal Commission*, (1986) p. 9-10 [CASB Report].

⁸ Transcripts, Vol. 89, December 5, 2007, p. 11702.

⁹ *Ibid.*, p. 11699 and 11702.

Commission that "the airplane blew up, so clearly there was."¹⁰ As discussed below, Air India's aviation security program was demonstrably deficient and was a major factor in the failure to prevent the bombing of Flight 182.

16. The legislative framework applicable to Canadian aviation security in 1985 was (and still is) found in the *Aeronautics Act* according to which the Minister of Transport exercises responsibility for the regulation and supervision of all matters concerning aviation security.¹¹ In 1982, Air India developed the *Security Programme of Air-India for Canadian Region* and successfully submitted it to Transport Canada.¹²

17. The Air India Security Program had as its stated purpose the prevention or deterrence of the unlawful introduction of any weapon, explosive device or dangerous substance. It mandated a level of security commensurate with the level of threat, as recommended by the International Civil Aviation Organization ("ICAO"). Thus, where there was a specific threat or particular reason to believe that the safety of the aircraft was endangered, emergency security procedures were to be implemented.¹³ The proposed security program also provided that, if suspicious objects were identified during an x-ray examination, the passenger associated with the bag should be contacted and asked to open the bag for inspection.¹⁴

18. According to the minutes of a meeting held on January 8, 1985 involving Mr. Mattson from Transport Canada and Mr. Saxena, the manager of Air India's security in New York, among others, Air India was advised that, according to Transport Canada's procedure, the air carrier was responsible for carrying out threat-assessment procedures. Once a threat was identified, Air India was responsible for advising Transport Canada. Mr. Saxena also advised that Air India's proposed security plan included the following specific measures:

- (i) Preboard passenger screening.
- (ii) Secondary physical passenger and carry-on baggage examinations.

¹⁰ Transcripts, Vol. 37, May 31, 2007, p. 4411 (Mr. Wallis).

¹¹ R.S.C. 1985, c. A-2.

¹² CATSA Air India Report, p. 26.

¹³ CATSA Air India Report, p. 27.

¹⁴ Minutes of Meeting, January 8, 1985, Doc. CAA0118.

- (iii) X-ray equipment operated by Burns security for the purpose of carrying out secondary baggage inspection.
- (iv) Contact with the passenger associated with any suspect bag for the purpose of having the passenger open the bag.
- (v) Where the passenger associated with a suspect bag is not located, the suspect bag should not be allowed on the aircraft and should be isolated for at least twenty-four hours. The bag should be inspected by a bomb detection dog and opened only on the advice of police.¹⁵

19. Also, according to Air India's security program in 1985, in the case of a gate "no show" passenger, his or her baggage should be offloaded from the plane. Any unaccompanied baggage was to be associated with a bona fide passenger before being loaded onto a plane. In the event of an emergency, all unaccompanied baggage was to be inspected physically or held for twenty-four hours before forwarding.¹⁶ Thus, assuming that the baggage which destroyed Flight 182 is defined as "unaccompanied", under either Air India's standard or emergency procedure, it should have been either removed, inspected or held.¹⁷

20. In 1985, Air India relied extensively on Air Canada for check-in procedures and security services. For example, Air India contracted its passenger security services to Air Canada which in turn contracted some of those services to Burns Security.¹⁸ Air India did not keep track of wait-list or stand-by passengers at that time. Rather those persons who were unconfirmed would have to go to the airport and the duty or airport manager would decide whether they could board the flight or not. According to Rajesh Chopra, the Duty Officer for Air India in Delhi in 1985, Air India had not yet developed a departure control system and so it relied on Air Canada.¹⁹

¹⁵ Minutes of Meeting re: Air India Security Plan, January 8, 1985, Doc. CAA0118.

¹⁶ "The Aviation Security Regime Applicable to Air India Flight 182", Exhibit P-147.

¹⁷ Transcript, Vol. 36, May 30, 2007, p. 4359 (Dr. Heed)

¹⁸ Transport Canada, Briefing Papers Air India/ CP Air, June 26, 1985, Doc. CAE 0249.

¹⁹ Transcript, Vol. 37, May 31, 2007, p. 4397 (Mr. Chopra).

21. Air India also relied on originating airlines, such as Canadian Pacific Air ("CP Air"), to handle interlined baggage coming to Air India in compliance with their own security procedures as well as with the Aircraft and Airport Security Procedures of the International Air Transport Association ("IATA").²⁰ However, Air India was aware at the time that CP Air had no practice or requirement to screen checked baggage. Air India simply relied on the fact that the baggage was interlined from CP Air. Air India assumed that this meant that the baggage was also authorized and took no steps to actually confirm that.²¹

Forewarning

22. In 1982, Transport Canada commented on the tendency of Canadians to believe themselves immune to terrorist attacks and the decreasing amount of resources available for airport security and how this led to aviation security being given a low priority in Canada.²² In 1984, the year before Air India began operating in Toronto, the Indian government had warned its airport managers and security officials about the potential for explosive devices to be concealed in baggage on international flights. In a confidential telex, it stated that the following important security measures should be taken at airports:

Airport security personnel be instructed to conduct pre-embarkation screening of passengers thoroughly and they should specially look for weapons/ explosives and other lethal objects which may be cleverly hidden from view. Particular attention should be paid to cameras, electronic equipments and parcels carried as hand baggage.²³

23. In light of the non-aligned summit meeting which was taking place that year, the telex also provided that it was necessary "to exercise utmost vigilance and make fool proof arrangements at our airports to rule out the possibility of unlawful interference in civil aviation."²⁴

²⁰ *Ibid.*, p. 4414 (Mr. Kumar).

²¹ *Ibid.*, p. 4427 (Mr. Kumar)

²² CATSA Air India Report, p. 44.

²³ Confidential/ Secret message, Doc. CAA0024.

²⁴ *Ibid.*

24. In July 1984, Air India received another telex which Ashwani Sarwal, the airport manager in 1985 for both Montreal and Toronto, forwarded on to the Royal Canadian Mounted Police ("RCMP") detachment in Montreal.²⁵ According to this telex, information had been received by Air India that there was a person who had:

volunteered to carry a bomb in his accompanied baggage with a view to blowing up an Air India plane in order to draw attention to the demands of the Sikhs. ... Request issue instructions for thorough implementation of anti-sabotage measures including checking of registered baggage with the help of x-ray machine/explosives sniffers to rule out the possibility of explosives.²⁶

25. Several months later, in October 1984, another telex from Air India was provided to the RCMP detachment at the Mirabel airport in Montreal.²⁷ The telex referred to the increasing threat from Sikh extremists and warned that these extremists intended that "there would be one hijacking of an Indian aircraft every month."²⁸ Another similar telex was provided to the Montreal RCMP airport detachment on December 31, 1984.²⁹ Thus, by the end of 1984, it should have been apparent to all that Air India's flights were at particular risk for a terrorist attack.

26. In January 1985, Mr. Saxena indicated that, due to Toronto's large Sikh community, he anticipated more security problems in Toronto than Air India normally experienced at the JFK airport in New York.³⁰ A few months later, on April 12, 1985 a telex was provided to the RCMP airport detachments in Montreal and Toronto stating that information had been received by the Canadian Department of External Affairs "of unconfirmed reports to hijack an Air India flight ... in particular Air India Flight 191 to Toronto on Saturday April 13, 1985."³¹

27. On April 25, 1985 the Director of Civil Aviation Security for the Government of India wrote a letter indicating that "proper supervision and monitoring of anti-hijacking and

²⁵ Letter to Insp. G. Remillard from Mr. Sarwal, July 30, 1984, Doc. CAA0083.

²⁶ Air India Telex, July 30, 1984, Doc CAA0084

²⁷ Letter to Insp. G. Remillard from Mr. Sarwal, October 5, 1984, Doc. CAA0096.

²⁸ Air India Telex, October 5, 1984, Doc. CAA-0097.

²⁹ Letter to Insp. Remillard from Mr. Sarwal, December 31, 1984, Air India's Disclosure Pursuant to the Subpoena dated June 25, 2007, Exhibit P-284, Tab 6.

³⁰ Minutes of Meeting re: Air India Security Plan, January 8, 1985, Doc. CAA0118.

³¹ Telex from OIC Airport Policing Branch, April 12, 1985, Doc. CAA0149.

security arrangements at the airports would go a long way in preventing extremist elements from carrying out their threats and nefarious designs to unlawfully interfere with civil aviation operations or hijack an aircraft."³²

28. On May 21, 1985 a telex was received by Air India which reported that terrorists were planning violent activities for the second week of June and that there was a possibility that civil aviation would be a target. As a result, the telex recommended that "airlines must keep utmost vigilance on registered baggage, its make up and its loading onto aircraft."³³

29. Mr. Sarwal, wrote to the RCMP the next day enclosing the letter of April 25, and directing that "utmost vigilance and meticulous care" should be exercised in order to thwart threats from extremists. Mr. Sarwal requested "full and strict security coverage and any other appropriate security measures for the protection of our aircraft, joining passengers and cargo in June 1985."³⁴ Five days later Herbert Vaney, the area sales manager for Air India in Toronto, wrote to the Metro Toronto Police enclosing the same letter.³⁵ Then, on May 29, Mr. Sarwal wrote to the RCMP requesting "suitable security measures" in Toronto.³⁶

30. On June 3, 1985 a telex from Air India was provided to the RCMP Pearson detachment with a letter again requesting that "suitable action" be taken.³⁷ The telex, dated June 1, indicated 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." As a result, the telex called for the physical identification of registered baggage at the time of check in as well as "meticulous implementation of counter sabotage measures for flights at all airports." Notably, the telex acknowledged that this was the responsibility of airlines.³⁸

³² Letter from Shanker Saran, Government of India, Dy. Director of Civil Aviation Security to the Director General of Police/ I.G. of Police, Doc CAC0419, p. 5.

³³ Air India Telex, May 21, 1985, Doc. CAA0161.

³⁴ Letter from Mr. Sarwal to Insp. J.R.R. Charbonneau, May 22, 1985, Doc. CAA0163.

³⁵ Letter from Mr. Vaney to the Metro Toronto Police, May 27, 1985, Doc. CAA0159.

³⁶ Letter from Mr. Vaney to RCMP, May 29, 1985, Doc. CAA 0164.

³⁷ Letter from Mr. Vaney to RCMP, June 3, 1985, Doc. CAA0184.

³⁸ Air India Telex, June 1, 1985, Docs. CAA0174 and CAA0185.

31. Mr. Jainul Abid, a sales and traffic officer for Air India in Montreal in 1985, confirmed that there was a heightened threat environment for Air India at that time which required extra vigilance, particularly in traffic handling.³⁹ As evidence of this heightened threat environment, Mr. Vaney wrote to the RCMP again on June 7 enclosing two telexes dated May 15 and June 6 indicating "that security measures should continue till the end of June 1985".⁴⁰ Thus, there was a "general enhanced threat environment surrounding Air India at this time."⁴¹ However, Air India did not signal to Canadian authorities that there was a specific threat in relation to Flight 182. Dr. Jacques Bourgault, of the Université de Québec à Montréal, testified that:

[T]he declaration of the specific threat was like a cornerstone in the whole story. Had it been declared a specific threat, a whole set of measures would have been put in place to install higher security procedures at that time, but it was not the case.⁴²

32. Mr. Wallis described Air India's situation in 1985 as a high-threat situation "with once a week service out of Canada where there was a known element at war with the Indian government ...[and] the symbol [of the government] on the tail of the airplane." As a result, it was Mr. Wallis' position that the difference between operational and specific threats in such a situation can become blurred or merged. The reaction of Air India would, therefore, logically be identical under an operational risk as under a specific risk in circumstances where the risk was always heightened.⁴³

33. According to Dr. Leiss, under the circumstances in June 1985, particularly in light of the June 1 telex, the level of risk was so high as to be "off the end of the scale" in terms of any variation of a threat matrix. Dr. Leiss testified that the specificity of the warnings that were received by Air India almost never happened. As a result, he questioned why "the alarm bells" did not go off everywhere. He noted that it is extremely rare to get information as specific as the

³⁹ Transcripts, Vol. 89, December 5, 2007, p. 11695 (Mr. Vaney).

⁴⁰ Letter from Mr. Vaney to Sgt. Ward, June 7, 1985, Doc. CAA0204.

⁴¹ Transcripts, Vol. 36, May 30, 2007, p. 4313 (Dr. Whitaker)

⁴² *Ibid.*, (Dr. Bourgault) See also Dr. Whitaker's statement at p. 4333 that "all we can say is in retrospect, that the decision was not made to call it a specific threat, and that had very considerable consequences. But, of course, if it had been declared a specific threat, that would have had considerable consequences for whether that flight ever took off."

⁴³ Transcripts, Vol. 37, May 31, 2007, pp. 4426-4427 (Mr. Wallis)

June 1 telex and that, in the face of that, security officials should have been "basically pulling out all the stops," even if that meant grounding flights.⁴⁴

Security Failures: Air India

34. Air India's aviation security broke down in a number of ways on June 22 and, as a direct result, the 'Singh' baggage was not detected and the death and destruction it caused was not prevented. Some of these mistakes include the failure of Air India's security regime to address the situation created by the baggage of 'M. Singh', the lack of a responsible Air India security authority on the ground in Toronto on June 22, and the failure to heed the warnings provided to it.

"Unauthorized" Baggage

35. The conclusion reached by the Rae Report was that the CP Air and Air India flights should not have flown without having reconciled the baggage of 'L. Singh' and 'M. Singh'.⁴⁵ As discussed above, Air India's security plan required unaccompanied baggage to be removed from the plane. However, according to T.N. Kumar, the General Manager for Legal Affairs for Air India, the baggage associated with 'M. Singh' was not an unaccompanied bag. Rather, it was an unauthorized bag for a passenger of CP Air.⁴⁶ Mr. Kumar testified that:

For an unaccompanied baggage, the most important requirement is there has to be an identifiable passenger. For Air India, we did not have a passenger. ... At the departure control of the airport there was no M. Singh. There was no identifiable passenger. So this baggage was not unaccompanied but an unauthorized bag.⁴⁷

36. Messrs. Kumar and Chopra testified that the 1982 Air India Security Policy only addressed unaccompanied baggage, defined as baggage which was associated with a bona fide

⁴⁴ Transcripts, Vol. 91, December 7, 2007, pp. 11981-2 (Dr. Leiss).

⁴⁵ Rae Report, p. 11.

⁴⁶ Transcripts, Vol. 37, May 31, 2007, p. 4406 (Mr. Kumar).

⁴⁷ *Ibid.*, p. 4397 (Mr. Kumar).

passenger but was separated from that passenger.⁴⁸ In other words, it was Air India's policy to put a stray bag in the make-up area onto the plane if no passenger was associated with the bag.

37. Air India's Security Program clearly failed to address the situation created by the Singh baggage, which was interlined without a passenger. This represents a major deficiency in their security plan, one which, if it had been corrected before June 1985, would have prevented the bombing of Flight 182.

Organizational Chaos

38. In addition to the problems with Air India's security plan, it also became apparent during the testimony of Air India officials that the reporting structure for Air India's security in Toronto and Montreal was confused and that responsibility for security was not clear. For example, while Messrs. Yodh, Saxena, De Souza and De Jesus all indicated that Mr. Vaney, was in charge of security for Flight 182, Mr. Chopra and Mr. Vaney indicated that Mr. De Souza was responsible. Dr. Reg Whitaker, of the CATSA Advisory Panel testified that:

[W]hen you get down to the front line, that is to the airport and the air carriers and the question of whether there were specific or non-specific threats against a particular airline such as Air India, it did become clear in our analysis of how the decision was made not to declare Air India 182 as a specific threat that, there really was a serious lack of clear authority and clear lines of communication to bring the various threat assessments that were out there and to bring them to bear right there at the airport where the decision had to be made. That there was far too much ad hoc and a sense that -- and in the aftermath, of course, that there could be a great deal of passing of responsibility and blame off on others because there had not been a clear delineation of authority.⁴⁹

39. According to Mr. Chopra, Air India's reporting structure looked something like this in 1985: Mr. Vaney was the area sales manager based in Toronto and his functions included enhancing revenues, dealing with travel agents and performing general administration work. He was not responsible for security. Mr. Saxena was the Manager for security based in New York but was not responsible for security in Canada. Mr. Sarwal was the airport manager for Montreal

⁴⁸ *Ibid.*, p. 4435 (Mr. Kumar).

⁴⁹ Transcripts, Vol. 36, May 30, 2007, pp. 4311-4312 (Dr. Whitaker).

and Toronto. Finally, Mr. De Souza was one of two security officers in Canada who reported to Mr. Saxena. There was, apparently, no security manager in Canada at the time.⁵⁰

40. This is consistent with Mr. Vaney's own testimony in which he described his duties as "trying to obtain business in the Indian community and the general administration of the Toronto office."⁵¹ He indicated that Mr. Yodh was the actual airport manager on June 22, because Mr. Sarwal was not available.⁵² When asked if he had any role in the management of the airport or security, Mr. Vaney replied that he did not.⁵³

41. Mr. De Souza, who Mr. Chopra and Mr. Vaney indicated was responsible for Air India security in Toronto, admitted in a statement given on July 23, 1985 that he was assigned to supervise security measures taken in Toronto for Flight 181/2. However, he also indicated that, when the x-ray machine broke, he went to Mr. Vaney to ask about getting it fixed and, when asked "who was in charge at the airport", Mr. De Souza provided that Mr. Vaney and Mr. Yodh were.⁵⁴ Mr. Yodh also gave a statement on July 22, 1985 in which he indicated that Mr. Vaney was "in charge at Toronto".⁵⁵ Another employee of Air India, Rui Filipe De Jesus, stated that Mr. Vaney was in charge in Toronto on June 22 as well.⁵⁶

42. Though Mr. Vaney's name appears on a number of security documents, and though he attended a meeting in January 1985 in which security measures such as the PD4 were discussed, Mr. Vaney insists that he was only ever acting as a "conduit", passing information from Air India to Canadian security officials.⁵⁷ Mr. Vaney testified that there were standing instructions in 1985 to pass on any messages dealing with threats to "whoever was concerned at the Enforcement Branch."⁵⁸ Mr. Sarwal, at the time, was also communicating with the responsible authorities about the threats. It remains unclear why Mr. Vaney was also

⁵⁰ Transcripts, Vol. 43, June 14, 2007, pp. 5330 and 5335 (Mr. Chopra). Transcripts, Vol. 89, December 5, 2007, p. 11730 (Mr. Chopra).

⁵¹ Transcripts, Vol. 89, December 5, 2007, p. 11624 (Mr. Vaney).

⁵² Transcripts, Vol. 89, December 5, 2007, p. 11652 (Mr. Vaney). See also Statement of Lal Herbert Vaney, October 23, 1985, Doc. CAF0533.

⁵³ Transcripts, Vol. 89, December 5, 2007, p. 11625 (Mr. Vaney).

⁵⁴ Statement of John Leo D'Sousa, July 23, 1985, Doc. CAF0531.

⁵⁵ Statement of Divyang Yodh, July 22, 1985, Doc. CAF0442.

⁵⁶ Statement of Rui Filipe De Jesus, July 23, 1985, Doc. CAF0530.

⁵⁷ Transcripts, Vol. 89, December 5, 2007, pp. 11630, 11632, 11649 (Mr. Vaney).

⁵⁸ *Ibid.*, pp. 11632-3 (Mr. Vaney).

communicating with security authorities as a "conduit" when he was not involved in security. Mr. Vaney's answer was that communicating security information received from Air India to Canadian security officials was "part of the task, the administrative task one has to do."⁵⁹

43. Mr. Abid indicated, in the context of the Mirabel airport, that Mr. Yodh was "the decision-maker" in place of Mr. Sarwal but that Mr. De Souza was responsible for anything to do with security. He also admitted that, in the heightened threat environment, he was not really sure what his duties were on June 22 until Mr. De Souza and Mr. Yodh arrived in Montreal.⁶⁰ Mr. Chopra, however, stated that Mr. Abid "was taking care of business," at least until Messrs. Yodh and De Souza arrived. According to Mr. Chopra, Mr. Abid had the ability to make a decision about loading or unloading bags, and indeed about holding back the plane until Mr. De Souza or Mr. Yodh arrived.⁶¹

44. It is obvious that Air India's security reporting and decision making structure was disorganized and unclear. Air India's failure to advise Air Canada, as its handler, of the fact that it was operating in a high-risk environment can perhaps be explained by this confusion. However, as noted by Mr. Wallis, confusion or not, simple common sense dictates that Air Canada should have been notified.⁶²

45. Mr. Chopra also admitted that an airline that would interline baggage, such as CP Air, would not have been advised of the threats to Air India.⁶³ This makes little sense when one considers that Air India officials were regularly briefed on threats to Air India. Why Air India would not have advised its partners and other stake holders remains a mystery.

Failure to Heed Clear Warnings

46. In addition to the failures of Air India's security program and reporting structure, Air India also failed to heed some very important warnings. As noted earlier, Air India received a great deal of information regarding the heightened threat environment, to which it should have

⁵⁹ *Ibid.*, p. 11644 (Mr. Vaney).

⁶⁰ Transcripts, Vol. 89, December 5, 2007, pp. 11700-11704 (Mr. Abid).

⁶¹ *Ibid.*, p. 11732 (Mr. Chopra).

⁶² Transcripts, Vol. 41, June 6, 2007, p. 5025 (Mr. Wallis).

⁶³ Transcripts, Vol. 43, June 14, 2007, p. 5333 (Mr. Chopra).

reacted more aggressively. However, it was also made aware that one of their security devices was completely unreliable and nonetheless, continued to use it.

47. Both Mr. Vaney and Mr. Sarwal were present when the PD-4 sniffer device was tested and were advised by the RCMP that the PD-4 sniffer was an unreliable, ineffectual security device.⁶⁴ According to the statement of Gary Carlson of the RCMP, at a meeting on January 18, 1985 Air India was told that the PD-4 sniffer was not an effective method of checking suitcases for explosives.⁶⁵ Detective Lemieux, who was also present at the January 18 meeting, indicated that it was suggested to Air India that they should not rely on the PD-4 sniffer solely in pre-board screening.⁶⁶

48. Mr. Kumar admitted that the PD-4 was demonstrated to be faulty but claimed that this demonstration was not made to Air India security personnel, only to commercial and traffic personnel. According to Mr. Kumar, these commercial and traffic personnel were not familiar with use of the PD-4 sniffer and, as a result, they used it incorrectly on June 22, 1985.⁶⁷ He did not explain why there were no security personnel at the January 18, 1985 demonstration of the use of the security device upon which Air India would rely, nor did he explain why the commercial and traffic personnel present at the January meeting did not inform the appropriate Air India authorities about the ineffectiveness of the PD-4.

49. Mr. Vaney, although he does not remember attending this meeting where the PD4 sniffer was tested, nonetheless admitted that the use of the PD4 on June 22, 1985 was "a useless exercise."⁶⁸ The Kirpal Commission's final report concluded that the effectiveness of the PD-4 was highly questionable and that it was not advisable to rely on it.⁶⁹

⁶⁴ Affidavit of Robin Ward, November 5, 1985, Doc. CAA0369. See also Memo to File by Sgt. Warren Sweeney re: Meeting – Department of Justice, January 9, 1986, Doc. RR0184 and Transcripts, Vol. 37, May 31, 2007, p. 4448 (Mr. Kumar).

⁶⁵ Statement of Gary Carlson, Doc. CAC0268.

⁶⁶ Letter from Detective Lemieux to Sgt. Atkinson, January 2, 1986, Doc. CAC0515.

⁶⁷ Transcripts, Vol. 37, May 31, 2007, p. 4429 (Mr. Kumar)

⁶⁸ Transcripts, Vol. 89, December 5, 2007, pp. 11655-6 (Mr. Vaney).

⁶⁹ India, Report of the Court Investigating Accident to Air India Boeing 747 Aircraft VT-EFO, "Kanishka" on 23rd June 1985 by Honourable Justice B.N. Kirpal (Delhi: High Court of Delhi, 1986) at p. 173 [*Kirpal Commission Report*].

50. Yet, Mr. Kumar in his testimony indicated that random physical checks of baggage were only performed at locations where no PD-4 sniffer was available. When the X-ray machine stopped working, therefore, Air India did not perform a physical check of the remaining baggage because it had the PD-4. This policy was applied even though they knew of the instrument's ineffectiveness and Burns' staff's cursory training with it.⁷⁰ Mr. De Jesus, an Air India employee in Toronto in June 1985, was asked what, if any, safeguards were in place to prevent an interlined bag from being loaded when the passenger associated with that baggage did not check in for the interlined flight. His answer was that the x-ray machine was the only safeguard.⁷¹

51. This statement is only partially correct, because Air India could have taken the time to do a physical check of all of the bags. Further, Air India could have requested the services of the RCMP canine team for the screening of the Air India flight in Toronto on June 22 but it did not.⁷² Though a canine unit was called in at Mirabel, the flight left before the unit arrived. Serge Carignan, the dog handler who was called to Mirabel, testified that he has always wondered why, if he was called to search an airplane, the plane would leave before the search was conducted.⁷³

52. Air India did not do all it could have done to protect the passengers of Flight 182. Consider, for example, the testimony of a Burns Security witness who indicated that Air India at least partially based its decision to release the Mirabel flight without further security checks on the cost of keeping the plane on the ground.⁷⁴ As noted by the CATSA Advisory Panel, Air India "appeared unwilling to impose serious inconvenience on its passengers at the price of greater security."⁷⁵

⁷⁰ Transcripts, Vol. 37, May 31, 2007, p. 4431 (Mr. Kumar).

⁷¹ Statement of Rui Filipe De Jesus, July 23, 1985, Doc. CAF 0530.

⁷² Transport Canada. *Transport Canada's Briefing to Independent Advisor Bob Rae re: Air India Flight 182*, (September 2005), p. 46 [*Transport Canada Briefing*].

⁷³ Transcripts, Vol. 26, May 9, 2007, p. 2671 (Mr. Carignan)

⁷⁴ Transcripts, Vol. 29, May 16, 2007, p. 3129 (Mr. Lalonde)

⁷⁵ CATSA Air India Report, p. 52.

Security Failures: Canada

53. Alongside the numerous problems with Air India's security in 1985, Canada's aviation security officials also made a very serious mistake. In particular, Transport Canada failed to heed the warnings of the heightened threat environment surrounding Air India. For example, prior to the bombing Transport Canada declined overtime costs for Air India security because it did not feel that extra security was necessary. An internal document dated June 5 to the Airport Policing Branch of Pearson International stated that the extra security steps requested by Air India on June 3 related directly to Air India and Burns Security and that extra security "by this force" was not necessary.⁷⁶

54. There were a number of meetings in the last week of May involving the RCMP, Transport Canada and Air India in which the level of threat to Air India was discussed. However, Transport Canada did not recognize the seriousness of what it felt was a non-specific threat and so did not authorize the use of extra RCMP personnel for the protection of Air India.⁷⁷ Perhaps if it had, the bombing of Flight 182 could have been prevented.

55. Furthermore, Air India had requested, in January 1985, that RCMP canine units be available in Toronto to check all flights. The June 1 Telex also suggested that the use of dogs for checking baggage would be useful. However, this request for access to canine units was denied. Instead, RCMP dogs were only made available in relation to specific bags identified as suspect. The Advisory Panel concluded that the use of sniffer dogs in the weeks leading up to the bombing of Flight 182 would have made screening much more effective.⁷⁸

III RESPONSE OF THE CANADIAN AVIATION SECURITY REGIME

56. The response of the aviation security regime in Canada has been alarmingly slow over the 20 years since the bombing of Flight 182 took place. The Standing Senate Committee on National Security and Defence (the "Senate Committee") recently described the upgrading of security at Canadian airports between June 1985 and September 2001 as "marginal" and the

⁷⁶ Secret message, June 5, 1985, Doc. CAA0208.

⁷⁷ Memo from O. I/C Criminal Operations to O. I/C Protective Policing Branch, June 24, 1985, Doc. CAA0239.

⁷⁸ CATSA Air India Report, pp. 53-54.

progress of the regime as "shuffling along at a snail's pace"⁷⁹ Further, the Advisory Panel was "struck by the similarity of many of our recommendations in *Flight Plan* to address deficiencies in aviation security to those of the Seaborn Report, some twenty years earlier."⁸⁰ What follows are some of the specific areas of aviation security in which the implementation of change has been particularly slow and, in many ways, inadequate.

Passenger and Baggage Screening

57. Prior to the bombing in 1985, the screening of checked baggage and passenger-baggage reconciliation were not usually conducted in Canada or internationally, as the focus remained on the prevention of allowing hijackers to board aircraft.⁸¹ As a direct result of the bombing of Flight 182, international and domestic aviation security measures began to focus more heavily on the inspection and screening of passengers and their carry-on baggage. Three kinds of screening were added to the aviation security agenda: pre-board screening, hold-bag screening and non-passenger screening. Pre board screening requires that all departing passengers be screened before entering airport restricted areas and departure lounges contained within the sterile area of the terminal building. Hold bag screening is the screening of all checked baggage before it is placed in the hold of an aircraft. Non-passenger screening is the screening of anyone whose workplace is an airport, who visits the airport to provide a service or deliver goods, or who passes through an airport and requires access to restricted areas.⁸²

58. Despite the increased focus on screening after the bombing, Transport Canada left air carriers responsible for screening until 2002. It was only after the events of 9/11 that CATSA was established to manage screening of passengers and baggage. Not until December 31, 2002, over fifteen years after the bombing of Flight 182, did CATSA assume responsibility for screening of persons accessing aircraft or restricted areas, as well as the property in their possession or control, and baggage provided to the carrier for transport.⁸³

⁷⁹ Standing Senate Committee on National Security and Defence, *Canadian Security Guide Book: Airports* (March 2007), pp. 1, 3 [*Senate Report*].

⁸⁰ CATSA Air India Report, p. 81.

⁸¹ CATSA Air India Report, pp. 10, 44.

⁸² CATSA Air India Report, p. 98.

⁸³ CATSA Act, s. 6(1). Transport Canada Briefing, p. 20. Non-passenger screening is also a function of CATSA and it takes place randomly at restricted area entry points using walk-through or hand-held metal detectors, with x-

59. Even then, it was not until January 1, 2006 that full hold bag screening was put in place for all baggage on commercial flights leaving eighty-nine designated Canadian airports. Full hold bag screening involves as many as five levels of inspection conducted by screening officers and in-line equipment. The first level involves a scan through a high-speed x-ray machine and, where a suspect item is detected, a screening officer will examine. If a further examination is determined necessary by the screening officer, it is examined by a Computed Tomography x-ray machine and, if still suspected, it is examined again using different cross-sections of computer tomography. If still suspect, the baggage is removed from the baggage handling system and subjected to trace explosive testing, then opened for hand checking in the presence of the passenger.⁸⁴

60. Annex 17 to the Convention on International Civil Aviation ("Annex 17") sets out the applicable security standards to protect international civil aviation from acts of terrorism and other unlawful interferences. In April 2006, the passage of Amendment 11 to Annex 17 significantly advanced the requirements for the screening of persons, their baggage and, as discussed below, their cargo. Standard 4.4 prescribes stricter provisions for the security of passengers and cabin baggage and standard 4.5.1 directs each contracting member state to:

... Establish measures to ensure that originating hold baggage is screened prior to being loaded onto an aircraft engaged in commercial air transport operations departing from a security restricted area.⁸⁵

61. As part of the current pre-board screening regime, a CATSA screening officer will check passengers' boarding passes prior to placing carry-on items onto a roller-belt for x-ray scanning. Further searching will be conducted using physical means or explosives-detecting trace equipment if an item is suspect or if it is randomly selected. Passengers must pass through a walk-through metal detector and, if metal is detected or if a passenger is randomly selected, a screening officer will conduct a search using a hand-held metal detector. If necessary, passengers

ray and explosives-detection trace equipment of possessions. This is discussed in more detail below, in the section of these submissions dealing with airport personnel. Also, although CATSA is responsible for screening, luggage is the responsibility of the air carrier as soon as it is accepted from the passenger. (Flight Plan, p. 62).

⁸⁴ CATSA Air India Report, p. 98.

⁸⁵ *International Standards and Recommended Practices – Annex 17 to the Convention on International Civil Aviation – Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, 8th ed. (April 2006) s. 4.5.1 [*Annex 17*].

may be subjected to further physical searches. Where a prohibited item is found, it may be confiscated or an immediate police response may be requested, depending on the danger detected.⁸⁶

62. Though Canada now screens 100 per cent of hold baggage, the fact that it took twenty years to implement screening of checked baggage in Canada should not be overlooked.⁸⁷

63. It should be a priority now though, especially given that, according to the Canadian Airports Council ("CAC"), "as commercial aviation continues to grow at 3-5% a year, it is not possible to build adequate screening space and hire additional screeners in a linear manner. The system will be overwhelmed."⁸⁸ The CATSA Advisory Panel has also noted that there is a significant amount of overlapping oversight in terms of screening personnel.⁸⁹ Of greater concern, however, is the Standing Senate Committee's conclusion that some baggage is still not screened. According to their report:

Airport workers know which baggage is screened at which locations, and which is not. If large numbers of workers know, that kind of knowledge obviously isn't impossible for would-be terrorists to access. One bomb planted in one bag would be enough to destroy many lives and bring air traffic to a virtual standstill.⁹⁰ [emphasis added]

64. As a result, the Committee, in March 2007, recommended that, since all passengers are searched, all materials being loaded onto aircrafts should also be checked for weapons and dangerous substances which, in combination, could be explosive. This includes searching airline catering service carts.⁹¹ Indeed, if it is correct that all baggage is not being screened, there is a serious gap in Canada's aviation security system that needs to be corrected immediately. Moreover, the Canadian government needs to think ahead and plan for the long term sustainability of screening as part of Canada's efforts to keep its airports and skies safe. It cannot take another twenty years to address the dangers of improper and inadequate screening.

⁸⁶ CATSA Air India Report, p. 98.

⁸⁷ Transcript, Vol. 38, June 1, 2007, page 4700, line 15 (Colin Kenny).

⁸⁸ Canadian Airports Council, *CATSA Act 5 Year Review: CAC Position Paper*, (May 2, 2006) Exhibit P-255, Tab 1, p. 9 [*CAC Position Paper*].

⁸⁹ Flight Plan, p. 83.

⁹⁰ Senate Report, p. 34.

⁹¹ Senate Report, p. 37.

Passenger-Baggage Reconciliation

65. Passenger baggage reconciliation was the major deficiency in aviation security in 1985, according to Mr. Wallis.⁹² According to the regulations at the time, air carriers were responsible for passenger and baggage reconciliation and were required to provide their security plans to Transport Canada.⁹³ The entire security regime rested on voluntary compliance, and Transport Canada only verified that security plans were in place, not that they were consistently carried out. Monitoring, according to the CATSA Advisory Panel, was very limited.⁹⁴ "Very, very few people were reconciling baggage in any way, shape or form" at the time of the bombing of Flight 182, according to Mr. Wallis.⁹⁵

66. As discussed above, the Air India Security Programme in 1985 accounted for situations involving unaccompanied baggage. If a passenger did not appear at the boarding gate in time to board the aircraft the Air India Security Programme directed that the baggage should be offloaded under its Standard Security Procedures.⁹⁶ Also, if baggage had not arrived at a destination with a passenger because of delays in baggage handling, the baggage would be subjected to physical inspection or a 24-hour hold prior to forwarding to the passenger's destination under the Air India Security Programme Emergency Procedures.⁹⁷ The Security Programme in 1985 did not, however, account for the situation of the "Singh" baggage which had been interlined to an Air India flight but where the stand-by passenger did not appear at the departure gate.⁹⁸ According to the Canadian Aviation Safety Board Report on Flight 182, had passenger-baggage reconciliation been done in 1985, the interlined "Singh" baggage would have been detected and it would not have been placed on the aircraft.⁹⁹

⁹² Transcripts, Vol. 37, May 31, 2007, p. 4411 (Mr. Wallis).

⁹³ Passenger-baggage reconciliation is the process whereby passengers are associated with their baggage in order to verify that passengers who check in baggage have also boarded the aircraft. Baggage is considered unaccompanied if the passenger does not board the aircraft for which the baggage was checked. CATSA Air India Report, pp. 48-50.

⁹⁴ CATSA Air India Report, pp. 45, 56.

⁹⁵ Transcripts, Vol. 37, May 31, 2007, p. 4412 (Mr. Wallis).

⁹⁶ CATSA Air India Report, p. 50.

⁹⁷ CATSA Air India Report, p. 50.

⁹⁸ CATSA Air India Report, pp. 50-51.

⁹⁹ CASB Report, pp. 56-57.

67. Air India was the first airline to begin implementing passenger-baggage reconciliation following the bombing of Flight 182. Then, based on recommendations made by the *Seaborn Report* post-bombing, Canada was the first member country of ICAO to require passenger-baggage reconciliation on all international and then domestic flights.¹⁰⁰ Nonetheless, until the events of September 11, 2001 passenger-baggage reconciliation was only conducted in a few countries.¹⁰¹

68. Further, it was not until April 2006 when Amendment 11 to Annex 17 was adopted. Amendment 11 sets out the most current aviation security standards, including Standard 4.5.3, which makes it mandatory for every contracting state to ensure that commercial air carriers do not transport the baggage of passengers who do not board the aircraft "unless that baggage is identified as unaccompanied and subjected to additional screening."¹⁰² Indeed, IATA has noted, in reference to Annex 17, that such baggage must be *subjected to appropriate extra security controls*.¹⁰³

69. Unfortunately, it is unclear what kind of "extra security controls" are sufficient and what kinds are used for unaccompanied baggage. As Georgina Graham stated, what "additional screening" consists of is completely unknown to the public at large.¹⁰⁴ While ICAO sets the baseline, national regulators make the ultimate decision about what extra security to use and, as a result, this additional screening will vary from country to country. As recognized by IATA, "the screening for explosives, explosive devices, and components however, can differ from country to country and from airport to airport."¹⁰⁵ This Commission's ability to assess the adequacy of this additional screening is therefore impossible.

70. Therefore, based on Standard 4.5.3 of Annex 17, in certain limited circumstances, luggage which is unaccompanied can travel on commercial passenger flights so long as it is

¹⁰⁰ Rae Report, p. 20; CATSA Air India Report p. 66; Seaborn, *Security Responses Affecting Airports and Airlines in Canada*, (September 24, 1985) at p. 6 [*Seaborn Report*] (Doc. CAF0039).

¹⁰¹ CATSA Air India Report, p. 81.

¹⁰² Annex 17, s. 4.5.3.

¹⁰³ International Air Transport Association, *Responses to Supplemental Questions from the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (December 21, 2007) at p. 9. Exhibit P-402, Tab 2 [*IATA Responses to Supplemental Questions*]

¹⁰⁴ Transcripts, Vol. 66, October 25, 2007, p. 8253.

¹⁰⁵ IATA Responses to Supplemental Questions, pp. 9-10.

subjected to unknown 'additional screening'. When and how this is determined is unclear, but it does raise concerns that, like the 'Singh' luggage, dangerous materials can travel on a plane without the person who checked the baggage in. In other words, another tragedy like that of Flight 182 could, in theory, happen once again. The only way to address this is to ensure that passenger-baggage reconciliation is always conducted and that, where bags are unaccompanied, they are subject to the highest levels of screening.

Cargo

71. Dr. Leiss, after reviewing the evidence, was "flabbergasted" by the fact that Canada does not screen cargo. He described it as "an accident waiting to happen."¹⁰⁶ Though all passenger luggage has been screened in Canada since January 1, 2006, cargo is still not screened. The issue of air cargo security has been identified as a major security concern many times since the bombing of Flight 182. The Seaborn Report in 1985,¹⁰⁷ the *Rae Report*,¹⁰⁸ *Flight Plan*,¹⁰⁹ the CATSA Air India Report,¹¹⁰ and the Senate Committee¹¹¹ have all noted that air cargo represents one of the most serious gaps in Canada's aviation security regime. As described by the CATSA Advisory Panel in *Flight Plan*:

Air cargo operations represent a major security gap, perhaps the single most significant gap that has been brought to our attention. Air cargo is largely unscreened at present, and this represents a serious vulnerability in the system.¹¹²

72. The CATSA Advisory Panel has also pointed out that the cargo sector currently represents 6.2 per cent of Canadian trade with the United States and 21 per cent of trade with other countries. The amount of cargo that is carried by aircraft is expected to double in the next two decades and yet, screening of cargo by x-ray or other equipment takes place at the discretion

¹⁰⁶ Transcript, Vol. 91, December 7, 2007, p. 12202, (Dr. Leiss).

¹⁰⁷ Seaborn Report, p. 7.

¹⁰⁸ Rae Report, p. 21.

¹⁰⁹ Flight Plan, pp. 48-49.

¹¹⁰ CATSA Air India Report, p. 108.

¹¹¹ Standing Senate Committee on National Security and Defence, "The Myth of Security at Canada's Airports," (January 2003), p. 10 [*The Myth of Security*]; Senate Report p. 29.

¹¹² Flight Plan, p. 48.

of air carriers.¹¹³ Chern Heed, an airport consultant, estimated that probably about a million tonnes of cargo is transported annually by air, none of which is screened.¹¹⁴

73. The National Security Policy of 2004 promised the development of strategies to enhance the security of air cargo, and allocated over \$26 million over two years for the design and pilot testing of "measures to ensure cargo security throughout the supply chain, as well as the evaluation of screening technologies."¹¹⁵ Nonetheless, air carriers still rely on 'known' or 'trusted' shippers. Cargo from those shippers is accepted while cargo from unknown shippers is subject to a minimum 24 hour hold.¹¹⁶

74. Mr. Wallis defined a 'known shipper' as an "approved agent, freight forwarder, account holder, or other entity who has conducted business with carriers on a regular basis and has provided an acceptable security program to the appropriate authority."¹¹⁷ However, when Mr. Duguay was asked about the Canadian government's definition of a 'known shipper', counsel for the Attorney General of Canada argued that it was dealt with in confidential security measures which could not be disclosed.¹¹⁸ "The security concern is that disclosure of that definition may enable persons to attempt to qualify as known shippers, to fall within that definition, and therefore get around the security controls."¹¹⁹

75. In response, counsel for the families pointed out that the term 'known shipper' as defined in the Canadian Aviation Security Regulations and the Enhanced Security Measures was found on Transport Canada's website. A shipper is deemed to be a known shipper so long as it has shipped on at least three occasions during the preceding six-month period.¹²⁰

76. While the known shippers do deal with the airlines on a regular basis, their employees 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

¹¹³ Flight Plan, p. 48.

¹¹⁴ Transcript, Vol. 38, June 1, 2007, p. 4650 (Mr. Heed).

¹¹⁵ Flight Plan, p. 20.

¹¹⁶ Flight Plan, p. 49.

¹¹⁷ Transcript, Vol. 41, June 6, 2007, p. 5002 (Mr. Wallis)

¹¹⁸ Transcripts, Vol. 43, June 14, 2007, p. 5294 (Mr. Graham).

¹¹⁹ *Ibid.*, p. 5295 (Mr. Graham).

¹²⁰ *Ibid.*, p. 5292 (Mr. Anand). See also Letter from Purolator to CATSA dated June 14, 2006, Exhibit P-191.

when delivered to the terminal.¹²¹ The Senate Committee has recommended that the practice of offering "blanket security shortcuts for 'known' shippers" should be discontinued. The Committee recommended that a protocol be developed for shippers based on proven capacity to assure security.¹²²

77. Meanwhile, mail travelling on passenger planes from Canadian airports is not properly inspected. According to the Senate Committee, "parcels and letters from Canada Post and packages from courier companies constitute a threat to Canadian passenger flights similar to that posed by unscreened luggage."¹²³ Canada Post ships about four per cent of its mail on passenger planes and these parcels are not scanned by Canada Post, air carriers, Transport Canada or by CATSA.¹²⁴ According to Canada Post, its "screening" amounts to little more than a visual scan of random packages without any electronic screening. When these unscreened packages arrive at the airports, Transport Canada places the onus on air carriers to take responsibility for their safety.¹²⁵

78. The CATSA Advisory Panel has indicated that the development of a security regime for cargo and mail air transport in Canada should be an urgent priority given that passenger aircraft are still the primary means of cargo transportation in this country.¹²⁶ According to Mr. Cyr, a CATSA representative, CATSA is working with Transport Canada on the issue of cargo and, though cargo is not part of CATSA's current mandate, if the government does decide to transfer responsibility for cargo to CATSA, they will be prepared.¹²⁷ In the meantime however, CATSA has no mandate to screen cargo and has taken the position that its employees and screening equipment should not be used for this purpose.¹²⁸

79. The federal government claims that Canada does not screen cargo because the technology is not readily available. However, Dr. Kathleen Sweet, an aviation security expert from the University of Connecticut, testified that technology is available for scanning cargo and

¹²¹ The Myth of Security, p. 48.

¹²² Senate Report, p. 54.

¹²³ The Myth of Security, p. 43.

¹²⁴ Senate Report, p. 29. Note: Canada Post employees do visual inspections looking for suspicious parcels.

¹²⁵ The Myth of Security, p. 47.

¹²⁶ Flight Plan, p. 23.

¹²⁷ Transcript, Vol. 39, June 4, 2007, p. 4826 (Mr. Cyr).

¹²⁸ Flight Plan, p. 49.

that cargo screening could have been implemented many years ago.¹²⁹ Air Canada, for example, has an x-ray machine for screening cargo in both London and Paris, where cargo screening is mandatory. Moreover, in Vancouver, Toronto and Montreal, Air Canada physically screens 100 per cent of non-exempt cargo destined for the United States.¹³⁰ Several European countries also do it routinely.

80. Therefore, there is no reason why the screening of cargo should not become a priority for the Canadian government. It is difficult to escape the conclusion that corporate expense, not safety, is the prime motivation despite the sound and fury of security measures in Canada and especially the United States since 9/11.

81. Other countries have recognized the danger that air cargo presents and have been much more diligent than Canada in filling the gap. The United Kingdom, for example, already has an air cargo screening program in place which includes a certification process for known shippers as well as periodic inspections of their facilities. As noted by the Advisory Panel, other countries are taking this threat very seriously. Canada has been left behind.¹³¹ As stated by Mr. Wallis, "if I were preparing a list of priorities for the Canadian government, cargo security would be way up on the list."¹³²

Fixed Base Operations

82. Both the Advisory Panel and the Senate Committee have also warned that fixed base operations ("FBOs") represent a serious security gap in the Canadian aviation security regime.¹³³ In *The Myth of Security at Canadian Airports* the Senate Committee noted "a lack of almost any kind of security requirements for private aircraft and their passengers."¹³⁴ FBOs offer charter services and corporate flights at a large number of airports where commercial airlines also operate, though they often use separate terminals. These fixed base operations can carry

¹²⁹ Transcripts, Vol. 41, June 6, 2007, p. 4991, line 4 (Kathleen Sweet).

¹³⁰ Transcripts, Vol. 43, June 14, 2007, pp. 5290-1 (Mr. Duguay).

¹³¹ Flight Plan, p. 49.

¹³² Transcripts, Vol. 41, June 6, 2007, p. 5003 (Mr. Wallis).

¹³³ CATSA Air India Report, p. 110; Senate Report, p. 58.

¹³⁴ The Myth of Security, p. 10.

100 passengers or more, yet there is no formal screening required of passengers or baggage.¹³⁵

According to the Senate Report:

Fixed-Base Operations – essentially private aircraft facilities attached to major airports for the use of charter aircraft, executive jets and general aviation – are subject to almost no scrutiny. ... Without appropriate security, large private or charter aircraft could fall into the wrong hands. Such aircraft could be used as a missile and cause massive damage and loss of life.¹³⁶

83. Senator Colin Kenny testified about his serious concern over FBOs. He stated that "you can walk through those facilities without ever being identified. You can board charter aircraft without being searched, without ever producing your identification ... there is no checking of baggage, there's no checking that the individuals match the manifest, and so it seems to be an extraordinarily vulnerable place."¹³⁷

84. Captain Craig Hall of the Airline Pilots' Association ("ALPA") also testified about the vulnerabilities that FBOs represent. He noted that every plane in the sky has the potential to be used as a weapon of mass destruction, whether it leaves from an FBO or elsewhere.¹³⁸

85. As a result, the CATSA Advisory Panel and the Senate Committee have both recommended that screening be extended to these operations, "where the size and magnitude warrants" and that CATSA should be responsible for overseeing these operations.¹³⁹ The Panel has also recommended that passengers and baggage transiting from fixed base operations to scheduled flights, which happens often in Northern Canada, be fully screened upon arrival if they were not checked at the point of origin.¹⁴⁰ Finally, the Panel has also pointed out the need to physically separate FBO passengers from screened passengers in sterile areas of the airport.¹⁴¹

¹³⁵ CATSA Air India Report, p. 110.

¹³⁶ Senate Report, p. 58.

¹³⁷ Transcripts, Vol. 38, June 1, 2007, p. 4696 (Sen. Colin Kenny).

¹³⁸ Transcripts, Vol. 64, October 23, 2007, p. 7995 (Capt. Hall).

¹³⁹ CATSA Air India Report, p. 110; Senate Report, p. 58.

¹⁴⁰ Flight Plan, p. 51.

¹⁴¹ Flight Plan, p. 52.

86. As in the case of cargo, FBOs represent a very serious gap in the Canadian aviation security regime. Again, this gap is not a secret. The Panel and the Senate Committee have been recommending changes in this area for years and the slow response of the Canadian government is nothing less than alarming.

Airport Personnel and Access to Secure Areas

87. The Seaborn Report discussed the problem of unauthorized access to airfields in 1985,¹⁴² the Senate Committee noted it in 2003,¹⁴³ and the Advisory Panel, in 2006, expressed "concerns about how easy it seems to be for unauthorized persons to move into and within restricted areas of airports, especially the larger ones." They described this as a "major lacuna in Canada's aviation security".¹⁴⁴

88. Perimeter security is currently the responsibility of airport tenants and operators. As part of this function, airport tenants and operators are required to monitor access points to restricted areas, for example, through terminal buildings, the ramp or apron where aircraft are loaded, airfield gates and tenant facilities.¹⁴⁵ This monitoring needs to be done carefully and consistently in order to avoid unauthorized access to secure areas of the airport. For example, Article 9.10.5 of Annex 17 specifically recommends that "suitable means of protection should be provided to deter the inadvertent or premeditated access of unauthorized persons into ground installations and facilities essential for the safety of civil aviation located off the aerodrome."¹⁴⁶

89. The Seaborn Report also recommended that all airside personnel, including anyone with access to sensitive areas of the airport or aircraft, be subjected to security and criminal checks as a condition of employment.¹⁴⁷ Amendment 11 to Annex 17, adopted in April 2006, also requires contracting states to implement restricted area clearance systems for authorized personnel, checkpoints for identification verification, and random screening of persons and vehicles based proportionally on a risk assessment.¹⁴⁸ It provides new standards for

¹⁴² Seaborn Report, p. 5.

¹⁴³ The Myth of Security, p. 89.

¹⁴⁴ Flight Plan, p. 54.

¹⁴⁵ CATSA Air India Report, p. 102.

¹⁴⁶ Annex 17, article 9.10.5.

¹⁴⁷ Seaborn Report, pp. 5-6.

¹⁴⁸ Annex 17, article 4.2.

screening personnel, including security clearance procedures, performance standards, certification and recertification, as well as periodic audits, tests, and inspections.¹⁴⁹

90. In 1987, Transport Canada established the Airport Restricted Area Access Clearance Program ("ARAACP") which introduced credit and criminal background checks of airport personnel.¹⁵⁰ More recently, in November 2002 the Minister of Transport assigned CATSA the responsibility of random screening of non-passengers who were entering restricted areas at airports. The Minister also assigned CATSA the duty of developing and implementing the Restricted Area Identification Card (the "RAIC") program.¹⁵¹

91. However, Canada's background checks of airport personnel represent yet another vulnerability in Canada's aviation security regime. Specifically, the checks are qualitatively insufficient and are not conducted often enough. For example, approximately 3.5 per cent of employees at five different airports examined in a study had criminal records and approximately 5.5 per cent of clearance holders hired between January 2001 and May 2003 had criminal records.¹⁵²

92. Also, the credit check part of the standard background checks of potential employees was discontinued late in 2006 and the CATSA Advisory Panel has expressed concern that potential vulnerabilities to undue influence will not be revealed as a result.¹⁵³ This is dangerous, since credit checks are an important indicator of security risk.¹⁵⁴ Mr. Heed noted that "there is a fair amount of theft that occurs at an airport, and a person's credit history has a lot to do with the chances they'll take if they need the money and could be easily compromised."¹⁵⁵

¹⁴⁹ Annex 17, article 3.4.

¹⁵⁰ Canada was one of the first ICAO nations to implement such an extensive security clearance program, but in 1990, the program was struck down by the Federal Court as ultra vires the *Aeronautics Act*. This was remedied by Transport Canada's issuance of two new orders: the *Air Carrier Security Measures Order* and the *Aerodrome Security Measures Order* which incorporate approved security procedures for airports, including the ARAACP, by reference. See CATSA Air India Report, p. 70.

¹⁵¹ Flight Plan, pp. 14, 69.

¹⁵² Senate Report, p. 14.

¹⁵³ CATSA Air India Report, p. 102.

¹⁵⁴ Transcripts, Vol. 38, June 1, 2007, pp. 4640-1 (Dr. Bourgault and Mr. Heed).

¹⁵⁵ *Ibid.*, p. 4642 (Mr. Heed).

93. The amount of time that it takes a new employee to receive Transportation Security Clearance to obtain a Restricted Area Pass is also problematic. The time lag in obtaining RAPs creates serious operational problems for CATSA and its screening providers. For example, new screening employees cannot receive training until their RAP is received, which often takes months.¹⁵⁶ In such circumstances new or short-term employees can work inside the restricted area without a pass so long as they are escorted at all times by a holder of a valid RAP.¹⁵⁷ According to the Senate committee, the ratio of valid pass holders to those without can vary from one to six¹⁵⁸ to as high as 1 to 15.¹⁵⁹ It is difficult to imagine that effective security can be achieved at such ratios.

94. Further, passes are often not checked, creating the risk of forgery. Insufficient monitoring to ensure the return of passes when employees are terminated also creates a danger that those passes can be used to facilitate unauthorized access to airports.¹⁶⁰ The Senate Committee determined that only about one per cent of workers entering a restricted zone in airports are being checked and no one leaving a restricted zone is checked at all.¹⁶¹ Finally, the RAIC program, once it is fully operational, will only be in place at 29 airports. There will be no RAIC program at the other 60 airports for which CATSA provides screening services.¹⁶² The same problems with unauthorized access to secure areas of the airport will therefore persist at the majority of airports in Canada.

95. Detailed training of airport personnel is also a very key area of aviation security. IATA, for example, has posited "that a well-trained competent employee, especially those involved with passenger and baggage service, is a crucial layer of security in aviation."¹⁶³ Article 3.4.4 of Annex 17 makes the development and implementation of aviation security quality control programs a requirement for members.¹⁶⁴ According to Article 3.4.2:

¹⁵⁶ Flight Plan, p. 126.

¹⁵⁷ Flight Plan, p. 63.

¹⁵⁸ The Myth of Security, p. 64

¹⁵⁹ Senate Report, p. 17.

¹⁶⁰ The Myth of Security, p. 65.

¹⁶¹ Senate Report, p. 19.

¹⁶² Senate Report, p. 28.

¹⁶³ IATA Answers to Supplemental Questions, p. 5.

¹⁶⁴ Annex 17, article 3.4.4.

Each contracting State shall ensure that the persons implementing security controls possess all competencies required to perform their duties and are appropriately trained according to the requirements of the national civil aviation security programme and that appropriate records are maintained up to date. Relevant standards of performance shall be established and initial and periodic assessments shall be introduced to maintain those standards.¹⁶⁵

96. ICAO also sets some basic guidelines for training, but states often differ in their additional training requirements. In many states, air carriers are restricted to implementing the airline security program developed by the state.¹⁶⁶

97. In the case of Canada, the Senate Committee has concluded that "screeners at security counters, in recent years contracted by airlines, have been notoriously under-trained, underpaid, and have worked unreasonably long shifts at scanning monitors, making them too bleary-eyed to be effective."¹⁶⁷ Senator Colin Kenny testified that, in preparing the Senate Report, "we repeatedly had employees say to us that they had no idea how to respond in the event of a terrorist attack."¹⁶⁸ Further, Mr. Cyr, during his appearance before the Commission, admitted that CATSA managers have not had formal training though a training module had been recently developed.¹⁶⁹

98. As Kathleen Sweet concluded, the key is to do proper training in the first place, and then keep the training constant. She placed a great deal of emphasis on continual re-training in order to keep screeners in particular, sharp and ready for new threats.¹⁷⁰ In order to ensure that Canada's aviation security regime is as secure as it can be, proper training of all screening and other personnel who work in proximity to aircraft will be of utmost importance but no more than the regular upgrading of that training in order to keep up with modern technology and terrorist tactics.

¹⁶⁵ Annex 17, article 3.4.2.

¹⁶⁶ IATA Answers to Supplemental Questions, p. 5.

¹⁶⁷ The Myth of Security, p. 16.

¹⁶⁸ Transcripts, Vol. 38, June 1, 2007, p. 4693 (Colin Kenny).

¹⁶⁹ Transcripts, Vol. 39, June 4, 2007, p. 4836 (Mr. Cyr).

¹⁷⁰ Transcripts, Vol. 41, June 6, 2007, p. 4953 & 4968 (Kathleen Sweet).

Aircraft Protective Officers

99. Since 2001, specially trained Royal Mounted Canadian Police ("RCMP") officers known as Aircraft Protective Officers ("APOs") or air marshals, have been placed on board selected Canadian commercial aircraft and all flights bound for Ronald Reagan Washington National Airport.¹⁷¹ This program is known as the Canadian Air Carrier Protective Program and it was implemented in response, not to the bombing of Flight 182, but many years later to the events of 9/11. In comparison, the United States have had such an air marshal program since the 1970s.¹⁷²

100. The program itself was only begun because of the United States' decision after 9/11 that it would not allow aircraft to land at Reagan airport without an air marshal on board and further, that it would only recognize trained RCMP officers as air marshals.¹⁷³ As a result, CATSA was given the responsibility for working with the RCMP to provide an aircraft protection program.¹⁷⁴

101. Since its inception, the program has evolved to cover other flights. APOs now travel regularly on flights around the world based on locations determined by a sophisticated threat matrix.¹⁷⁵ In addition to the threat matrix, field units have tactical intelligence officers who can collect information from a variety of different sources including localized crime investigation units. As a result, while performing his or her functions as an APO both on board the aircraft and in the airport, the APO is also policing the airport and providing information to the appropriate law enforcement officials when necessary.¹⁷⁶

102. While APOs' identities are highly confidential, flight crew are advised when an APO is on board and the pilot in command has information that would enable him or her to

¹⁷¹ Article 4.7.7 of Annex 17 provides that "Each contracting state that decides to deploy in flight security officers shall ensure that they are government personnel who are specially selected and trained, taking into account the safety and security aspects on board an aircraft and deployed according to the threat assessment of the competent authority. The deployment of such officers shall be coordinated with concerned states and kept strictly confidential."

¹⁷² CATSA Air India Report, p. 96; Transcripts, Vol. 65, October 24, 2007, p. 8058 (Supt. MacNeil).

¹⁷³ *Ibid.*, (Supt. MacNeil).

¹⁷⁴ CATSA Air India Report, p. 100.

¹⁷⁵ Transcripts, Vol. 65, October 24, 2007, pp. 8060, 8065 (Supt. MacNeil).

¹⁷⁶ *Ibid.*, p. 8087 (Supt. MacNeil).

identify the APO. Further, APO training has now expanded to include training for pilots and chief flight attendants.¹⁷⁷ Mr. Wallis testified in support of sharing information about APOs on board flights because otherwise, should an incident arise, the APO could be mistaken for a terrorist.¹⁷⁸

103. APOs are armed when travelling on flights but no APO has ever had to use a weapon.¹⁷⁹ There is a concern about the use of weapons during a flight. Mr. Wallis testified that a plane could crash as a result of combat in the air between APOs and terrorists and, in fact, this occurred in the Middle East.¹⁸⁰ As a result, he is opposed to the use of weapons inside an airplane, indicating that "any gun is capable of being turned against the aircraft and against the commander, if it falls into the hands of a terrorist."¹⁸¹ As noted by the Commissioner, putting armed marshals on a plane "is almost like inviting the gun battle at the O.K. corral."¹⁸²

104. Also, given that no APO has ever had to physically secure a plane, there is no real evidence that the function is even a useful one. As Kathleen Sweet has noted, "the air marshal program provides a perception of security, but no real security."¹⁸³ As indicated by Mr. Wallis, security starts on the ground, that is where a dangerous situation should be prevented.¹⁸⁴ Waiting until a dangerous, armed person is in the air with innocent passengers is counterintuitive. Instead, Canada should direct its energy to the very obvious gaps in aviation security, some of which have been discussed above.

Technology

105. The main devices currently employed to detect explosives at most major Canadian airports are still the explosive vapour detection machines which were first installed in 1985, post-bombing. While these machines have been updated, they still suffer from serious problems. For example, the shelf life of an average machine is estimated at only between five to

¹⁷⁷ *Ibid.*, p. 8079 (Supt. MacNeil).

¹⁷⁸ Transcripts, Vol. 41, June 6, 2007, p. 5049 (Mr. Wallis).

¹⁷⁹ Transcripts, Vol. 65, October 24, 2007, p. 8073 (Supt. MacNeil).

¹⁸⁰ Transcripts, Vol. 39, June 4, 2007, p. 4767 (Mr. Wallis).

¹⁸¹ Transcript, Vol. 41, June 6, 2007, pp. 5000 and 5009 (Mr. Wallis).

¹⁸² *Ibid.*, p. 4983 (The Commissioner).

¹⁸³ *Ibid.*, p. 4983 (Dr. Sweet).

¹⁸⁴ *Ibid.*, p. 5000 (Mr. Wallis).

seven years. Further, the machines often record false positives. One estimate suggests that as many as one in five bags can send off a false alarm requiring time-consuming x-raying or physical searches of the baggage.¹⁸⁵

106. CATSA has also deployed new equipment using x-rays, computed tomography and explosive trace detection technologies as part of its screening activities. The equipment, though modern, is perpetually challenged by new and difficult to detect substances as well as newer options available that promise to deliver better detection of dangerous substances. However, the more complex the device becomes, the longer must be spent on training in maintenance and repair. Also, a large amount of the research and development in new screening technologies is done in the private sector.¹⁸⁶ CATSA and Transport Canada will have to remain vigilant to ensure that this technology is of the appropriate quality necessary for the protection of Canada's aviation security.

107. While these new screening technologies present valuable opportunities for security screening, they are not without their own issues. For example, some of the newly developed x-ray machines have raised a number of privacy concerns as well. As described by Mr. Cartwright, this new technology is "quite revealing" which, from a security standpoint is positive, but from a privacy perspective, is concerning.¹⁸⁷ Dr. Sweet made the following comment about it, "You can't miss if somebody has something on their body because they're literally naked."¹⁸⁸

108. Mr. Cartwright pointed out that there have been attempts to calibrate the technology so that it covers particularly private parts of a person's body, but there is a danger that suspicious objects can be hidden there.¹⁸⁹ Dr. Sweet was also opposed to covering certain parts of a person's body because that would, effectively, defeat the purpose of the scan.¹⁹⁰ Balancing privacy interests with security imperatives in this case makes the efficacy of the

¹⁸⁵ The Myth of Security, p. 40.

¹⁸⁶ Flight Plan, pp. 157-158.

¹⁸⁷ Transcripts, Vol. 42, June 13, 2007, p. 5134 (Mr. Cartwright).

¹⁸⁸ Transcripts, Vol. 41, June 6, 2007, p. 4971 (Dr. Sweet).

¹⁸⁹ Transcripts, Vol. 42, June 13, 2007, p. 5135 (Mr. Cartwright).

¹⁹⁰ Transcripts, Vol. 41, June 6, 2007, p. 4972 (Dr. Sweet).

technology for scanning passengers questionable. Passengers do not forfeit their fundamental rights when they use an airport.

109. These machines also use ionizing radiation which causes some serious health concerns. Though the levels are very low, many people are uncomfortable with the idea of being exposed to radiation, even in a very small amount.¹⁹¹ Dr. Sweet noted that pregnant women, in particular, should not be exposed to radiation.¹⁹²

110. Another revolution in screening technology is the "puffer", described by Mr. Cartwright as "the people sampling portal." To use this technology, a passenger walks through a gateway which samples the environment around the passenger and attempts to remove any chemical or other particle residue from the person's body or clothing. The machine uses particular jet streams of air which strip off any particles on the passenger in order to submit them for analysis. The theory is that if someone has been exposed to explosive material, the residue from that material will end up on the person.

111. However, there are a number of problems with this technology. First, there are persons who legitimately work with explosive material. Second, depending on the sensitivity of the machine, it can mistakenly identify ingredients common in, for example, perfume, as a dangerous substance. According to Mr. Cartwright, the calibration of the machine would have to be very complex in order to distinguish a few atoms of substances. This technology, he said, still has "a way to go."¹⁹³

112. The government, in developing and monitoring the use of new technologies will have to be very careful to balance Canadian security with Canadian privacy rights. While security is of the utmost importance, it should not have to come at a cost to individual human rights.

¹⁹¹ Transcripts, Vol. 42, June 13, 2007, p. 5129, (Mr. Cartwright).

¹⁹² Transcripts, Vol. 41, June 6, 2007, p. 4972 (Dr. Sweet).

¹⁹³ Transcripts, . Vol. 42, June 13, 2007, pp. 5118-5122 (Mr. Cartwright).

Intelligence

113. The bombing of Air India Flight 182 was a serious failure of the Canadian intelligence regime.¹⁹⁴ As a result, it is imperative that aviation security intelligence be a priority for the government. As we discuss in greater detail below, there are a large number of players in the governance of Canada's aviation security regime. If that system is going to function efficiently and effectively, Canada needs to ensure appropriate use is made of intelligence information. It is urgent that we move from the old "need to know" principle to a new "need to share" principle. Accordingly there must be an intensification of information sharing among the Transport Canada partners and stakeholders.¹⁹⁵

114. CATSA has indicated a serious degree of dissatisfaction with its access to intelligence. The Senate Committee has also indicated that CATSA "needs an intelligence capability for its training of pre-board screeners and non-passenger screeners."¹⁹⁶

115. The CATSA Advisory Panel however, concluded that there was little evidence that CATSA lacked adequate evidence to do its job. Mr. Marriott testified that Transport Canada actively shares aviation security related information with CATSA, and CATSA receives the information that it needs for the performance of its responsibilities. He described the program of information sharing as an active, ongoing one, supported by professionals in both Transport Canada and CATSA.¹⁹⁷

116. A number of airlines have also indicated that they were not informed of critical incidents directly affecting their operations.¹⁹⁸ Again, this was a problem faced by airlines in 1985 when Air India did not share information about the heightened threat environment with Air Canada and CP Air.

117. IATA has also stated that "much more work needs to be done by regulators to share intelligence information with airlines." According to IATA, "unilateral regulation by

¹⁹⁴ CATSA Air India Report, p. 31.

¹⁹⁵ Flight Plan, p. 39.

¹⁹⁶ Security Guide Book, p. 64.

¹⁹⁷ Transcript, Vol. 39, June 4, 2007, p. 4803 (Mr. Marriott).

¹⁹⁸ Flight Plan, p. 41.

governments, absent a sound reasoning for such measures, often causes stakeholders to lose confidence in the regulatory process." In other words, IATA disagrees with the regulators' tendency to only tell what needs to be told, when it needs to be told.¹⁹⁹

118. The availability of intelligence and threat warnings to front-line players must therefore be stressed if Canada's aviation security regime is to improve. In order to avoid another disaster like Flight 182, Canadian security intelligence needs to be provided in a timely manner to all persons to whom it could be useful.

Risk Based Threat Assessment

119. Dr. William Leiss, an expert in risk assessment, described aviation security as "a prime example of an intensely dynamic environment of risk." This, he said, is not only because there are multiple categories of risk (e.g. passengers, non-passengers, cargo and fixed based operations) but, more importantly, because the sources of the risk include terrorist groups presumed to be actively and continuously probing the international aviation security system for areas of weakness.²⁰⁰

120. As part of the current aviation security regime CSIS is responsible for providing threat assessments to, among other departments, Transport Canada, based on current intelligence.²⁰¹ The main function of the Integrated Threat Assessment Centre ("ITAC"), based at CSIS, is to produce comprehensive threat assessments concentrating on terrorism, and these reports are then distributed to various key players in the intelligence community including Transport Canada.²⁰²

121. Air carriers may also have access to their own information about risk assessment. This was demonstrated in the case of Air India in 1985 when it received intelligence about possible threats to aviation security from the Indian government. Further, each regulator has its own set of criteria for identifying high risk passengers who should be subject to additional

¹⁹⁹ International Air Transport Association, *Responses to Questions from the Commission of Inquiry into the Bombing of Air India Flight 182* (August 20, 2007), Exhibit P258, Tab 1 at p. 12 [*IATA Responses to Questions*].

²⁰⁰ William Leiss, *Witness Brief: Risk Assessment and Risk Management in Civil Aviation Security*, Exhibit P-361, Tab 1, [*Leiss Witness Brief*].

²⁰¹ CATSA Air India Report, p. 96.

²⁰² CATSA Air India Report, p. 96.

screening. IATA noted, for example, "that it is impossible to design a single automated risk assessment applicable to all threat situations and compatible with all carrier reservation, check-in, and screening processes."²⁰³ As a result, risk assessment criteria may not be consistent throughout the industry. Nonetheless, some sort of risk assessment plan should be in place in all countries, Canada included.

122. The CATSA Advisory Panel has recommended that "a risk-based approach, such as the SeMs, is the necessary basis for any effective aviation security system" and that such a program should be adopted by CATSA.²⁰⁴ Risk assessment at CATSA currently operates within the Treasury Board's Integrated Risk Management Framework, defining risk as "the uncertainty that surrounds future events and outcomes." It is CATSA's position that "risk management is a systematic approach to setting the best course of action under uncertainty by identifying, assessing, understanding, acting on and communicating risk issues."²⁰⁵ CATSA has divided risks into two main categories: business and organizational risks. According to its report, all risks can be managed in one of five general ways: avoidance, transference, prevention, mitigation once it arises, or acceptance.²⁰⁶

123. The SeMS or Security Management Systems approach is described by the Panel as "a management approach to human and organizational risk management that is applied throughout an entire organization, including the non-regulated aspects."²⁰⁷ Some of the basic elements associated with a SeMS approach include the adoption of policy statements, the establishment of security management plans, the implementation of training programs, the monitoring of such programs and the development of an emergency response plan. The focus of such a plan is regulation at the system level with less concentration on day to day compliance.²⁰⁸

²⁰³ IATA Responses to Supplemental Questions, p. 4.

²⁰⁴ Flight Plan, p. 34.

²⁰⁵ CATSA Advisory Panel. *CATSA Risk Management Program Report*, (December 5, 2007), Exhibit P-361, Tab 5, p. 3.

²⁰⁶ *Ibid.*, p. 5.

²⁰⁷ Flight Plan, p. 89.

²⁰⁸ Flight Plan, p. 89.

124. The Panel has also recommended that Transport Canada "more fully reflect risk assessment in its screening regulations."²⁰⁹ Dr. Leiss noted his concern that Transport Canada was not consistently assessing aviation threats according to risk measured quantitatively and ranked.²¹⁰ To date, Transport Canada has not fully implemented a formal risk assessment and management system, something which is alarming in the face of tragedies like Air India Flight 182. As Dr. Leiss noted, there can be no gaps in the risk assessment system.²¹¹

IV PRIVACY AND HUMAN RIGHTS

Passenger Protect Program

125. On June 18, 2007 the Passenger Protect Program, designed to prevent individuals who pose an immediate threat to aviation security from boarding a flight, came into effect. The program involves the comparison of passenger names to names on a secure 'specified persons list' and, if there is a match, Transport Canada will be contacted to determine whether or not the passenger may board the flight.²¹²

126. The legal authority for this program is unclear. The Privacy Commissioner of Canada, Jennifer Stoddart, describes the program as one "which derives from a policy that is generally but not specifically based on powers that are contained in the *Aeronautics Act*".²¹³ The "Resolution of Canada's Privacy Commissioners and Privacy Enforcement Officials on the Passenger Protect Program – Canada's Aviation No-fly List" stated:

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 Impact Analysis Statement accompanying the Identity Screening Regulation.²¹⁴

²⁰⁹ Flight Plan, p. 92.

²¹⁰ Transcripts, Vol. 91, December 7, 2007, p. 11990 (Dr. Leiss).

²¹¹ Leiss Witness Brief.

²¹² Transport Canada, "Passenger Protect Program," (November 26, 2007) online: Transport Canada <http://www.tc.gc.ca/vigilance/sep/passenger_protect/menu.htm> Exhibit P-278, Tab 14 [*TC Passenger Protect Program*].

²¹³ Transcripts, Vol. 71, November 6, 2007, p. 9075 (Jennifer Stoddart).

²¹⁴ 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> Exhibit P-278, Tab 9 [*OPCC Resolution*].

127. In addition to the lack of a sufficient legislative basis, there is also a lack of clarity about how names are added to this specified persons list. The Privacy Commissioner noted that "hugely general criteria is being used" and she described the program as "totally opaque."²¹⁵ According to Transport Canada's answers to questions posed by the Privacy Commissioner's Office:

The Passenger Protect Program proposes to use a watchlist to prevent specified individuals from boarding flights based on practical global experience and risk assessment rather than specific studies.²¹⁶

128. However, the criteria for this watchlist are completely unclear. Dr. Lyon described persons on the Specified Persons List as "people who are an immediate threat to aviation security ... these are people who are too dangerous to fly but too innocent to be arrested."²¹⁷ According to Transport Canada, individuals can find themselves on this list if they are or have been involved in a terrorist group, if they have been convicted of one or more serious and life-threatening crimes against aviation security, 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.²¹⁸

129. As noted by the Privacy Commissioner, only the second criterion is fact specific. Whether a person has been "involved in a terrorist group" or "may attack or harm an air carrier, passenger or crew member" are questions involving a judgment rather than a question of fact, making it difficult to determine when someone will be placed on the list.²¹⁹ Nonetheless, such an inquiry may not be as fact-specific as suggested by the Privacy Commissioner, particularly when one takes into account the fact that the definitions of terrorism and terrorist groups can differ widely between jurisdictions.

²¹⁵ Transcripts, Vol. 71, November 6, 2007, pp. 9017, 9026 (Jennifer Stoddart).

²¹⁶ Transcripts, Vol. 40, June 5, 2007, p. 4901 (Mr. Brandt); Office of the Privacy Commissioner of Canada, "Submission in Response to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182: The Privacy Implications of Aviation Security Measures" (September 2007) Exhibit P-278, Tab 11, p. 5, [*Privacy Commissioner Submission*].

²¹⁷ Transcripts, Vol. 40, June 5, 2006, p. 4858 (Dr. Lyon).

²¹⁸ TC Passenger Protect Program.

²¹⁹ Privacy Commissioner Submission, p. 9.

130. For example, Dr. Anne Cavoukian, the Information and Privacy Commissioner of Ontario, has noted that the definition of membership in a terrorist group is not transparent. Also, according to Dr. Lyon, "terrorism is not an ideology or a program. Terrorism is a strategy for certain kinds of activities."²²⁰ Thus it would be appropriate for the Canadian government to identify what criteria a group must display to be considered terrorist. It would also be useful if the government identified any other factors that are considered because, according to Brion Brandt, Director of Security Policy at Transport Canada, the Minister is free to consider other factors as well and his discretion cannot be fettered by these guidelines.²²¹

131. Also, it is unclear where the information about passengers will come from and whether there will be any checks to determine the accuracy of that information. Mr. Brandt, in his testimony, indicated that law enforcement and intelligence services will gather information about persons "from any source that's available, including other jurisdictions."²²² Given that other jurisdictions have different privacy protections than Canada, how will Transport Canada ensure that the information relied on to place someone on the Specified Persons List was not obtained in violation of that person's privacy rights under Canadian law?

132. A further concern is what options are available to persons who find that their names are on the list. IATA has specifically noted its concern that,

Transport Canada does not have the appropriate procedures in place to protect passengers and airline employees should a positive match be made at the check in counter, regardless of whether that match occurs at a Canadian airport or an airport located in another country from which a covered flight to Canada originates.²²³

133. Yves Duguay from Air Canada articulated a similar concern during his testimony at the Inquiry. Though generally supportive of the program, Air Canada has serious concerns for the safety and security of its frontline staff and passengers at the check-in counter when a person's name matches a name on the Specified Persons List. Though Transport Canada is

²²⁰ Transcripts, Vol. 40, June 5, 2007, p. 4876 (Dr. Lyon).

²²¹ Transcripts, Vol. 40, June 5, 2007, p. 4876 (Mr. Brandt).

²²² *Ibid.*, p. 4875 (Mr. Brandt).

²²³ IATA Responses to Questions, p. 6.

supposed to call the police if a match is made, Mr. Duguay noted that danger still existed in the time it took for those police services to arrive.²²⁴

134. Quite apart from this, the process of reconsideration is set out in administrative procedures but not in the legislation and thus may not be legally enforceable.²²⁵ We know from the government website that those who have been denied boarding can apply to the Office of Reconsideration to challenge the inclusion of their name on the specified persons list though it is unclear how long this process would take.²²⁶ The Privacy Commissioner has testified that it would be very difficult, practically, to challenge the exclusion of oneself from a flight because one's name was on the specified persons list.²²⁷ She also testified that the reconsideration process is not open, complete or satisfactory and, from a natural justice point of view, that it is very troubling.²²⁸

135. Yet another problem with national no-fly lists is the situation created by false positives or mistaken identities. As Dr. Sweet noted, it is particularly difficult to distinguish between persons with the same names.²²⁹ For example, Senator Ted Kennedy was put on the American no-fly list. Also, a Canadian architect and political cartoonist had a particularly negative experience with the American no-fly list when attempting to fly within Canada. Mr. Shahid Mahmood was flying from Vancouver to Victoria for a wedding when Air Canada refused to let him board a flight because he had been designated as high profile, presumably on the American no-fly list since the Passenger Protect Program did not yet exist. Despite a number of efforts made by Mr. Mahmood, he was never able to find out why his name had appeared on this list.²³⁰

²²⁴ Transcripts, Vol. 43, June 14, 2007, p. 5270 & 5305 (Mr. Duguay).

²²⁵ Ontario Privacy Commissioner. *Annual Report to Parliament 2006-2007 – Report on the Privacy Act*, Exhibit P-278, Tab 7, p. 30.

²²⁶ Transport Canada, "Reconsideration under the Passenger Protect Program," online: Transport Canada <<http://www.tc.gc.ca/reconsideration/ppp/menu.htm>> Exhibit P-278, Tab 18.

²²⁷ Transcripts, Vol. 71, November 6, 2007, p. 9076. (Ms. Stoddart).

²²⁸ *Ibid.*, p. 9048. (Ms. Stoddart).

²²⁹ Transcripts, Vol. 41, June 6, 2007, p. 4980 (Dr. Sweet).

²³⁰ Transcripts, Vol. 71, November 6, 2007, pp. 9084-9085.

136. According to the Privacy Commissioner, there is nothing in the Passenger Protect Program to prevent this from happening to another Mr. Mahmood.²³¹ Mr. Brandt testified that the system is designed to avoid false positives, but if they does occur, it can take about thirty working days to rectify the problem. Indeed, no guidelines have been developed for situations of mistaken identities and further, the thirty day timeline is only an estimate, not a promise or a requirement.²³²

137. The Privacy Commissioner also expressed concern about the correlation of the list with ethnic or religious affiliation. She noted that it would be reasonable to expect that some names on the list could be misspelled, particularly if they are not common English or French names. The translation of names into English or French based on our alphabet and pronunciation would add to the problem of having incorrect names on the list.²³³

138. Mr. Wallis testified that he is not in favour of no-fly lists. He described the program as "very peripheral as far as security is concerned" also noting that the program seems to have not been adequately researched.²³⁴ This is supported by the testimony of the Privacy Commissioner who stated that, when asked, Transport Canada did not adequately respond to questions about the basis for such a program. She noted, in reference to the purpose of the program that "it was not on the basis of a demonstrable study that my office saw about how this would reduce threats to aviation security."²³⁵ Moreover, Dr. Sweet has also indicated that no-fly lists like the Passenger Protect Program are not effective. In particular, she noted that "you might do a great job in catching people who are maybe trying to escape an arrest warrant, but you're probably not going to catch a lot of terrorists."²³⁶

139. In a joint resolution of federal and provincial Privacy Commissioners and Ombudsmen issued the same day the Passenger Protect Program came in to effect, the program was criticized for its lack of clarity and transparency, insufficient protections of Canadians' privacy rights, concern that lists would be shared with foreign governments, the potential for

²³¹ *Ibid.* (Ms. Stoddart).

²³² Transcripts, Vol. 39, June 7, 2007, p. 4885 (Mr. Brandt).

²³³ Transcripts, Vol. 71, November 6, 2007, p. 9023 (Ms. Stoddart).

²³⁴ Transcripts, Vol. 41, June 6, 2007 p. 5020 (Mr. Wallis).

²³⁵ Transcripts, Vol. 71, Nov. 6, 2007, p. 9016 (Ms. Stoddart).

²³⁶ Transcripts, Vol. 40, June 5, 2007 p. 4980 (Dr. Sweet).

harm to persons based on inaccurate or unreliable information, an inadequate reconsideration process and the excessive collection, use, and disclosure of sensitive personal information by a number of stakeholders.²³⁷

Passenger Profiling

140. As noted by the Advisory Panel, CATSA's mandate does not currently allow for the screening of individuals based on behaviour or identity but the CATSA Act is broad enough to introduce this role in the future.²³⁸ ALPA, for example, has suggested that, "unless and until the system becomes more human-centred, rather than weapon-centred, we will remain vulnerable to potential hijackings and other aircraft attacks."²³⁹ Such a system is in place at the El Al, the Israeli carrier. Dr. Whitaker made the following comments about the profiling system there:

It is raised as the notion of passenger profiling or behavioural profiling and this is a system which has been really pioneered, I think, in Israel and certainly is used most extensively and effectively in Israel, which begins with the notion that there are certain normal and abnormal or anomalous patterns surrounding passengers and that can be a number of aspects of the mean -- for example, the way that they have purchased their tickets, the circumstances, their itinerary and it could also include certainly and will include who they are in terms of their nationality and perhaps ethnicity, religion and so on that might come into it. I will come back to that in a moment. But essentially this is to the idea that you can identify anomalous patterns of behaviour or anomalous attributes of passengers and then set them aside for more rigorous questioning. And in the course of that questioning, you may in fact be able to find a terrorist.²⁴⁰

141. Jean Barrette, testified that there was a "fine line" between objective behavioural assessment and racial profiling.²⁴¹ Ms. Stoddart also expressed concern about behavioural profiling spilling over into racial profiling. According to her testimony, "there's much concern in various ethnic religious communities across Canada about this, but we have yet to receive any

²³⁷ OPCC Resolution.

²³⁸ Flight Plan, p. 60.

²³⁹ Air Line Pilots Association. *Submission the Advisory Panel on the CATSA Act Review*, Exhibit P-252, Tab 1. ALPA takes the position that physical screening of pilots whose background and criminal history has been checked should be replaced with electronic identity verification and controlled access to secured areas.

²⁴⁰ Transcripts, Vol. 38, June 1, 2007, p. 4595 (Dr. Whitaker).

²⁴¹ Transcript, Vol. 39, June 4, 2007, p. 4822 (Mr. Barrette).

answers about the extent to which there is any kind of profiling de facto in the functioning of these large information collection systems."²⁴² Obviously, racial profiling would have a negative impact on minorities. This is especially significant given that almost all of the victims of the bombing of Flight 182 were a member of a minority group.

142. The Panel has also indicated its reservations concerning the introduction of behavioural analysis as a method of screening because of the potential infringement of individual *Charter* rights, the level of resources and the space requirements at airports.²⁴³ Behavioural analysis has been described as a technique, through human-to-human contact or through technology, that attempts to identify higher-risk passengers for more thorough security searches. As pointed out by the Advisory Panel, "even simple security awareness of unusual behaviour, as in the case of the 1985 Air India flights when names and other changes were made to the reservation and aggressive behaviour was exhibited during check-in, could have proven useful if such training had been provided to CP Air employees and had been acted upon."²⁴⁴

143. However, behavioural profiling goes far beyond 'simple security awareness of unusual behaviour'. Mr. Barrette indicated that, in order to effectively accomplish behavioural profiling, one would need an extensive amount of training involving both theory and on the job experience. Behavioural profiling is not something that can be taught in a two-week training course.²⁴⁵ Dr. Whitaker stated that the present screening staff at Canadian airports "are neither trained nor qualified to carry out this kind of observation and questioning of passengers" and therefore, the institution of such a program" would require a very significant, and expensive, upgrading of their training.²⁴⁶

144. The American behavioural profiling project is called the Screening Passengers by Observation Technique ("SPOT"), and it has not proven effective.²⁴⁷ For example, in nine

²⁴² Transcripts, Vol. 71, November 6, 2007, p. 9090 (Ms. Stoddart).

²⁴³ Flight Plan, p. 61.

²⁴⁴ CATSA Air India Report, p. 109.

²⁴⁵ Transcripts, Vol. 39, June 4, 2007, p. 4823 (Mr. Barrette).

²⁴⁶ Transcripts, Vol. 38, June 1, 2007, p. 4597 (Dr. Whitaker).

²⁴⁷ Eric Lipton. "Faces, Too, Are Searched at U.S. Airports," *New York Times*, August 17, 2006, Exhibit P-253. It is also worth noting that so-called "behaviour detection officers" deployed in approximately 12 airports across the United States, including Dulles, only receive four days of classroom training in observation and questioning techniques and three days of field practice on top of their standard screening training.

months, several hundred persons out of about seven million have flown out of Dulles airport where "behaviour detection officers" are deployed. Of those several hundred, only about six people have faced any legal follow up and largely it was because the persons had outstanding warrants, forged documents, or immigration problems. As described by an official from the SPOT program, behavioural profiling "is like throwing a big fishing net over the side of the boat: you catch what you catch," despite the unlikelihood of catching a terrorist.²⁴⁸ Furthermore, as pointed out by Dr. Reg Whitaker of the Advisory Panel, if there had been appropriate security measures in place, then behavioural profiling would not have been necessary in the case of Mr. Singh.²⁴⁹

Information Sharing

145. Article 2.4.3 of Annex 17 encourages the exchange of information and intelligence on threats:

Each Contracting State shall establish and implement procedures to share with other Contracting States threat information that applies to the aviation security interests of those States, to the extent practicable.

146. Consistent with this obligation, in December 12, 2001 Canada and the United States signed the *Smart Border Declaration* and its *30 Point Action Plan* "to enhance the security of the shared border while facilitating the legitimate flow of people and goods."²⁵⁰ The *Declaration* provides for the sharing of passenger information and agreed upon passenger name records on flights between Canada and the United States, including in-transit flights.²⁵¹ Mr. Brandt also described an extension of *Smart Border* called the *Security and Prosperity Partnership* which provides for the sharing of information between Canada, the U.S. and Mexico.²⁵²

²⁴⁸ *Ibid.*

²⁴⁹ Transcripts, Vol. 38, June 1, 2007, p. 4610 (Dr. Whitaker).

²⁵⁰ CATSA Air India Report, p. 86.

²⁵¹ Department of Foreign Affairs and International Trade Canada, "The Canada-U.S. Smart Border Declaration" online: Foreign Affairs and International Trade Canada <<http://www.dfait-maeci.gc.ca/anti-terrorism/actionplan-en.asp>> Exhibit P-278, Tab 26.

²⁵² Transcript, Vol. 40, June 7, 2007, p. 4920 (Mr. Brandt).

147. However, a concern has been expressed about the dangers of transferring personal information about people from one jurisdiction to another. Dr. Lyon, in his testimony at the Inquiry, noted his apprehension about how another country might assemble information about persons that it provides to Canada.²⁵³ Further, while there are protections for personal information in Canada, privacy laws are different in other jurisdictions and thus one's personal information could easily be misused. Notably, the United States does not have any applicable privacy laws. According to section 9 of the *Identity Screening Regulations*:

No person shall disclose any information respecting the specified person that was provided to the air carrier by the Minister for the purposes of these Regulations including the specified person's name, date of birth, gender and the fact that he or she was specified.

The air carrier shall ensure that access to information respecting the specified person is restricted to air carrier employees, agents or contractors who require that access to carry out their duties.²⁵⁴

148. Despite this confidentiality provision, the Privacy Commissioner has expressed serious concern that the list, though intended to be confidential, would in fact, not be.²⁵⁵ Carman Baggaley, Senior Policy and Research Analyst from the Privacy Commissioner's office, testified that "the risk of the Specified Persons List getting into the hands of other governments is not insignificant."²⁵⁶ Indeed, contradictory testimony at this Inquiry supports this conclusion.

149. For example, despite the confidentiality provision above, Yves Duguay, Chief of Security for Air Canada, testified that it was Air Canada's interpretation of the Passenger Protect Program that Air Canada would be allowed to pass on information collected to foreign authorities.²⁵⁷ Mr. Brandt also indicated, in response to a question about the disclosure of the list by a foreign carrier to its national government, that "should their national government require

²⁵³ *Ibid.*, p. 4879 (Dr. Lyon).

²⁵⁴ SOR/2007-82, s. 9.

²⁵⁵ Transcripts, Vol. 71, November 6, 2007, p. 9079 (Ms. Stoddart).

²⁵⁶ *Ibid.*, p. 9028 (Mr. Baggaley).

²⁵⁷ Transcripts, Vol. 43, June 14, 2007, p. 5302. (Mr. Duguay).

that information of them, that's up to them to decide what they want to do with that information."²⁵⁸ According to Mr. Brandt, "there has to be a sharing of information."²⁵⁹

150. In response, the Privacy Commissioner's Submissions on the Privacy Implications of Aviation Security Measures expresses the following concern:

First of all, it is not apparent that Transport Canada would necessarily become aware that SPL has been shared with a foreign government. Secondly, in the case of foreign carriers, there would seem to be real possibility that faced with a court order or other legal instrument issued by a foreign court a carrier would be compelled to provide the SPL notwithstanding the confidentiality provision.²⁶⁰

151. This is particularly alarming, given the *Arar* and other similar cases, since the specified persons list is based on suspicion, and the individuals on it may not have done anything wrong, though a foreign government might not recognize this. Ms. Scotton, from the Privacy Commissioner's Office testified that "we've certainly seen instances where information in the hands of foreign governments and foreign law enforcement bodies can have dire consequences for the person who is stranded in that situation."²⁶¹ Further, the list is updated every thirty days and there is a risk that a foreign government may rely on outdated information. The reconsideration process in Canada is also not available to persons on the specified persons list when they are in other jurisdictions.²⁶²

The Impact of Systemic Racism

152. The Honourable Bob Rae, in his report on the bombing of Flight 182, asked "why did the murder of 331 people not do more to shake our complacency?"²⁶³ On that issue, Mr. Ujjal Dosanjh suggested that:

At that time, in '84, '85, that the institutions of our society, be they government, police or others, had a bit of a blind spot, to put it

²⁵⁸ Transcripts, Vol. 40, June 5, 2007, p. 4912 (Mr. Brandt).

²⁵⁹ *Ibid.*, p. 4881 (Mr. Brandt).

²⁶⁰ Privacy Commissioner Submission, p. 11.

²⁶¹ Transcripts, Vol. 71, November 6, 2007, p. 9032 (Ms. Scotton).

²⁶² Privacy Commissioner Submission, p. 12.

²⁶³ Rae Report, p. 4.

mildly, where we felt those of us who were in the thick of these issues, we felt that many people a) didn't have the knowledge or the experience to deal with the issues; b) the fact that they cared, and they may have, didn't come through at all. And so one was left with the impression that there wasn't much caring, and that may have been for many reasons.²⁶⁴

153. Dr. Sherene Razack concluded in her expert opinion to the Commission that at least one of the reasons for the Canadian post-bombing response was the influence of systemic racism. According to her review of the evidence, which included many transcripts, exhibits and reports prepared for this Inquiry, "there is nothing to indicate that the government considered the crash as a Canadian tragedy and its victims primarily Canadian."²⁶⁵

154. Dr. Razack was not the only witness before this Commission to draw such a conclusion. Mr. St. John also testified that, when the bombing of Air India happened, "they didn't even think it was Canadian. They thought it was Indians from India."²⁶⁶ Senator Colin Kenny also acknowledged that, after the bombing, there was a sense that it was not Canadians who were involved.²⁶⁷ Similarly, Mr. Dosanjh described a sense, around the time of the bombings, of feeling "abandoned by the political leaders, by the government, by other institutions, including police."²⁶⁸

155. The response of the Canadian government after the bombing of flight 182 was a pale shadow of its response after the tragedy of September 11, 2001. For example, the introduction to *Flight Plan* reads as follows:

The security of Canadians has always been a leading national concern. Since the events of September 11, 2001, and the emergence of a terrorist threat that has struck in the past and could strike again into the very heart of North America, the safety and security of Canadians has become an urgent priority for their government.²⁶⁹

²⁶⁴ Transcripts, Vol. 80, November 21, 2007, p. 10168 (Mr. Dosanjh).

²⁶⁵ Razack, "Opinion: The impact of systemic racism on Canada's pre-bombing threat assessment and post-bombing response to the Air India Bombings." (November 25, 2007) Exhibit P-387 at p. 25 [*Razack*].

²⁶⁶ Transcript, Vol. 35, May 29, 2007 p. 4231 (Mr. St. John).

²⁶⁷ Transcripts, Vol. 37, June 1, 2007, p. 4700 (Sen. Kenny).

²⁶⁸ Transcripts, Vol. 80, November 21, 2007, p. 10173 (Mr. Dosanjh).

²⁶⁹ *Flight Plan*, p. 7.

156. Flight Plan then goes on to assert that reaction to the attacks of 9/11 was "swift, and literally overnight it became an urgent priority for the Canadian government to enhance the country's counter-terrorism capabilities and preparedness, including putting a renewed focus on aviation security and closer, system-side Canada-U.S. coordination."²⁷⁰

157. The bombing of Flight 182 claimed 329 lives, 278 of which were Canadian. It remains the single largest mass murder by an aircraft bombing in history, exceeding the 270 people killed on board and on the ground when a bomb destroyed Pan Am Flight 103 over Lockerbie, Scotland in 1988.²⁷¹ The Air India bombing killed proportionately more Canadians than the Americans who perished in 9/11 and yet the Canadian government reacted with significantly more vigour after the attacks of 9/11 than it did after the bombing of Flight 182.

158. Indeed, Canada's limited reaction to the bombing of Air India flight 182 does suggest that Canadians, in general, were not as affected by the loss of the lives of so many Indo-Canadians as they were by the loss of life in 9/11. According to Dr. Razack:

A racial response is discernable in the overall *disinclination* to take seriously the specific threat, and the people of Indian origin who offered warnings of it, and who stood to be the most harmed by it. To put the matter bluntly, one pays attention to the security concerns of London, Paris, Washington and Tel Aviv, but not those of New Delhi.²⁷²

159. Of course, this is not to say that there were not many compassionate and dedicated individuals who, in the days and weeks following the bombing of Flight 182, worked hard to assist the families of the victims of the bombing. Dr. Razack stated during her testimony that:

[T]here is even evidence that some Canadian officials acted heroically within the systems in which they were caught; that they did in fact do their jobs and tried to be as compassionate as possible and to offer as much as possible. But they were stuck in

²⁷⁰ CATSA Air India Report, p. 87.

²⁷¹ Flight Plan, p. 10.

²⁷² Razack, p. 14.

systems that limited the extent to which they could respond and this is where we would – I would say there was systemic racism.²⁷³

160. As explained by Dr. Razack in her opinion and during her testimony, there is an important difference between systemic racism and individual racism. Nevertheless, because systems are made up of individuals, this distinction can sometimes be difficult to identify. Dr. Razack described the difference between the two kinds of racism as follows:

Systemic racism commonly refers to collective, unintentional practices whereas individual racism is linked to the behaviour of individuals and is often considered intentional.²⁷⁴

161. Thus, it is the system which can foster racist responses and unconscious attitudes in individuals who are not intentionally acting discriminatorily. In the case of Air India, for example, there are a number of instances where individual actors in Cork did not display racist attitudes but nonetheless were limited in their ability to respond to the tragedy by the system within which they operated. According to Dr. Razack, "I don't think that the presence of responses that one would call racist necessarily precludes that there are no moments of compassion and no dedicated, caring people. Isn't it the point of systemic racism precisely that there are caring compassionate people caught in systems that disadvantage?"²⁷⁵

162. While there were many factors which played a part in the failure to prevent the bombing, race undoubtedly played a role in how Canada responded, particularly in the area of aviation security. As Dr. Razack concluded, "perhaps nothing conveys the limited impact of the Air India bombings on the consciousness of Canadian officials than the few changes made in aviation security."²⁷⁶

163. The federal government's blistering, personal attack on Dr. Razack, from the release of her report on December 13, 2007 to her cross-examination on February 14, 2008, was

²⁷³ Transcripts, Vol. 96, February 14, 2008, p. 12723 (Dr. Razack).

²⁷⁴ Razack, p. 3.

²⁷⁵ Transcripts, Vol. 96, February 14, 2008, p. 12737 and 12744 (Dr. Razack).

²⁷⁶ Razack, p. 19.

unfair, unjustified and legally improper. The oral submissions of family counsel on this point²⁷⁷ will not be repeated here.

164. Three points, however, bear emphasis for present purposes.

165. First, despite the massive resources quite properly devoted to this inquiry by the federal government, and despite the repeated references to this issue during the hearings by the families, the Commissioner, and cross-examining counsel, the government was evidently unable or unwilling (following the express invitation of the Commissioner) to find any expert who could express the view the government took so vociferously in attacking Dr. Razack.

166. Second, the aggressive reaction of the government to the families' genuine attempt to understand this societal form of Canadian systemic failure is very telling. It epitomizes the continuing systemic inability or unwillingness of the Canadian government over the last quarter century to display leadership and self-examination in the face of multiple causes of the Air India disaster. It repeats the failure of Canadian institutions to heed the warning signs and pleas of "foreigners" over this long period.

167. Therefore the families conclude, with great sadness and frustration, that the government's dismissive and disrespectful response to their good faith attempt to analyze and understand their treatment as Indo-Canadians over the last 25 years substantiates the opinion that was voiced by their expert witness.

V. GOVERNANCE OF THE AVIATION SECURITY REGIME

168. Currently, the governance of the Canadian aviation security regime is complex, overlapping and inefficient. Responsibilities are diffused among multiple players and the division of those responsibilities is not clear enough for aviation security to be managed effectively. The Senate Committee has described the governance of Canada's aviation security regime as follows:

²⁷⁷ Transcripts, Vol. 97, February 15, 2008, p. 12878-12893 (Raj Anand).

A maze-like matrix of departments, agencies and corporations hold responsibilities for security at Canadian airports, and there is a fuzzy Alphonse-and-Gaston relationship between the public and private sector as to who will be responsible if security all goes haywire.²⁷⁸

169. In the immediate aftermath of the bombing of Flight 182 in 1985, the Seaborn Report made similar comments. The report stated that "clear lines of authority and division of duties as between the Department and the carriers should be established."²⁷⁹ Over twenty years later, the Senate Committee and the Advisory Panel have also identified serious issues with clarity, consistency and coordination of aviation security activities.²⁸⁰ Accordingly, "jurisdictions and mandates among various government agencies, police forces, and airport authorities present a more tangled web than what is needed to focus on creating not just an efficient and prosperous industry, but also a safe industry."²⁸¹

170. Transport Canada is designated as Canada's national aviation security authority and is responsible for developing aviation security policy and regulations for the Governor in Council's approval. Transport Canada is also responsible for adopting various security measures relating to aviation security and for monitoring the industry to ensure compliance with the regulations. Transport Canada has been described by the Advisory Panel as "the landlord (of airports), policy-maker, regulator and compliance monitor."²⁸²

171. Part of CATSA's mandate is to handle screening of persons and baggage, a function previously held by air carriers at the time of the Air India bombing. Under the *CATSA Act*, CATSA was assigned responsibility for "the effective and efficient screening of persons who access aircraft or restricted areas through screening points, the property in their possession or control and the belongings or baggage that they give to an air carrier for transport."²⁸³ CATSA also manages funding agreements for the Canadian Air Carrier Protective Program and general airport policing, and is responsible for the acquisition, installation and maintenance of

²⁷⁸ The Myth of Security, p. 109.

²⁷⁹ Seaborn Report, p. 9.

²⁸⁰ The Myth of Security, p. 109, CATSA Air India Report, p. 44.

²⁸¹ The Myth of Security, p. 109.

²⁸² CATSA Air India Report, p. 27.

²⁸³ CATSA Act, s. 6(1).

security screening equipment, and the implementation of the RAIC program.²⁸⁴ CATSA continues to contract with private security firms for the employment of over 4,000 screening officers deployed at the 89 designated Canadian airports where screening is required.²⁸⁵

172. Public Safety and Emergency Preparedness Canada ("PSEPC") is responsible for the RCMP and CSIS, as the central government department for national security. Other institutions with large roles in the aviation security regime include the Canadian Security Intelligence Service ("CSIS"), the RCMP and the Canadian Border Services Agency ("CBSA").²⁸⁶

173. The Seaborn Report in 1985 noted that while air carriers will always have an important role to play in respect of the security of their operations, it could be argued that Transport Canada instead of the air carriers should provide the personnel necessary to operate the security measures for checking passengers, baggage and cargo. The Report noted however that this change was not necessary at that time.²⁸⁷ Today, air carriers are still accountable for a great deal in the context of Canada's aviation security regime. Air carriers are responsible for the security of their aircraft, including all belongings carried on board such as cargo, mail and catering as well as carry-on and checked baggage. Of particular importance is the requirement that air carriers perform passenger-baggage reconciliation.²⁸⁸

174. The Senate Committee has recommended that Transport Canada's responsibility for aviation security would be more appropriately held by the Department of Public Safety and Emergency Preparedness.²⁸⁹ It has also said that "it is imperative that the government claw back some of the responsibility for airports that it devolved to local authorities in the 1990s."²⁹⁰ Similarly, Transport Canada, according to the Senate Committee, should not be in charge in the security arena. Instead, CATSA should report to the Minister of Public Safety and work under

²⁸⁴ CATSA Air India Report, p. 28.

²⁸⁵ CATSA Air India Report, p. 94.

²⁸⁶ CATSA Air India Report, p. 96.

²⁸⁷ Seaborn Report, p. 9.

²⁸⁸ CATSA Air India Report, p. 28.

²⁸⁹ CATSA Air India Report, p. 31.

²⁹⁰ Senate Report, p. 47

the operational control of the RCMP. The Senate Committee urged the government to consider putting CATSA in charge of security operations and the RCMP in charge of security strategy.²⁹¹

175. Evidence provided by the Canadian Airports Council ("CAC"), however, indicates that the majority of airports prefer that CATSA continue as an "aviation security service delivery" organization regulated by Transport Canada. Specifically, the CAC believes that CATSA's responsibilities should not be subsumed within the Department or the CBSA. CATSA, according to the CAC, should not expand its mandate to include airport policing or intelligence gathering. Generally airports still favour the current type of service delivery, which involves contracted security companies rather than direct federal or airport employees.²⁹²

176. Similarly, the Advisory Panel noted that, in its consultations, there was nearly unanimous agreement that the current division of responsibility in the Canadian aviation security regime should remain as is. Overall, the Panel recommended that Transport Canada remain the national authority for aviation security because of its wider mandate for the transportation sector as a whole.²⁹³ According to Dr. Whitaker,

It's obviously in the interests of everyone that planes fly securely, but others may have other interests that a purely security perspective excludes and we think that the great strength of Transport Canada is its overall responsibilities, not only for aviation transportation, but for all forms of transportation in this country, which after all interact, and the whole transportation infrastructure.²⁹⁴

177. Mr. Wallis agreed with this position. As he noted, to make changes now will likely only create confusion.²⁹⁵ Given the multiple gaps in Canada's aviation security regime as it stands, creating a situation where responsibility is further divided and/or shifted among the players would not be beneficial to anyone. However, Canada does need to ensure that the regulatory framework for aviation security operates optimally, using resources efficiently and

²⁹¹ Senate Report, p. 52.

²⁹² CAC Position Paper, p. 2-4.

²⁹³ CATSA Air India Report, p. 31. This is consistent with the recommendation of the Seaborn Report which provided that "the Minister of Transport and his Deputy should be responsible for ensuring that there is effective operation of all air security arrangements regardless of who may actually work them." (p. 9).

²⁹⁴ Transcripts, Vol. 38, June 1, 2007, p. 4643 (Dr. Whitaker).

²⁹⁵ Transcripts, Vol. 41, June 6, 2007, p. 5031 (Mr. Wallis).

effectively. If this means that the division of responsibility or even the relationship between certain stakeholders should be changed, then it is in everyone's best interest that these steps be taken.

178. For example, it has been suggested that the relationship between CATSA and Transport Canada change "significantly". According to this line of argument, CATSA should, in addition to its security screening responsibilities, be held accountable for operational decisions to the Minister of Transport. Transport Canada would therefore have to shift from a prescriptive regulatory and compliance regime to a more performance-based and results-oriented system.²⁹⁶

179. According to the new regulatory framework suggested by the Panel, CATSA would be responsible for developing security plans, adopting the SeMs approach, developing operational policies and procedures for carrying out their screening mandate in compliance with the CATSA National Security Plan, defining and deploying resources needed for screening operations, managing their own operations as well as financial and administrative affairs. Transport Canada, in comparison, would be freed from the responsibility for making and enforcing detailed regulations. It would be able to focus on all of its many other responsibilities, including priority projects in areas of particular vulnerability like air cargo and perimeter security as discussed above.²⁹⁷

180. These suggested changes towards a less prescriptive, results-based regulatory regime would essentially overhaul aviation security as it is known in Canada, requiring an entirely different skill set by the whole industry "consisting of more analytical and strategic thinking, problem-solving, threat and risk analysis, teamwork and communication."²⁹⁸ The current regime is overly detailed and prescriptive. It presents a danger of predictability: because of standardized and mandatory security procedures, the system can be more easily overcome by persons who watch it for long enough. According to the Panel, "this rigidity may provide, in certain circumstances, a reduced level of security by not allowing new equipment and methods to be adopted quickly. In other circumstances, it may be more costly and less efficient to operate

²⁹⁶ CATSA Air India Report, p. 106. See also Recommendation 4.4 of the Panel in Flight Plan: "it is recommended that, as a high priority, Transport Canada develop a more results-based regulatory framework for aviation security."

²⁹⁷ Flight Plan, p. 97.

²⁹⁸ CATSA Air India Report, p. 106.

according to a fixed recipe when flexibility is required."²⁹⁹ In other words, rules and regulations that are overly prescriptive can hinder the operating authority's ability to adjust as new threats emerge.

VI. CONCLUSION

181. The families of the victims of the bombing of Air India Flight 182 agree with the Senate Committee's conclusion that, "the system as it stands is not adequate."³⁰⁰ As outlined above, there are major deficiencies in Canada's aviation security regime including, in particular, cargo screening, fixed base operations, access to secure areas and the potential violation of human rights that some of the recent changes, such as the Passenger Protect Program, present.

182. It is important for this Commission to make recommendations for the proactive improvement of Canadian aviation security. The slowness with which the system has been able to deal with gaps and vulnerabilities in the aviation security regime is alarming. Up until this point, the regime has developed through a series of reactions, reactions which have been slow and ineffective. Consider, for example, the following conclusion made by the Advisory Panel:

Each threat has brought forth a specific set of remedies which remain as part of a cumulative system. These constitute 'layers' of security, but do not appear to add up to a coherent system by design. Again, the Canadian government has been reactive rather than proactive.³⁰¹

183. Therefore, the Commission must make strong recommendations to the Canadian government to act immediately and effectively to address the problems identified in these submissions. There is no room for delay. The safety of Canadians depends on this Commission's ability to recognize the problems prevalent in aviation security and to ensure that no more time is wasted.

²⁹⁹ Flight Plan, p. 87.

³⁰⁰ The Myth of Security, p. 14.

³⁰¹ Flight Plan, p. 25.

VII RECOMMENDATIONS

184. The families of the victims of Air India Flight 182 make the following recommendations for the improvement of Canada's aviation security regime:

Recommendation 1

Screening

- (a) Transport Canada should install equipment and staff at *all* airports, including fixed base operations, to ensure that all baggage and passengers are screened completely.
- (b) All passengers and non-passengers should be subject to complete screening. There should be no exceptions to this rule.
- (c) All materials being carried on board aircraft should be screened completely. This includes carry-on and checked baggage, whether accompanied, unaccompanied or interlined between airlines, as well as all materials being carried on board aircraft by catering staff or airline personnel.
- (d) The protection of human rights and human health should be a primary consideration in the development and deployment of screening technology at Canadian airports.
- (e) Transport Canada should develop and implement a plan for the long-term sustainability and efficiency of screening operations in Canadian airports.

Recommendation 2

Cargo

- (a) Transport Canada should immediately develop and implement a plan to ensure that all cargo at Canadian airports is screened completely.
- (b) The 'known shipper' system should be abandoned in favour of a system which ensures that all cargo is screened completely.

Recommendation 3

Airport Personnel

- (a) Transport Canada should develop and implement a plan to address the cause of inefficiencies in the security clearance process at Canadian airports, including the amount of time it takes for new personnel to obtain Transportation Security Clearance.
- (b) Anyone with access to sensitive areas of the airport or aircraft should be subjected to security, credit and criminal background checks as a condition of employment.
- (c) Only persons with approved security clearance should have access to secure areas of the airport and airplane. The Restricted Area Identification Card system should be implemented at all Canadian airports as soon as possible.

Recommendation 4

Protection of Human Rights

- (a) The Passenger Protect Program should be immediately discontinued and passenger profiling should be avoided in order to ensure the protection of fundamental human rights.
- (b) Where personal information and other intelligence is shared within Canada and with other jurisdictions, the protection of privacy and other human rights, consistent with Canadian privacy laws, must be guaranteed.
- (c) Transport Canada, the RCMP and CSIS must intensify and expedite the racial diversification of their respective workforces.
- (d) As part of training of all personnel in Transport Canada, the RCMP and CSIS, in depth instruction on the operation of racism and racist assumptions in society and in the workforce should be mandatory.

Recommendation 5

The Families of Victims of the Bombing of Flight 182

(a) The Prime Minister's office should issue a formal apology to the families of the victims of the bombing of Flight 182 for the insufficient pre-bombing threat assessment and the inadequate institutional response in the aftermath of the bombing, including the twenty year delay in convening this Inquiry.

(b) The Government of Canada should reassess the entitlement of family members of victims of the bombing of Flight 182 to ensure equitable compensation in light of the new evidence heard by this Inquiry which was not made available during the families' civil suit against the Government of Canada.

1010982.6