

**REPLY 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

1. These are the reply submissions of the Family Interests Party, and in particular, its members Mrs. Lata Pada, Mr. Satrajpal (Fred) Rai, Ms. Lorna Kelly, and Mr. Kalwant Mamak to the submissions of the Government of Canada (the "Government").

AVIATION SECURITY

Responsibility

2. In its final submissions to the Commission of Inquiry into the investigation of the bombing of Air India Flight 182 (the "Inquiry"), the Government has denied the government's responsibility for certain issues in aviation security. For example, the Government relies on the fact that "Transport [Canada] was not required under any legislation or regulation to monitor the security programmes of air carriers."¹ Similarly, the Government states that, though the RCMP had brought the ineffectiveness of the PD-4 sniffer to the attention of Air India, "it was up to Air India to remedy the problem."² The Government also focuses heavily in its submissions on the fact that Transport Canada did not receive the infamous June 1 telex.³ One can take from this line of argument that the Government denies that Transport Canada was responsible for increasing security in relation to Air India because it did not receive that specific warning.

3. Indeed, bi-annual inspections of air carrier security programmes were only required by policy at the time and the RCMP may have been under no legal obligation to follow up with Air India about avoiding the use of the PD-4. However, Transport Canada did not even follow its own policy to check Air India's security programme and, even though Transport Canada may not have received the June 1 telex, the RCMP did.⁴ It was as much the RCMP's responsibility as it was Air India's to forward this important information on to CSIS and Transport Canada.

4. Ultimately, the Government is responsible for the protection of its citizens and common sense dictates that greater attention should have been paid to aviation security

¹ Final Submissions of the Attorney General of Canada to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Vol. 2 of 3, para. 61 [*Government Submissions Vol. 2*].

² Government Submissions, vol. 2, para. 161.

³ Government Submissions, vol. 2, paras. 181-191.

⁴ See the Government Submissions vol. 2 at paras. 163 and 168, including footnotes 220 and 221.

particularly given the heightened threat environment around Air India in 1985. In any event, to now cast off responsibility is unproductive.

5. Finally, the Government makes some very vague references in its submissions as the basis for some of its conclusions. For example, at paragraph 163 in volume 2 of its submissions, the Government posits that, "the evidentiary record called by the Commission demonstrates that both the RCMP and Transport Canada worked with Air India to expose the weaknesses in their security programme, draw them to Air India's attention and offer assistance."⁵ As is discussed in more detail below, the Government also makes such fuzzy references in relation to Dr. Razack's report. This failure to point to actual evidence does not assist the Commission and can, in fact, be misleading. The Government's submissions should therefore be read carefully, and discounted where it has failed to identify evidence to support its conclusions.

Air Cargo

6. Air cargo is a vital area of aviation security, as outlined in the families' final submissions.⁶ The Government has described, in its final submissions, an Air Cargo Security Initiative which "includes developing supply chain security programs for air carriers, freight forwarders and shippers and assessing and developing screening technologies and protocols."⁷

7. As described, cargo will be subject to a risk classification system wherein some cargo will be considered low-risk and air carriers, freight forwarders and shippers can be classified as "secure partners."⁸ Given the extreme vulnerability that unscreened cargo represents, it makes no sense to identify some of it as "low-risk" particularly if this means that it will be subject to less stringent security controls. As argued in the families' final submissions, all cargo should be screened.

⁵ Government Submissions, vol. 2, para. 163.

⁶ See pp. 26-29 of the Final Submissions made by this Family Interests Party, and in particular, its members Mrs. Lata Pada, Mr. Satrajpal (Fred) Rai, Ms. Lorna Kelly, and Mr. Kalwant Mamak (*Family Interest Party Submissions*).

⁷ Government Submissions, vol. 2, para. 354.

⁸ Government Submissions, vol. 2, para. 355.

8. Also, as argued in the families' final submissions, the "known shipper" classification system is unsafe and should be discontinued immediately. It is unclear how a system of "secure partners" differs from a system which uses "known shippers". For example, the Government states that "known shippers" will become "secure partners" once they have completed some unspecified "validation process."⁹ For the same reasons that the "known shipper" program should be discontinued, so should a system of "secure partners" be avoided.

9. The Government also makes the statement that "current research regarding screening technologies indicates that technologies for screening consolidated (bulk) and palletized cargo for explosive detection is still in the development stage" though there is no reference to any of this research or other evidence supporting this conclusion.¹⁰ On the contrary, the evidence before the Commission is that technology for effectively screening cargo does exist and is in use in other parts of the world.¹¹

Fixed Base Operations

10. As stated in the families' final submissions, fixed base operations represent a major gap in Canada's aviation security system.¹² Nonetheless, the Government has indicated that securing fixed base operations is not a priority for it. At paragraph 409 of volume 2 of its submissions the Government states that "further work on recommendations [relating to fixed base operators] was displaced last year by other aviation security priorities."¹³

11. Given the concern about fixed base operations expressed over the years by, among others, the CATSA Review Panel and the Standing Senate Committee on National Defence, it is baffling that fixed base operations are not already a priority for the Government.¹⁴ In order to secure aviation in Canada, fixed base operations most certainly need to be addressed immediately.

Privacy and Human Rights

⁹ Government Submissions, vol. 2, para. 360.

¹⁰ Government Submissions, vol. 2, para. 363.

¹¹ See para. 79 of this Family Interests Party's submissions and the evidence referenced there.

¹² See of this Family Interests Party's submissions, pp. 29-31.

¹³ Government Submissions, vol. 2, para. 409.

¹⁴ See para. 85 of this Family Interests Party's submissions and the evidence referenced there.

12. Improvements in the aviation security regime should not come at the expense of human rights. The Government's new Passenger Protect Program threatens Canadian privacy and human rights. The families' particular concerns with this program are outlined in their submissions but the families also felt it important to reply to some of the statements made about the program by the Government in its submissions.

13. The Government also states in its submissions that Passenger Protect will be limited to the exchange of personal information about individuals whose names are on a 'Specified Persons List' and that the "additional information that may be exchanged in order to resolve false positive situations is both consensual and voluntary."¹⁵ However, once again, the Government has provided no authority for this statement. Furthermore, it is unclear how the exchange of information can be characterized as either consensual or voluntary where a person is forced to provide such information in order to be able to fly.

14. Although the Government has concluded that the Passenger Protect Program meets all of the requirements of the *Privacy Act* to ensure that information exchange is both limited and protected,¹⁶ Privacy Commissioners across Canada have concluded that "the *Privacy Act* requires reform and offers no adequate protection nor remedies to meet the privacy risks resulting from this type of initiatives."¹⁷ Therefore, the Government's current formulation of the Passenger Protect Program should be halted in order to adequately protect human rights.

The Current Aviation Security Regime

15. Of particular concern to the families is the Government's description of the current civil aviation security regime as "responsive".¹⁸ Indeed, the system has always been 'responsive' and that is one of the main problems with it. As described by the CATSA Review Panel, "in every phase, the aviation security regime reacted to what had happened and made

¹⁵ Government Submissions, vol. 1, paras. 455-456.

¹⁶ Government Submissions, vol. 1, para. 458.

¹⁷ 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.

¹⁸ Government Submissions, vol. 2, para. 284.

every effort to mend what had already been broken."¹⁹ Rather than being 'responsive' to problems that happen, the aviation security regime needs to become proactive and prepared to deal with problems before they arise.

SYSTEMIC RACISM

16. On February 14, 2008, Dr. Sherene Razack testified before the Commission in relation to her written expert opinion on systemic racism.²⁰ The Government has, in its submissions, raised several issues in relation to Dr. Razack's opinion and testimony which require a reply.

Individual vs. Systemic Racism

17. It is clear from a review of the submissions of the Government, as well as the questions asked by counsel for the Government of Dr. Razack, that the Government still does not grasp the distinction between systemic and individual racism. For example, counsel for the Government suggested to Dr. Razack during cross-examination that it was "prevalent throughout [your opinion], it was a theme or an argument that the individuals themselves – the individual actors, for the most part, government actors that were involved in this terrible tragedy were racists themselves."²¹

18. Contrary to this suggestion, Dr. Razack did not opine that any individuals were racist. In fact, Dr. Razack pointed out to counsel for the Government that there is no suggestion, anywhere in her opinion, that individuals committed individual, intentionally racist acts.²² What she did conclude was that systemic racism played a role in the overall Canadian response pre- and post-bombing.

19. This is not the same as a suggestion that particular individuals were racist. Dr. Razack very clearly outlined the differences between systemic and individual racism both in her

¹⁹ Canada. *Air India Flight 182: Aviation Security Issues* (Ottawa: CATSA Act Review, 2007) (Chair: Dr. Reg Whitaker) at p. 112 [*CATSA Air India Report*].

²⁰ Sherene 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 [*Razack*].

²¹ Transcripts, Vol. 96, Feb. 14, 2008, p. 12736 (Dr. Razack) [*Razack Testimony*]

²² Razack Testimony, p. 12738.

opinion and during her testimony.²³ Although Dr. Razack acknowledged that the distinction between the two forms of racism is "messy", she also very carefully examined how important the distinction is, demonstrating how racialized minorities are often viewed as outsiders and not Canadians.²⁴

Materials Reviewed

20. The Government makes the submission that Dr. Razack "did not have access to a sufficient body of data upon which to base her conclusions, nor even sufficient time to dissemble the limited body of information that she was provided with."²⁵ The transcript reference to which the Government points in support of this point only describes some of the material to which Dr. Razack referred and does not support the allegation that the information she had was insufficient.

21. The Government's submissions also state that Dr. Razack "appeared to have been unaware of or ignored the testimony of numerous government and former government employees who testified at the Inquiry."²⁶ Not only is this statement factually incorrect and inconsistent with Dr. Razack's testimony, counsel for the Government never put any of this testimony to Dr. Razack.²⁷ Had he, Dr. Razack could have indicated that she had indeed reviewed it.

22. The Government had the opportunity to clarify the specific materials which Dr. Razack reviewed but did not do so. Counsel arrived at the cross-examination armed with stacks of material and put precisely one two-page document to Dr. Razack while she was available for questioning. As a result, it made incorrect assumptions about what was and was not reviewed. For example, counsel for the Government put to Dr. Razack that she had not reviewed the

²³ Razack, pp. 3-9; Razack Testimony, p. 12718-12720.

²⁴ Razack, p. 5.

²⁵ Government Submissions, vol. 1 para. 469 [*Government Submissions*].

²⁶ Government Submissions, vol. 1 para. 477.

²⁷ Dr. Razack testified that she did review the testimony of government officials (Razack Testimony, p. 12760). Further, Dr. Razack could not have opined on the dedicated efforts of individual government officials, particularly in Cork, had she not read their testimony. Razack, p. 20.

CATSA Review Panel's Report when, in fact, she had.²⁸ The Government therefore has no basis upon which to conclude that Dr. Razack's opinion was "poorly researched".²⁹

Alleged Factual Errors

23. The Government argues that there are "numerous factual errors" contained in Dr. Razack's opinion and that therefore, doubt should be cast upon her conclusions. The Government relies on particular facts from Dr. Razack's opinion along with references to evidence which the Government argues are proof that some of Dr. Razack's facts were incorrect.³⁰

24. First, the references to evidence which the Government relies on are notably vague and in some instances, incorrect. For example, footnote 618 in volume 1 of the Government's submissions refers to "evidence given in the aviation security phase" which narrows the reference to about twenty days of hearings and hundreds of documents. Similarly, at footnote 620, the Government refers to "numerous CSIS threat assessments" without further clarification or reference.

25. The Government refers to Dr. Razack's testimony but its references do not support the conclusions it reaches in its submissions. For example, at paragraph 479, the Government submits that Dr. Razack "was unaware of much of the evidence about efforts of Canadian officials to contact families and provide them with information and support as well as various commemorative events." In support of this position, it relies on Dr. Razack's testimony in which she refers to monuments which were built in memory of the crash. This testimony does not support the rash conclusion that Dr. Razack "was unaware of much of the evidence." Further, the Government often refers to Dr. Razack's opinion as Exhibit P-358 which is the curriculum vitae of William Sheahan.³¹

26. Second, the Government has mischaracterized some of what Dr. Razack said in her cross-examination. For example, it was not Dr. Razack's position that Serge Carignan was

²⁸ Razack Testimony, p. 12747.

²⁹ Government Submissions, vol. 1, para. 476.

³⁰ Government Submissions, vol. 1 para. 472.

³¹ For example, see footnotes 612, 613, 615 of the Government Submissions, vol. 1.

called to inspect all of the baggage on Air India Flight 182. Dr. Razack testified to her conclusion about what Mr. Carignan's view was of his responsibilities that day. Dr. Razack reached no conclusion about whether that view was accurate.³² Also, Dr. Razack was aware of William Warden's testimony, contrary to the Government's submission.³³ Moreover, Dr. Razack's reference to the evidence of family member Satrajpal Rai was accurate; he did not receive a letter of condolence.³⁴

27. Third, it is trite law that counsel, in final submissions, cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow the contradiction to be explained.³⁵ None of the evidence relied on by the Government in its final submissions was put to Dr. Razack on cross-examination, even though Dr. Razack asked counsel for the Government to do so.³⁶ Therefore, the Government cannot now rely on evidence which was never put to Dr. Razack to call into question the accuracy or veracity of her opinion.

28. Finally and in any event, the alleged factual errors which the Government relies on do not have any bearing on the substance of Dr. Razack's opinion. It is noteworthy however, that the Government has made a serious factual error in both Dr. Razack's cross-examination and in its final submissions in concluding that it was Air India that screened luggage when, in fact, Air India contracted with Burns Security for screening.³⁷

³² Razack Testimony, p. 12759.

³³ Government Submissions, vol. 1, para. 476.

³⁴ Transcripts, Vol. 1, September 25, 2006, p. 104 (Fred Rai).

³⁵ *Browne v. Dunn* (1893) 6 R. 67 (H.L.).

³⁶ Razack Testimony, p. 12756.

³⁷ For example, see Mr. Brucker's statement at line 7, p. 12753 of the Razack Testimony. Transcripts, Vol. 37, May 31, 2007, p. 4457 (Mr. Kumar).