

REPRESENTATION OF CANADA
AT JUDICIAL INQUIRY INTO AIR INDIA FLIGHT 182

ISSUES

- The purpose of this memorandum is to apprise you of imminent problems concerning the representation of Canada at the proposed Indian judicial inquiry into Air India Flight 182. Specifically, what should be the role at this inquiry of the Department of Transport and of the Canadian Aviation Safety Board?
- A secondary issue is a resolution of who will be responsible for the costs associated with the inquiry.

BACKGROUND

- Since the occurrence of the crash on June 23, 1985, there have been daily (now weekly) meetings of the Inter-departmental Task Force into Air India Flight 182 chaired by the Prime Minister's Office. The purposes of these meetings were to ensure that key government officials possessed up-to-date information, and to devise timely strategy concerning responses to the press, assistance to victims' families, assistance to the Indians in their investigation, etc. The departments and agencies represented were Transport (DOT), Canadian Aviation Safety Board (CASB), Royal Canadian Mounted Police (RCMP), Justice, External, Solicitor-General, Multiculturalism, Defence. On behalf of Transport, there have been attending Doug Rimmer from your office, Bruce Stockfish from Legal Services, Paul Sheppard from Aviation Security and Art Mountain from Coast Guard.
- As the Indians progressed in their investigation, Canada has provided assistance in two ways. First, the Coast Guard ship "John Cabot" has been mapping the crash site with a view to possible retrieval of wreckage. Second, representatives from the CASB have been attending in India, primarily to assist in the analysis of the flight recorders (although the Indians have not reciprocated with provision of information). The CASB maintains that it has been attending in India as Canada's "accredited representative" pursuant to the terms of Annex 13 of the Chicago Convention which sets out the international rules governing accident investigation.

- Although an official of the CASB (not the CASB per se) would be the logical choice as Canada's accredited representative to the investigation and a Memorandum of Understanding between the CASB and the DOT dated December 28, 1984 so provides, it is not clear that there has been such formal accreditation.
- Early in July, Ivan Whitehall, General Counsel with the Department of Justice, was appointed by the Deputy Attorney General to coordinate all litigation on behalf of the Government of Canada. As you are aware, many Notices of Claim against the Crown on behalf of victims' families have already been received and continue to be received.
 - In mid-July, the Government of India appointed Mr. Justice B. Kirpal to head a public inquiry into the crash of Air India Flight 182. A copy of his terms of reference has yet to be obtained. Latest information is that the pre-hearing for the inquiry will be held in Delhi on September 20, 1985, with the inquiry to formally commence several days later. The inquiry is expected to last several weeks. Mr. Whitehall has received written instructions from the Prime Minister's Office and the authority of the Deputy Attorney General to seek standing on behalf of the Government of Canada at the Kirpal inquiry. Indications are that standing will be granted, and preparatory meetings have already been held with concerned departments and agencies.
 - Recent meetings have indicated that the CASB may perceive itself as being in a position of possible conflict. The CASB views its interests (aviation safety, determination of the cause of the accident) as being possibly at odds with those of the Government of Canada as a whole (ensuring that the commission of inquiry receives in the best light evidence concerning Canada).
 - It further seems that the CASB views itself as having exclusive jurisdiction in acting on behalf of Canada when dealing with other states in matters of accident investigation. This has been seen with its sending of representatives to the recorder analysis sessions in India, its dealing directly with Indian investigators during their current tour of Canadian airports and now possibly with its efforts to itself represent Canada at the proposed inquiry.

CURRENT STATUS

- The conflict between the CASB and the Government as a whole is purely hypothetical. It is more likely that Canada's interests will be in harmony with those of the CASB. Even if such a conflict presents itself, however, it should be put in perspective by examining the following arguments.
- In this situation, the CASB appears to have no authority under its legislation to act in an official capacity. Section 3 of the CASB Act gives the CASB authority when an aviation occurrence occurs a) in Canada; b) outside Canada, involving Canadian registered aircraft; c) outside Canada, when the appropriate foreign state requests Canada to investigate. The CASB may argue that paragraph c) applies. However, Canada has only been requested to assist in the investigation, and not to come to India and conduct the investigation as the provision more likely means. Accordingly, the CASB probably has no statutory power to formally investigate, to call an inquiry in Canada or to represent Canada at the Kirpal inquiry. It would seem to have no official status, the same as investigation authorities in other countries unconnected with the accident.
- The CASB having no official status, only officials of the CASB could have accredited representative status at the investigation under Annex 13. Even assuming, however, that official status exists or that accredited representative status has been conferred, it is doubtful that that also means status to represent Canada at the Kirpal judicial inquiry. There is nothing in the CASB Act that authorizes the CASB to so act.
- While it is true that the CASB has been made independent of the DOT and would appear as an independent party in its own right at domestic judicial inquiries (such as the recent Gimli inquiry), an inquiry in a foreign state where Canada is the sole party is another matter. It is important for Canada's international image that Canada speak with one voice, and it would seem that that voice should not be that of the CASB. The DOT, if its security measures are found blameworthy, has most to lose in such an inquiry. If Justice Kirpal determines that Canada is blameworthy by virtue of its inadequate security measures, then even in the event the courts in Canada do not subsequently find liability, the political and financial costs may be unavoidable. The DOT should therefore at the least provide the lead role in advising counsel in the conduct of the inquiry.

- It would seem that one concern of the CASB is that early in its operation its jurisdiction will be cut back as a result of this matter. It may be for this reason that it is maintaining it has exclusive jurisdiction, or in the least an obligation to act independent of the government.

DEPARTMENTAL POSITION

- Counsel for the inquiry, on behalf of the Government of Canada, can take his instructions from
 - a) the DOT, as having most at stake at the inquiry;
 - b) the CASB, pursuant to its claimed mandate in respect of accident investigation generally (although if the CASB represents Canada it may be that Department of Justice counsel should not act);
 - c) all departments and agencies concerned including the DOT and the CASB, with dispute resolution to take place in the Prime Minister's Office or at the Cabinet level.
- Option c) is recommended as being the most logical and practical. The role of the CASB would be similar to that of other parties, to advise and assist counsel on behalf of Canada in a fair determination of the causes of the crash. Indications are, however, that the CASB may resist such a role, claiming its need to be independent.
- Counsel for the inquiry and the CASB are attempting to reach agreement between themselves on this issue that will satisfy all concerns. As the Minister responsible for the two key parties, the DOT and the CASB, the issue may eventually be directed to you, and it is the intent of this memorandum to prepare you for that possibility.
- Representation of Canada at the inquiry will mean extensive costs to the Government of Canada. The RCMP, CASB and DOT have already indicated a desire to send observer/advisers. It would seem that these organizations should be responsible for their resulting costs. It has yet to be determined who will be

responsible for the costs of Department of Justice counsel (including assistant Indian counsel) at the inquiry. The options appear to be:

- a) Department of Justice, having the representative role;
- b) Department of Transport, having the most at stake;
- c) Prime Minister's Office, on behalf of the Government of Canada;
- d) shared by various departments in a manner to be agreed upon.

These options will be explored further at meetings of the Inter-departmental Task Force. Your guidance on this question would be appreciated.

August 15, 1985