

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

**IN THE MATTER OF ORDER OF COUNCIL P.C. 2006-293,  
MADE PURSUANT TO PART I OF THE INQUIRIES ACT:  
COMMISSION OF INQUIRY INTO THE INVESTIGATION  
OF THE BOMBING OF AIR INDIA FLIGHT 182**

**NOTICE OF MOTION**

1. TAKE NOTICE that a motion is hereby made to the Commissioner pursuant to Rule 12 of the Rules of Procedure and Practice of the Commission of Inquiry for an order granting the Canadian Bar Association (CBA): (i) leave to make an opening statement during Stage Two of this Inquiry pursuant to the Commissioner's ruling on standing of August 9, 2006 and (ii) such further or other order as the Commissioner may deem appropriate;

AND TAKE FURTHER NOTICE that in support of this application will be read the affidavit of J. Parker MacCarthy, Q.C., sworn on March 19, 2007, the written submission of the CBA to this Inquiry, and such further or other materials as the Commissioner may permit;

AND TAKE FURTHER NOTICE that the said motion shall be made on the following grounds:

1. The Applicant was granted standing as an intervenor in this Inquiry, and has long been an advocate of the legal profession;
2. As part of its mission, the CBA works to improve the law and the administration of justice, by promoting the Rule of Law, the independence of the legal profession, the independence of the judiciary, and the elimination of discrimination;
3. The CBA has particular expertise relating to the issues raised in this Inquiry, including the practical application of practices and legislation relating to the investigation and prosecution of terrorism offences, the legal framework of criminal trials, and the constraints on terrorist financing;

4. If granted leave to make an opening statement, the CBA will assist the Commissioner by providing a unique national perspective on application of the Constitution, including the foundational principle of the Rule of Law, to the issues raised in this Inquiry. The CBA in its opening statement will summarize its position on these issues for the Commissioner and respond to any questions he may have about the CBA's submission.

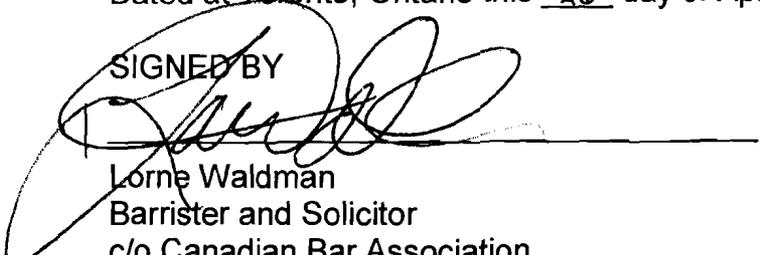
5. The written submissions of the CBA, representing the legal profession in Canada, to this Commission include the following:

- a) There must be detailed protocols governing the sharing of information between CSIS and the RCMP;
- b) Any anti-terrorism measure that places limitations on the right to legal counsel, and the right to know the case to meet, must provide for 'special counsel' who could review all of the evidence, consult with the party on an ongoing basis, and advocate on their behalf;
- c) That confidentiality in the solicitor-client relationship must be preserved in any anti-terrorism measures employed;
- d) That the finding in *R. v. Malik* 2005 BCSC 350 does not demonstrate deficiencies in existing trial procedures;
- e) That *R. v. Malik* reinforces the cautions previously stated by wrongful conviction inquiries about the unreliability of witnesses to whom incentives for testifying have been extended by the state;
- f) That special courts for terrorism offences, with special procedures and evidentiary rules, are not required and would represent a serious infringement of the Rule of Law;
- g) Instituting a 'Do Not Fly' list requires procedural safeguards to ensure the accuracy of information, a right of review, and that passenger information will not be used for ulterior purposes; and
- h) Additional regulatory burdens on charities are not required to curb terrorist financing.

6. The CBA makes this motion in writing and does not seek to make oral submissions relating to its request to make an opening statement.

Dated at Toronto, Ontario this 26<sup>th</sup> day of April 2007.

SIGNED BY



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**for the Canadian Bar Association**

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**Counsel for the Commission**

AND TO:  
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**AFFIDAVIT OF J. PARKER MACCARTHY, Q.C.**

I, J. Parker MacCarthy, Q.C., of the City of Nanaimo, in the Province of British Columbia, Barrister and Solicitor, MAKE OATH AND SAY:

1. I am the President of the Canadian Bar Association (CBA), and as such have personal knowledge of the matters below, except where I have relied on the information of others, which information I believe to be true.
2. This Affidavit is in support of the CBA's motion to make an opening statement during Stage 2 of this Inquiry.
3. The CBA is a national professional organization established in 1896 and incorporated in 1921. The CBA's membership consists of approximately 37,000 lawyers, notaries, law students and teachers from across Canada, representing about two thirds of Canada's legal profession.
4. The CBA is the voice of the Canadian legal profession both nationally and internationally. Part of the mission of the CBA is to improve the administration of justice in Canada by promoting the rule of law, preserving the independence of the legal profession and of the judiciary, and eliminating discrimination.
5. The mandate of this Inquiry includes consideration of questions relating, *inter alia*, to the assessment and investigation of terrorist activities, terrorist financing, the relationship between security intelligence and evidence in criminal trials, and the prosecution of terrorism offences. These issues will have a significant impact on constitutional rights of those within Canada, the rule of law, and Canada's national security. The Commissioner will consider the necessity and appropriateness of fundamental changes to Canada's system of justice with the goal of better addressing and preventing terrorist threats. These issues go to the heart of the preservation of the rule of law.

6. The CBA, intends to make written submissions to this Commission that include the following:

- (a) There must be detailed protocols governing the sharing of information between CSIS and the RCMP;
- (b) Any anti-terrorism measure that places limitations on the right to legal counsel, and the right to know the case to meet, must provide for 'special counsel' who could review all of the evidence, consult with the party on an ongoing basis, and advocate on their behalf;
- (c) That confidentiality in the solicitor-client relationship must be preserved in any anti-terrorism measures employed;
- (d) That the finding in *R. v. Malik* 2005 BCSC 350 does not demonstrate deficiencies in existing trial procedures;
- (e) That *R. v. Malik* reinforces the cautions previously stated by wrongful conviction inquiries about the unreliability of witnesses to whom incentives for testifying have been extended by the state;
- (f) That special courts for terrorism offences, with special procedures and evidentiary rules, are not required and would represent a serious infringement of the Rule of Law;
- (g) Instituting a 'Do Not Fly' list requires procedural safeguards to ensure the accuracy of information, a right of review, and that passenger information will not be used for ulterior purposes; and
- (h) Additional regulatory burdens on charities are not required to curb terrorist financing.

7. The CBA has taken a leadership role in analysing anti-terrorism legislation introduced after September 2001, commencing with submissions to the Senate and House of Commons Committees charged with reviewing *Anti-terrorism Act*. Most recently, the CBA made comprehensive submissions to both the Senate and House of Commons Committees for the three-year review of the legislation.

8. As an intervener before the Supreme Court of Canada in *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, and *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, both cases related to the constitutionality of anti-terrorism measures, the CBA has been granted leave to present oral argument. The Arar Commission of Inquiry in 2005 invited the CBA to file written argument and make oral submissions before the Commissioner, the Honourable Dennis J. O'Connor.

9. The CBA can present the Commissioner with its unique expertise and perspective on the constitutional and legal policy issues in the mandate of the Inquiry. If allowed to present oral submissions the CBA will draw on its expertise and membership to provide the Commissioner with a neutral, balanced summary of the legal profession's perspective on the issues involved.

10. The CBA has retained counsel to represent it in the Inquiry and plans to file its written submission with the motion for leave to make an opening statement. The CBA respectfully requests an order granting leave to make an opening statement during Stage 2 of the proceedings so that the CBA can address the issues that are of concern to the CBA and are within the Commissioner's mandate.

SWORN BEFORE ME at the City of  
Ottawa, Ontario on March , 2007

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Commissioner for Taking Affidavits

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**J. PARKER MACCARTHY, Q.C.**