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INTO THE FUTURE CONFERENCE

THE AGENDA FOR CIVIL JUSTICE REFORM

EXAMINING BARRIERS THAT PREVENT LITIGANTS FROM ACCESSING THE CIVIL JUSTICE SYSTEM

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Thank you for allowing me to participate in this important and timely Conference. This is a short address on a subject of considerable complexity. I propose, therefore, to do three things: (1) to set the stage by briefly identifying some of the barriers to justice that continue to confront us; (2) to discuss certain of the measures taken to overcome these barriers; and (3) finally, to offer some personal observations concerning the road that lies ahead.

I. THE BARRIERS

Traditional barriers endemic to our civil justice system are well known. I refer to excessive delays in our court system and the associated costs of legal services. These concerns are neither new, nor unique to Canada.

Delay and costs have long been significant factors affecting access to justice. Sadly, this remains true today. These barriers drove the considerable justice reform efforts of the 1970s. And the 1980s. And the 1990s. And they continue to prompt calls for reform today.

In the August 1996 Report of the *CBA Task Force on Systems of Civil Justice*, the Task Force members detailed the results of an extensive consultation process undertaken to aid the Task Force in its work. Of particular (although not surprising) note, the Task Force reported that members of the public and litigation counsel alike identified the following three areas as most in need of improvement in the civil justice system (at p. 12):

> 1. the speed with which disputes are resolved in the civil courts;
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> 2. the affordability of dispute resolution in the civil courts; and
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> 3. public understanding of the civil justice system as a whole.

With respect to the second factor, in particular, the Task Force commented (quoting from a participant in the Task Force's consultation process):

> ***The fact that the majority of Canadians cannot afford to seek justice through the current [court] system is a problem [that] far outstrips in magnitude concerns about maximizing procedural and due process protections for those litigants who are presently able to access the system***.

Let me offer these comments at the outset regarding costs. We know that delay drives up the costs of litigation. The costs of litigation are now so high, they are often the source of injustice. As Lord Wolfe[1] observed in his reports on civil justice reform in England in 1995 and 1996, costs sustained are often higher than the results achieved.

Lord Wolfe reported that in one-half of the 'lowest value' cases, the costs on one side alone were close to, or exceeded, the total value of the claim. In Ontario, the authors of the *Civil Justice Review*[2] reported in 1996 that in a *typical* case, the legal costs incurred were $38,000 + (based on 190 hours x $200). That was at a modest hourly rate, based on a short trial.

During the work of the CBA Task Force, one commentator put it this way: The 'full blown' adversarial process as it existed under rules of court in effect in the early 1990s provided many opportunities for "***monied might to wear out the right***".

1. Lord Wolfe, *Access to Justice Interim Report:* June 1995; *Final Report*: July 1996.
2. *Civil Justice Review: Supplemental and Final Reports* (Toronto: Ontario Civil Justice Review, 1996)

Regrettably, in my opinion, these observations remain apposite today. Indeed, I believe that the situation has worsened. I will return to this topic later in my remarks.

There are also other powerful and fundamental barriers to justice in our civil justice system. These include:

- physical barriers – the challenges of providing access to justice for individuals with disabilities, for those who reside at great distances from lawyers or judicial centres, and for those who, because of child care, employment or family responsibilities, cannot avail themselves of legal services during practical hours;
- language barriers – that prevent many Canadians from understanding the nature of our civil justice system, from seeking needed legal advice and from engaging in our court processes;

- cultural barriers – that cause those persons whose backgrounds, experiences and cultural norms differ from those of the majority to be apprehensive or fearful and suspicious of the unfamiliar and imposing environment of our courts. I will have more to say concerning the increasing prominence of this barrier to justice later in these remarks.
- socio-economic barriers – that prevent the economically disadvantaged from being able to afford legal services or resort to the courts. Regrettably, statistics suggest that some groups within Canadian society remain vastly overrepresented among this country's low-income population. They include women, children, aboriginal peoples, immigrants, refugees, the elderly, and persons with disabilities.

Of the plight of the poor, Stephen Wexler has said:

> ***Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms…Poverty creates an abrasive interface with society; poor people are always bumping into sharp legal things. The law school model of personal legal problems, of solving them and returning the client to the smooth and orderly world in television advertisements, doesn't apply to poor people***.[3]

- the nature of many of our court procedures, which, despite many reform initiatives throughout the 1990s, still impose difficult procedural requirements, often cloaked in dense 'legalese' that is difficult to understand, and that sometimes produce lengthy, unex-

3. Stephen Wexler, *Practising Law for Poor People* (1970), 79 Yale L.J. 1049 at 1049-50.

plained and costly delays in the pace of a proceeding; and

- I would argue, the changing climate and focus of many Canadian law firms.

Illustrations abound of the searing and often invisible impact of many of these barriers to justice. The experiences of Canada's aboriginal peoples provide a particularly compelling example. As others have observed, Canada's formal civil justice system is founded on values and legal rules that, too often, do not comport with traditional aboriginal laws and that, in many instances, are the antithesis of aboriginal dispute resolution traditions. As a result, it has been said that aboriginal peoples are slow to assert their rights before the courts and, of great concern, that "[T]hey have, over time, lost confidence in the dominant justice system. They see the present system as biased against them."[4]

Whether one agrees or disagrees with that statement, of this we can be certain: for those in this country who do not speak English or French, or for whom the normative values at work in our courts are

4. Samuel D. Stevens, *Access to Civil Justice for Aboriginal Peoples*, in A. Hutchinson (ed.) *Access to Civil Justice*, 205.

foreign and discordant with personal history and traditions, mastering even straightforward legal procedures can seem a Herculean task.

II. WHAT HAS BEEN ACCOMPLISHED? – AN INFORMAL 'REPORT CARD'

I turn now to an informal and admittedly incomplete 'report card' of some of the measures taken to dismantle existing barriers to justice. What, objectively, can we say has been accomplished? Fortunately, in my view, the answer is "a great deal". (I apologize in advance that many of the specific illustrations to which I will refer are drawn from Ontario, my home province, but that is the province with which I am most familiar).

1) First, and significantly, a growing commitment within the legal profession to *pro bono* service to the public. For example, Pro Bono Law Ontario ("PBLO"), was incorporated several years ago in Ontario under the leadership of Chief Justice Roy McMurtry, to provide legal services required by the needy. PBLO provides

tailored *pro bono* legal services to fill gaps in existing services, without duplicating those services offered by Legal Aid Ontario.

In part as a result of PBLO's efforts, and its partnership associations with law firms and legal aid clinics in Ontario, *pro bono* services are gradually gaining acceptance in mainstream legal practice in many Ontario law firms, accompanied (as they must be to achieve more than a transient foothold) by credit in lawyer compensation processes.

Mention must also be made in this context of the admirable proliferation in Canada of *pro bono* advocacy representation projects (in Ontario, through The Advocates' Society and The Criminal Lawyers' Association). As

a result of these projects, self-represented litigants in civil cases and inmates involved in criminal cases who are incarcerated in federal and provincial institutions have *pro bono* legal services available for argument of their appeals before the Court of Appeal. The quality of this *pro bono* representation, in my experience, has been uniformly excellent.

These projects make a direct, front-line contribution to the improvement of access to meaningful justice.

Arguably, there is also an important relationship between the provision of *pro bono* services and the fees structures of many of Canada's major law firms. I will comment further on this matter later in this address.

2) An abundance of public information and education initiatives. The interim report of the Organizing Committee for this Conference on the 'Jurisdictional Questionnaire', which I understand has been made available to all Conference participants, lists a series of important developments in this area since the mid-1990s. These include:

- the liberal distribution of brochures about the civil justice system and consensual dispute resolution programs;
- the continued development of simplified forms;
- the creation of court websites providing electronic copies of court decisions and, in some jurisdictions, information about court procedures; and
- improvements in the availability of 'point-of-entry' advice and assistance for litigants, particularly self-represented litigants (initiatives in British Columbia and Alberta, particularly, come to mind).

In Ontario, the establishment of the Ontario Justice Education Network ("OJEN"), again under the leadership of Chief Justice Roy McMurtry, is but one example.

Through the work of OJEN, lawyers and judges now address law classes in Ontario's high schools on a regular basis concerning our criminal and civil justice systems, thousands of high school students have visited court-houses throughout the province of Ontario (meeting lawyers and judges to discuss trial and appellate procedures), and educational law institutes are held annually for high school teachers.

Recommendation No. 26 of the *CBA Task Force on Systems of Civil Justice*

indirectly forecast such a development. That recommendation urged the CBA, in consultation with law societies, the judiciary, law schools and governments, to enter into discussions with ministries of education across the country to facilitate the introduction of educational measures in Canadian elementary and secondary schools regarding the operation of the civil justice system and dispute resolution skills.

The CBA Task Force stressed the need to foster what it termed 'public literacy' concerning our civil justice system. Initiatives like OJEN can and have made a significant contribution to the achievement of this objective.

3) <u>The spectacular growth of the alternative dispute resolution industry in</u>

Canada. With this development, the culture of litigation in Canada experienced a powerful transformation, a change that is no less radical for having occurred gradually.

The need for enhanced ADR training for lawyers was emphasized in the Report of the *CBA Task Force on Systems of Civil Justice* and other calls for civil justice reform in the early 1990s. The CBA Task Force Report envisaged a multi-faceted civil justice system that was not exclusively, or even predominately, trial-driven.

The concept was simple: courts should not be the last resort for the public. Rather, *trials* should be.

Thus, the need for both private and court sponsored ADR was embraced, as methods of encouraging speedy and affordable dispute resolution, short of a trial.

The business community and individual litigants have seized upon ADR, almost with passionate abandon, as a mechanism to achieve more expeditious and less costly dispute resolutions. It is also now used, in one form or another, by some judges in Canada at both the trial and appellate levels, to assist in achieving consensual compromise in select cases. Its important place within our civil justice system as an alternative to traditional court processes is now assured.

4) The creation of the Akitysiraq Law School in Iqaluit, Nunavut, under the auspices of the Faculty of Law at the University of Victoria.

This law school, designed to exclusively train Inuit lawyers, witnessed its first graduating class in June 2005. Eleven graduates received their law degrees from the University of Victoria. Thereafter, they took their place as articling students among varied law firms in Canada, the Department of Justice and the courts. One of the graduates of the Class of 2005 is now articling at the Supreme Court of Canada for Justice Louise Charron.

In the near future, therefore, legal services for Inuit persons will be available from Inuit lawyers trained in

the Arctic. That is no small accomplishment.

5) Mention must also be made of the indispensable provision of legally-aided services through Canada's legal aid clinic systems, which provide for access to legal assistance by the economically disadvantaged.

6) In addition, significant substantive law developments have had or will have a considerable impact on reducing barriers to justice. I refer, especially, to the introduction of class proceedings legislation in various jurisdictions in Canada. This law reform measure opened the door for the first time to the orderly prosecution of aggregated claims, a development long overdue.

7) I conclude this 'report card' by alluding to what I regard as one of the cardinal strengths of the civil justice system in Canada. I refer to the wonderful dedication to service of Canadian advocates.

We are blessed in this country with a strong and independent Bar. I see evidence of it daily in our appellate court where the creativity, sheer tenacity and limitless intelligence of our advocates is ever manifest. The willingness of Canadian advocates to take on unpopular, difficult and inadequately remunerative causes, and to discharge such briefs with full attention and consummate skill, is one of the shining attributes of Canada's legal profession. It bodes well for the continued erosion of impediments to justice.

My 'report card', of course, is not a complete listing of our victories – some minor, some major – as we continue to confront injustice. It does provide insight, however, into the realm of the possible.

The list demonstrates that change – *real* change – is achievable. As Eric H. Holder Jr., a former Deputy Attorney General under the Clinton administration in the United States, once said in discussing the legal profession, "***Manmade problems are susceptible to manmade solutions. We must not look at an imperfect world and consign ourselves to merely existing in it***."[5]

III. THE ROAD AHEAD

What, then, of the road ahead?

The central question for participants at this Conference, in the end, is what should be the focus of reform in the years to come?

You will hear much over the next two days regarding specific procedural reforms, many of which were discussed in detail in the

5. Eric H. Holder Jr., *The Importance of Diversity in the Legal Profession*, March 2004, International Society of Barristers Quarterly, Vol. 39, No. 3 at 407.

CBA Task Force Report (i.e. the need for early disclosure; the control of the use of experts; discovery reform; changes to simplified rules and summary trial procedures; the advantages and disadvantages of mandatory mediation, and the like). I leave to others the task of shaping our dialogue on these important issues.

For my part, I have tried to step back and, as an original CBA Task Force member, to ask myself this question: If I was helping to write the CBA Task Force Report today, what would I wish to say differently? How, if at all, would the emphasis change? What, if anything, was left out?

I say from the outset that the following comments are intended to be provocative and to stimulate debate.

First, we must continue the struggle to counter the adverse affects on access to justice arising from economic pressures on lawyers and law firms.

Much has been said of the fear of economic loss reflected in rigid billing and ever-increasing billable hours targets, increased

competition, and the difficulties of practitioners – in every practice setting – to maintain a balanced lifestyle. There is no doubt that we live in an era where there is intense pressure from clients 'to do more, for less, and more quickly'. Lawyers must also contend with competition from non-lawyers, severely reduced legal aid funding and the adverse affects of economic downturns. These factors impose great burdens on lawyers and, make no mistake about it, on their ability and willingness to represent the disadvantaged and the average citizen who cannot afford normal hourly rates, or to take on test cases.

These forces must be acknowledged, but resisted. If they are not, our resources to eradicate barriers to justice will be severely diminished.

When I left practice in July 2001, the highest *standard* hourly billing rate for senior advocates in the major law firms in Toronto was approximately $550. I understand that, in some of Canada's largest law firms, the top 'rack rate' for senior barristers is now in the range of $750 to $800 per hour (ignoring premium billing).

I could not afford to hire me in July 2001. Today, I wouldn't be able to afford even the first consultation.

These rates do more than disenfranchise the middle class. They also disenfranchise all but the very wealthiest of individuals and many corporations.

I do not criticize lawyers for seeking legitimate compensation. I also recognize that hourly rates do not translate directly into lawyer compensation. The current hourly rates in our major urban centres are strongly influenced by rents and other overhead components.

Nor can the issues of hourly rates and legal fees be considered in isolation from the costs of the civil justice system itself. The overall costs of litigation for anybody (that is, for clients of any wealth) are straining the system: the more complex and time-consuming our pre-trial procedures and the lengthier our trials, the greater the overall costs of litigation (for example, consider, if you will, the costs implications of 'E-discovery', a huge issue now confronting the Bar).

It would be unfair and overly simplistic to suggest that current litigation costs are the product solely, or even predominately, of hourly rates. This is only half the equation. Litigation costs are the function of lawyer fees and of the *process* of litigation itself. Focus on only one of these, underestimates the impact of the other.

I also recognize that the increase in hourly rates in some firms has been balanced with a growing commitment to *pro bono* services. This is a salutary development, which should be vigorously encouraged.

But the fact remains that to increase per partner income in the last five years, many law firms in our large urban centres have been driven to increase billing rates significantly.

My message is a simple one. We must find ways to contain these rates, while at the same time reducing the costs generated by the system itself.

If this means introducing systemic measures to encourage focused and more effective means of litigating, we must collectively

take up that challenge. And we must do so in a way that ensures the continued presence in major law firms of litigation departments. In my view, it would be a tragedy of staggering proportion if the quest for lower litigation costs rendered litigators uncompetitive with their corporate partner counterparts and, therefore, drove litigators out of the major firms.

I understand the force of economic pressures on Canadian law firms. But even in the large national law firms, there is no doubt that in tough economic times (when profits are falling and work is scarce), the tolerance for public or *pro bono* service is hugely reduced. As the pundit once said, "***When the watering hole gets smaller, the animals start looking at each other differently***." This is an important access to justice issue.

Second, there is still a need, as there was ten years ago, to reduce unnecessary complexity in the law and, I suggest, to abandon exaggerated attention to procedure and process.

A lack of comprehension of our civil justice system and of the law is a continuing and significant barrier to justice. ***Without under-***

standing, there is no engagement. I ask rhetorically: How is the public interest advanced and how is public confidence in our civil justice system fostered by procedures and vocabulary in the law that are dense at best and often impenetrable, absent highly specialized legal training?

Similarly, I ask (as others have before me) whether our commitments to natural justice and procedural fairness have driven us to equate 'process' with justice.

As I have said on previous occasions, a litigant's right to his or her 'day in court' does not mean 'years' in court. Nor does it mean that the parties to a dispute can keep litigating, in repeated proceedings, until one of the parties thinks that they have finally 'got it right'.

All participants in the civil justice system have an important contribution to make to the enhancement of 'public literacy' concerning the justice system. We should constantly work to reduce unnecessary complexity in the law, to eliminate unnecessary

procedural impediments to dispute resolution, and to encourage, where appropriate, early compromise and settlement.

The need to continually improve 'public literacy' concerning our civil justice system remains an imperative. The public is not disinterested. Indeed, in this post-*Charter* era, it is immensely interested, if sometimes badly informed. All active participants in the system have a duty to elevate the public's comprehension of our civil justice system and the import of the law. As Justice Samuel Grange of the Court of Appeal for Ontario once said, "***This is not a case of ignorance being bliss and wisdom folly. It is, to quote St. John, a case of 'knowing the truth and the truth will set you free***'."

Third, we must also be ever alert to the quality of the leadership of the legal profession, the judiciary, and those in government charged with responsibility for the administration of justice. Canadians have every right to demand the best. Discussions about access to justice are important. They are meaningful, however, only when reinforced by the behaviour of persons in positions of leadership or authority in government and in the legal community.

There is a continuing need for transparent and consistent leadership from those in positions of influence in Canada if enduring, accessible and affordable civil justice is to be a reality in Canada. This includes Attorneys General, Ministers of Justice, Chief Justices, Bar leaders, court administrators, legal educators, and managers of law firms: in short: all legally-trained participants in the system. There is no room for a leadership deficit in the justice system.

Fourth, renewed attention should be paid to the relationship between diversity and service in the legal community, both at the Bar and on the Bench. In commenting on this issue in the United States, Eric Holder, Jr. said:

> ***[A] legal profession lacking significant racial and gender diversity can only go so far in combating the sense of alienation that… disadvantaged clients feel when regularly confronted by an establishment of a distinctly different colour and gender.***
>
> ***…***
>
> ***The legal profession, however dedicated to pro bono activity, will always lack some of the credibility integral to forging strong attorney-client relationships so long as it bears little resemblance to the clientele it purports to represent. But it is not only those from the lower socio-economic strata that are adversely affected by this lack of diversity. All of society is***

> ***negatively impacted when a homogeneous legal profession is unable to deal as effectively as it might with an increasingly smaller, more diverse world***.[6]

The relationship between diversity in the civil justice system and access to justice requires further study.

There is no doubt that important gains have been made. One need only consider the tremendous strides made by women in the legal profession in the last 30 years. As well, law schools have attained considerable success in broadening the composition of law school populations and that of the practising Bar.

The face of the judiciary has also changed. As of April 1, 2006, there was a total of 1,039 federally appointed judges (including 201 supernumeraries) across Canada. *300 of these were women (28.9%).*

Contrast this to England, where Lady Brenda Hale is the only woman who currently sits among Britain's 12 Law Lords. And, she

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6. *Ibid*, f.n. 5.

was only appointed in 2004.

Comparable statistics regarding the representation of visible minority candidates on Canadian courts and, more generally, in the legal profession, are not readily available.

Notwithstanding the considerable progress made in the last several decades, women and members of racialized communities continue to be vastly underrepresented within many parts of the civil justice system.

Consider that in 2001, according to Statistics Canada, the visible minority population in Canada reached 4 million, a three-fold increase over 1981, in a total population of 29.6 million. Over 200 ethnic groups were reported in the 2001 census. As well, the proportion of foreign born persons was the highest in 70 years, at 18% of the total population.

What has this to do with access to justice?

The overall lack of diversity within the legal profession adversely impacts the ability of lawyers to serve those who are most in need of assistance. It also impairs their ability to communicate effectively with their clients and to understand the cultural nuances of their clients' legal needs and experiences. Further, it inhibits their ability to ensure that their clients' diverse cultural experiences are recognized and engaged in our judicial systems.

I suggest that we must do what is necessary to make lack of support for diversity in the civil justice system unacceptable, and the hallmark of the unenlightened. In Canada, we have much to be proud of on the diversity front. But the time has not yet come to celebrate. I would describe the current situation in Canada this way, (to paraphrase the title from a book written by a friend of mine, a professor in England): "***Diversity Watch: Still Watching, and on High Alert***".

Finally, I turn to my last observation: the need to instil and maintain cultural competencies within the legal community.

People see and understand what their education and experiences have equipped and trained them to see and understand. As Walter Lippman commented so long ago in his 1922 book, *Public Opinion*, **"*The image most people have of the world is reflected through the prism of their emotions, habits and prejudices*."**[7]

I believe that while standards and norms in the law must be uniform for all the peoples of Canada, the cultural backgrounds, life experiences and perspectives of persons affected by or involved in our civil justice system are critical factors in assuring and achieving access to justice.

IV. "ARE THEY HERE? IF NOT, WHY NOT?"

Let me close by sharing with you a story that demonstrates, evocatively and poignantly, the continuing need to confront barriers to justice and to improve our understanding of the cultural backgrounds, life experiences and perspectives of the public we serve.

I first heard this story, told by Bryan A. Stevenson, the founder and Executive Director of the Equal Justice Initiative of Alabama in

7. Walter Lippman, *Public Opinion* (New Brunswick, New Jersey: Transaction Publishers, 1997); See also (New York: Macmillan, 1922).

Montgomery, Alabama, about 8 years ago. Mr. Stevenson is a Professor of Clinical Law at New York University School of Law. He is also a black lawyer labouring at his craft throughout the southern United States. I heard him tell the story again two years ago to an audience of experienced trial lawyers in the United States. Then I read it in a speech he delivered to a different legal audience last year. I believe I understand why he keeps repeating the story, and I think you will too.

I tell the story now, in Mr. Stevenson's words and in virtually his verbatim language (with apologies to those who may have heard it before).

The story begins with Mr. Stevenson's agreement to represent a black man who had served six years on death row in southern Alabama for the murder of a young white woman that he did not commit. At the time of the killing, the accused, Walt McMillan, was at his home raising money for his sister's church. His presence there at the critical time was witnessed by about 35 people. They went to the police after Mr. McMillan's arrest and told them that they had arrested the wrong person – to no avail. The trial proceeded after Mr.

McMillan had already spent 15 months on death row. He was convicted.

When evidence of police misconduct was subsequently obtained, Mr. Stevenson went to court to overturn the conviction. He had been approached repeatedly by the people who had been with Mr. McMillan at the time of the murder. They continued to protest his innocence. They were poor people and people of colour and, according to Mr. Stevenson, the despair in their community arising from Mr. McMillan's wrongful arrest and conviction, despite their alibi testimonials, was palpable.

On the first day of the court challenge, Mr. Stevenson was excited to see many people from the poor community, from the community of colour in southern Alabama, in the courtroom, which was packed. He said that when he left the court that day, he saw hope growing in the community.

When he returned for the second day of the hearing, however, he noticed that all the poor people and the people of colour who had been inside on the first day were now sitting outside the courtroom.

He went up to the community leaders and asked, “Why aren’t you all inside?” They replied, “They won’t let us in today.” He went to the deputy sheriff and said, “I want to go into the courtroom.” He said, “You can’t.” Mr. Stevenson said, “I’m the defence attorney, I think I have to be able to go inside.” The deputy said, “I’ll go check.” He checked and then came back and said, “Well, ***you*** can come in.”

Mr. Stevenson walked into the courtroom and saw that things had changed considerably. A metal detector had been placed just inside the door and a huge German shepherd dog was positioned on the other side of the metal detector. Further, the courtroom was now filled with people sympathetic to the prosecution’s case. Mr. Stevenson complained to the judge, and the judge said, “I’m sorry, ***you people*** will just have to get here earlier tomorrow.”

Mr. Stevenson went out and explained to the community leaders what had happened and said that he was sorry. They replied, “That’s okay, Mr. Stevenson, we’ll just have a few people be our representatives at today’s hearing.” They began selecting people to be representatives.

One person they chose was an elderly black woman. Mr. Stevenson said that she was beautiful. Her name was Miss Williams. When the leaders called her name as one of the representatives, Miss Williams beamed with pride. She walked through the courtroom door with tremendous grace and dignity. She held her head high when she walked through the metal detector – but when she saw the dog, she stopped dead in her tracks. She began to tremble and her shoulders sagged and tears started streaming down her face. She groaned loudly, turned around, and ran out of the courtroom.

Mr. Stevenson had another good day in court and he had forgotten all about Miss Williams until he went to his car that night. At the end of the day, she was still sitting outside the courthouse, and she came over to him and said, “I feel so bad. I let you down today. I let everybody down today, and I just don’t know what to do about it.” He tried unsuccessfully to console her. She said, “No, no, no. I was meant to be in that courtroom. I should have been in that courtroom. I wanted to be in that courtroom.” She began to cry, and said, “But when I saw that dog, all I could think about was Selma in 1965. I remember how we were going to march to Montgomery for the right to vote, and they put dogs on us. I tried to make myself move, I

wanted to make myself move, but I just couldn't do it." She went away with tears running down her face.

The next day Mr. Stevenson went back to court. That morning Miss Williams' sister told him that the night before, Miss Williams didn't eat, didn't talk to anybody, and stayed in her bedroom praying all night long: "***I can't be scared of no dog, I can't be scared of no dog***." Her sister also told him that, earlier that morning, Miss Williams had begged the community leaders for another chance to be a representative. And on the trip from the house to the courthouse, she kept saying over and over again, "***I ain't scared of no dog, I ain't scared of no dog***."

When Miss Williams came into the courtroom, Mr. Stevenson could hear her saying to herself, "***I ain't scared of no dog, I ain't scared of no dog***." She walked through the metal detector, up to the dog and say in a very loud voice, "***I ain't scared of no dog***." She walked past the dog, sat down in the front row of the courtroom and said, "Mr. Stevenson, ***I'm here***." Mr. Stevenson turned around and said, "Miss Williams, it's good to see you here." A few minutes later,

she said again, “No, Mr. Stevenson, you didn’t hear me. I said, ***I’m here***.”

Mr. Stevenson turned around and said, “No, Miss Williams, I do see you here, and I’m glad to see you here.” The judge walked in, and you know what happened. Everybody in the packed room stood up, and then everybody sat back down when the judge took his seat.

But when everybody else sat back down, Miss Williams remained standing. When the courtroom got quiet and people were staring at her, Miss Williams said, one last time, “***I’m here***.”

It became clear to Mr. Stevenson then what she was saying. She wasn’t saying, “I’m physically present.” What she was saying was “***I may be old, I may be poor, I may be black, but I’m here because I’ve got this vision of justice that compels me to stand up to injustice***.” She was “***there***”.

This is a story of great courage and moral fortitude. One particularly apt, perhaps, as a descriptor of racial barriers to justice in

the southern United States. Mr. Stevenson ultimately prevailed and Mr. McMillan was released from death row.

I do not suggest, even metaphorically, that Canadian justice is similar to justice in Alabama's south. Nor do I tell you this story because the presence of police dogs and metal detectors in a courtroom and an aged, initially frightened and timorous black woman make for good oratorical drama, although of course they do.

I tell you this story for three reasons. **First**, because I have been unable to forget it. As I think of the story, I feel that I am in that Alabama courtroom – in almost a visceral sense. That, of course, was Mr. Stevenson's intent for his audience. He is a gifted, extraordinary advocate.

Second, I tell you this story because it reminds me that, for many Canadians, courtrooms are frightening and foreign places, where they still do not feel welcome or confident in justice or in lawyers, court administrators and judges who are often deaf and blind to their history, life experiences and pain.

It also reminds me that we cannot predict the gender, shape, age, colour or size of our heroes.

Third, I tell you this story because I share Mr. Stevenson's conviction that people of goodwill, talent, dedication and vision, can improve our justice systems. They are people who can say, "***I'm here to tell you that unequal, inaccessible, unaffordable justice in Canada is unacceptable***." They are people who can ask of our politicians, our public servants, our judges, our lawyers, and themselves, "***Are they here***?"

Like Mr. Stevenson, I ***know*** that when policymakers, lawyers and judges position themselves in places where there are barriers to justice, where there is confusion, fear, suffering or frustration, and say, "***I'm here***", the dynamics of justice inevitably change.

After hearing Mr. Stevenson's story, especially since my appointment to the Bench, I survey the environment of a courtroom differently. Now, when I enter and take my seat, my eyes instinctively sweep the room. And on occasion, I will not pretend always, but on

occasion, in the quiet of my mind, I find myself asking, "***Are they here****?" and "****If not, why not****?*"

As we meet on the 10th anniversary of the CBA Task Force Report to consider the barriers to justice that unfortunately continue to exist in this country, my rhetorical questions are simple ones. Each of us must ask ourselves, today and tomorrow: "***Are they here***?" and, critically, "***If not, why not***?"

I suggest that in Canada's preferred future, justice will be accessible to all, regardless of income, race, gender, culture, age, disability or background. Meaningful access to justice in a democracy such as ours demands no less.

V. Concluding Remarks

I said in 1995 (in various speeches concerning the work of the CBA Task Force), that the civil justice system in Canada need not be popular. However, it does need to be:

- relevant
- responsive, and
- available.

I believed that then. I believe it now.

Perfect justice that is inaccessible (and, by definition therefore, unavailable, irrelevant and non-responsive) is “Fools’ Gold”. But, as Tennyson said, “***Tis not too late to seek a newer world***.”

Thank you.