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ADVISORY COMMITTEE ON PROFESSIONALISM**

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PROFESSION**

PROFESSIONALISM AND BARRIERS TO JUSTICE

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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 – especially in Ontario – to overcome these barriers; and (3) finally, to offer some personal thoughts concerning the road that lies ahead.

I. THE BARRIERS

When we speak of ‘barriers to justice’, to what do we refer? Traditional barriers endemic to our civil and criminal justice systems are well known. I refer to excessive delays in our court systems and to the corresponding cost 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 are driving current changes to the civil justice system in Ontario – most notably, at present, in the

Greater Toronto Area, with the recent introduction of targeted case management.

But non-traditional barriers have also emerged as powerful and, arguably, more fundamental impediments to justice. They 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 and family responsibilities, cannot avail themselves of legal services during practical hours;
- language barriers – that prevent many Canadians from understanding the nature of our justice systems, from seeking needed legal advice and from engaging in our court processes;

- cultural barriers (as emphasized in the main theme of this Colloquium) – 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;
- socio-economic barriers – that prevent the economically disadvantaged from being able to afford legal services or resort to the courts. These barriers, including poverty, “neither begin nor end at the courthouse door”.¹ Regrettably, statistics suggest that some groups within Canadian society remain vastly over-represented among this country’s low-income population. They include women, children, aboriginal peoples,

¹ *Justice in the Balance – 2020*, Report of the Commission on the Future of California Courts (California, Abbey Press, 1993) at 67.

immigrants and 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.²

- the adversarial system itself – that in theory leads to truth and justice. But, as others have recognized, “Adversarial justice is not always real justice, as certain...disputes [notably family disputes] demonstrate;”³

² Stephen Wexler, *Practising Law for Poor People* (1970), 79 Yale L.J. 1049 at 1049-50.

³ *Ibid*, f.n. 1.

- the nature of many of our court procedures – that impose inflexible procedural requirements, often cloaked in dense ‘legalese’ that is difficult to understand or penetrate, and that sometimes produce lengthy and unexplained delays; and
- As I will argue, the changing climate and focus of many Canadian law firms.

Illustrations abound of the searing and often invisible impact of many of these impediments to justice. Several examples will underscore the point.

In a 1995 *Report of the National Council of Welfare on Legal Aid and the Poor*, it was said that (at p. 32):

Applying for legal aid sounds like an easy thing to do. It is not difficult:

- 1) if the legal aid or lawyer’s office is within easy reach and is open at convenient times;

- 2) if you are not in charge of children or other dependents who need constant care;
- 3) if you speak English;
- 4) if you are able-bodied enough to find the office(s), contact it and get yourself there; and
- 5) if you are not housebound due to illness or disability, in jail or confined in a psychiatric institution.

The experiences of Canada's aboriginal peoples provide particularly compelling evidence of the obstacles faced by many Canadians who seek recourse to justice through our justice systems. As others have observed, our established justice systems administer and enforce 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 they "have, over time, lost confidence in the dominant justice system. They see the present

system as biased against them. More and more, it is not just a perceived bias, but it is, in fact, an actual bias".⁴

Whether one agrees or disagrees with that assertion, I suggest that 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 foreign and discordant with personal history and traditions, mastering even straightforward legal procedures can seem a Herculean task.

I offer one more example. Almost 25 years ago, Justice Rosalie S. Abella wrote of the problems that confront persons with disabilities in accessing legal services, law schools, the courts, and legal training.⁵ More recently, M. David Lepofsky has been an eloquent and vocal spokesperson for the need to reform our legal systems to accommodate the needs of persons with disabilities.⁶ He suggests that persons with disabilities comprise 15% to 17% of the Canadian population and are over-represented among the poor in

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

⁵ Rosalie S. Abella, Justice, Supreme Court of Canada, *Access to Legal Services by the Disabled* (Toronto: Queen's Printer, 1983).

⁶ See for example, M. David Lepofsky, *Equal Access to Canada's Judicial System for Persons With Disabilities – A Time for Reform* (Unpub. April 1995).

Canada. Further, he maintains that essential reforms include such matters as readily available sign language interpretation or real time transcription for persons with hearing disabilities; the provision of standard legal and court information in alternative formats for persons with reading disabilities; and insistence on plain, non-technical language in our courts for persons with developmental disabilities. In short, reconfiguring the design of courthouses to permit physical access was a necessary first step, but that's all it was – a beginning.

II. LINK TO PROFESSIONALISM

What does all of this have to do with 'professionalism'? The link, I believe, is clear.

The legal community, as a self-governing profession, establishes its own standards of professionalism and ethics. Senior lawyers, in all sectors, are role models for the next generation. Lawyers enjoy a rare monopoly on the provision of legal services. They are also required to respect and are protected at law from compelled disclosure of their clients' confidences. These are privileges to be treasured and guarded assiduously. They confer on

lawyers the power to influence the content and course of justice in Canada, as well as access to it. With that power, I believe, comes great responsibility.

Lawyers have an obligation to challenge and eradicate existing barriers to justice in our increasingly pluralistic and diverse society. They are the guardians of the legal rights of Canadians. They, together with judges, are also the stewards of our systems of justice.

In my opinion, it is the task of lawyers to attack the notion and, in some instances, the reality that our laws are the symbol of exclusion rather than empowerment. The elements of professionalism include not only integrity, honour, independence, civility and leadership. Central to professionalism is the duty of service to the public: not to some of the public; not to only the dominant majority; but, to *all* the public, including the disadvantaged, the unpopular and the marginalized. Any contemporary definition of professionalism can import no less.

In the preferred future, justice in Canada will be accessible to all, regardless of income, race, gender, culture, age or disability. Our justice systems (which, I hasten to add, are the envy of many nations), depend on the understanding and approval of the public. The role of lawyers is of fundamental importance in fulfilling the imperatives of equal access to justice. Without such access, we will attract neither the understanding nor the approval of the public.

III. 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 can we reasonably say has been accomplished? Fortunately, in my view, the answer is “a great deal”. The list includes:

- 1) The creation of Pro Bono Law Ontario (“PBLO”), which was incorporated several years ago under the leadership of Chief Justice McMurtry, to provide legal services required by the needy in

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

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

The success of PBLO reinforces the modern formulation of 'professionalism'. As Chief Justice McMurtry said at a

previous Colloquium hosted by this Advisory Committee, “A profession committed to justice...should want to participate in making justice accessible.”⁷

- 2) The establishment of the Ontario Justice Education Network (“OJEN”), again under the leadership of Chief Justice McMurtry.

In its *First Report* (1995), the Ontario Civil Justice Review recommended that the Ontario Ministry of Education, elementary and secondary schools, universities and community colleges play a greater role in the education of the public “with respect to the purpose,

⁷ R. Roy McMurtry, Chief Justice of Ontario, *The Legal Profession and Public Service*, Chief Justice of Ontario’s Advisory Committee on Professionalism, Third Colloquium, at 15.

values and processes of the civil justice system” (Recommendation No. 70).

The Systems of Civil Justice Task Force of the Canadian Bar Association (the “CBA”) made a similar recommendation in its August 1996 Report when it urged the CBA to enter into discussions with ministries of education across the country to facilitate educational measures in elementary and secondary schools regarding the operation of the civil justice system and dispute resolution skills (Recommendation No. 26).

The creation and activities of OJEN have brought us closer to achieving the objectives of these recommendations. As a result of OJEN, lawyers and judges now address law classes in Ontario’s

high schools on a regular basis concerning our justice systems, thousands of high school students have visited courthouses throughout the province – meeting lawyers and judges to discuss trial and appellate procedures, and educational law institutes are held annually for high school teachers.

OJEN's contributions to the fostering of what I call 'public literacy' concerning our justice systems and the law cannot be underestimated.

- 3) The spectacular growth of the alternative dispute resolution industry in 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 CBA Systems of Civil Justice Task Force Report and other calls for civil justice reform in the early 1990s. But ADR was not embraced immediately. I recall the occasion, in about 1990 when I was a member of the executive committee of a major national law firm, when one of the then senior litigators in the firm pronounced, with great authority, that “This ADR thing will come and go.”

How wrong he was. The business community and private individual litigants have now 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 judges in Ontario 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 Akitysiaraq 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, will witness its first graduating class in June 2005. Eleven graduates will receive their law degrees

from the University of Victoria and, thereafter, will take their place among hundreds of Department of Justice lawyers in the Arctic to provide legal services for Inuit persons by Inuit lawyers.

Plans are now in progress to seek sufficient funding to continue the law school for at least another four years.

This was an enormously exciting and successful project.

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

- 6) The admirable proliferation in Ontario of pro bono advocacy representation projects 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.

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

- 7) 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 the *Class Proceedings Act*, which opened the door in Ontario for the first time to the prosecution of aggregated claims, and to the recent amendments to the *Solicitors Act*, which authorize contingency and other special fee arrangements in solicitor/client relationships. The latter development was long overdue in Ontario.

One could also chronicle similar legislative reforms in the criminal law sphere. Consider, for example, the amendments to the sentencing principles set out in s. 718.2 of the *Criminal Code* concerning offences motivated by bias, prejudice or hate and the circumstances

of aboriginal offenders. Consider also the recently introduced *Youth Criminal Justice Act*, with its emphasis on incarceration as a disposition of last resort.

- 8) One must add, as you heard from this morning's panel on the Gladue court model, that we have made some progress in attempting to foster cultural awareness and competencies in our court systems.

- 9) I conclude this 'report card' by alluding to what I regard as one of the cardinal strengths of the legal profession in Canada. I refer to the wonderful dedication to service of Canadian advocates that, to me, epitomizes true professionalism.

We are blessed in this country with a resoundingly independent bar. I see renewed evidence of it everyday in our appellate court where the creativity, sheer tenacity and limitless intelligence of our advocates is ever manifest. The willingness of Canada's 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 our 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.”⁸

IV. THE ROAD AHEAD

What, then, of the road ahead? I offer the following seven suggestions.

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

⁸ Eric H. Holder, Jr., *The Importance of Diversity in the Legal Profession*, March 2004, in *International Society of Barristers Quarterly*, Vol. 39, No. 3 at 407.

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 or the poor and to take on test cases.

These forces must be acknowledged, but resisted. If the practice of law is reduced to a business, like any other business, the privilege of self-regulation is threatened, as is the public's perception that lawyers play a special and unique role in Canadian society. Importantly, our resources to eradicate barriers to justice will also be 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 quarters, it has now reached \$700 to \$750. I could not afford to hire me in July 2001. Today, I wouldn't be able to afford even the first consultation.

In the late 1990s, the standard annual billable hours target in the major Toronto law firms (where these targets were at their highest), was approximately 1,600 to 1,650 hours. Today, I am told, it is creeping closer to 1,750 to 1,800 hours. The demand for unreasonable billable hours targets leaves young associates and partners alike exhausted, with little room for involvement in activities that enrich the community and their personal and family lives.

I understand the force of economic pressures on Canadian law firms. After 26 years in private practice, including more than 20 years in a national law firm, several years of service as a member of its executive committee, and four and a half years as a partner in a specialty counsel boutique of fewer than 10 lawyers, the realities and demands of meeting 'budget' and payrolls are not foreign to me. In addition, my years as a Bencher of the Law Society of Upper Canada reconfirmed that the business pressures on sole practitioners in Ontario, while different from those that apply to lawyers in larger law firm settings, are intense.

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.”

I suggest that lawyers must recommit themselves to the core tenets of professionalism and not merely profit. I endorse Earl Cherniak’s suggestion, made to The Advocates’ Society in November 2003 during an address called *Professionalism at the Crossroads*, that:

We have to recognize in our firms, large and small, and whether solicitor or barrister based, that when we say law is a business, what we mean is that a law firm must be run like a business, but the practice of law is a profession, because if it is only a business, there is no justification for the monopoly that we have in the practice of law, and no reason to continue to call ourselves professionals.

This simple proposition, he suggested, must guide our future. I agree.

I turn next to my **second** observation.

In our mentoring and training of young lawyers, both in the law schools and in practice, we must instill the ideals of professionalism and not merely profit. We must also be alert to the fact that the seeds of professionalism start in our law schools. Law students and new lawyers must be taught how to conduct themselves as professionals, in the most robust sense of that word.

Most new lawyers begin the practice of law with overflowing idealism. We must continually re-examine the culture of our law firms and law schools and ask whether we are creating environments that feed idealism, or smother it, a little at a time.

Every lawyer has an obligation to foster the ideals of professionalism in the lawyers that follow. James E. Coleman Jr. of the American College of Trial Lawyers, during a March 2002 speech to that College on professionalism, expressed it well. He said:

The serpent in our paradise is our indolence in perpetuating and passing from one generation

of lawyers to the next the idealism of the profession. We can change this!...if not us, who?...[Remember], as you help young lawyers grow, as you work for ethics, civility, and honour, your influence will merge with the good influences of lawyers of past generations, into the eternal stream of a true profession – ripe with idealism. ***What sculpture is to marble, idealism is to the legal profession*** [emphasis added].⁹

Third, there is a need to reduce unnecessary complexity in the law and, I suggest, to abandon exaggerated attention to procedure and process.

A lack of comprehension of our judicial systems and of the law is a continuing and significant barrier to justice. Without understanding, there is no engagement. I ask rhetorically: How is the public interest advanced and how is public confidence in our judicial systems fostered by procedures and vocabulary in the law that are dense at best and often impenetrable, absent highly specialized legal training?

⁹ James E. Coleman Jr., *Priests of the Profession*, Spring 2002, in *The Bulletin*, American College of Trial Lawyers, No. 41 at 26.

Similarly, I ask whether our commitments to natural justice and procedural fairness have driven us to equate 'process' with justice.

Justice Rosalie Abella has suggested that, for members of the public, process may in fact be *the obstacle*, rather than the path, to justice.¹⁰ As she has pointed out, a distinction must be drawn between 'process' in the criminal justice system, where the liberty of the subject is at stake, and 'process' in the civil justice system.¹¹ In the latter system, justice demands that litigants have their day in court, if they so elect. But a 'day in court', as I have said on many previous occasions, does not mean 'years' in court. Nor does it mean that the parties to a dispute can keep litigating, in repeated trials, until one of the parties thinks that they have finally 'got it right'.

Lawyers have an important contribution to make to the enhancement of 'public literacy' concerning the justice system. The efforts of OJEN have launched us in a valuable direction. Lawyers can assist in other fundamental ways, however, by constantly working to reduce unnecessary complexity in the law, to eliminate

¹⁰ Rosalie S. Abella, Justice, Supreme Court of Canada, *Professionalism Revisited*, Opening Address to the Benchers of the Law Society of Upper Canada Planning Session, October 14, 1999, at 8.

¹¹ *Ibid.*

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

The need to improve ‘public literacy’ concerning our justice systems, I believe, is a requirement of professionalism. 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 justice systems 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”.”

Fourth, it is important for lawyers to be alert to the shifting causes of lawyer criticisms.

We all recognize that lawyers cannot serve only the dominant groups in society. The history of lawyer criticisms reflects this concern.

In the United States the mounting costs of litigation and expanding areas of liability have led to sustained campaigns for 'tort reform'. Renewed calls for such reform, together with attendant vigorous criticisms of trial lawyers, figured in the campaign messaging of the then incumbent presidential candidate, George W. Bush, in last November's presidential election in the United States. Recent news reports in that jurisdiction record the Bush government's efforts to introduce tort reform legislation in Congress. The business section of The New York Times on Sunday, February 27, 2005 was entitled *Bush's Next Target: Malpractice Lawyers*. As well, the Bush administration has already introduced legislation to sharply restrict class action lawsuits against American companies.

I do not suggest that the need for reform is wholly unjustified. The quantum of some jury awards in the United States is truly staggering. So are some of the compensation arrangements negotiated by lawyers under contingency fee arrangements in that jurisdiction.

I share the concern, however, expressed in The New York Times recently, that at least insofar as the current White House is concerned, “the term ‘trial lawyer’ is an epithet.”¹²

The point was well made by Marc Galanter in an article entitled *Predators and Parasites: Lawyer-Bashing and Civil Justice*, when he said:

Anti-lawyer feeling varies in both intensity and focus. Of course, episodes of elevated anti-lawyer feeling are never entirely new; they draw on old themes. ***But they are never just reruns. Such episodes are about more than lawyers: they are about people’s responses to the legal system and the wider society in which it is set*** [emphasis added].¹³

Thus, the focus of public discontent with lawyers must be of critical importance to the legal profession. As the 1994 Role Statement of the Law Society of Upper Canada reflects, the legal profession exists in the public interest to advance the cause of justice and the rule of law. It is essential, therefore, that the profession

¹² Steve Lohr, *Bush’s Next Target: Malpractice Lawyers*, The New York Times, February 27, 2005, Section 3 at 1.

¹³ (1994), 28 Georgia Law Review 633 at 681

continue to earn and deserve the confidence of the people. If it does not, it will not survive. Nor will our systems of justice.

Fifth, lawyers should also be alert to the quality of the leadership of the profession. They have every right to demand the best. Discussions about professionalism are important. They are meaningful, however, only when reinforced by the behaviour of persons in positions of leadership or authority in the legal community. There is no room for a leadership deficit in the legal profession.

Sixth, renewed attention should be paid to the relationship between diversity and service in the legal profession. In commenting on this issue in the United States, Eric Holder, Jr. said in an address last year:

[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.¹⁴

Chief Justice McMurtry has had occasion to observe:

In serving the public, it is also vital that members of the legal community recognize the need to have a profession that mirrors the rich diversity of our population. If our profession is to truly serve the public, our ranks must reflect the multicultural character of Canada.¹⁵

The relationship between diversity and service in the public interest requires further study. There is no doubt that important gains have been made. One need only consider the tremendous strides made by women in Ontario's legal profession in the last 30 years. (I remember clearly the day when I sat, for the first time, as a member of a panel of the Court of Appeal comprised of three women. I commented to the Chief Justice when I encountered him in the hall, in only partial jest, that the 'dream team' was sitting that day. I meant

¹⁴ *Ibid*, f.n. 8.

¹⁵ *Ibid*, f.n. 7, at 32.

one of my dreams.) As well, law schools have attained considerable success in broadening the composition of law school populations and that of the practising bar.

As the community diversifies and its legal needs change, the composition of the legal profession and the roles of lawyers must similarly evolve. Notwithstanding the considerable progress made in the last three decades, women and members of racialized communities continue to be vastly under-represented within all parts of the profession. Ask yourself:

- how many partners in Canada's largest and most profitable law firms are representatives of racialized communities? Of these, how many hold equity positions? Do we know?
- how many associates at major law firms are people from visible minority populations? 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. Of this 4 million, 19.1% resided in Ontario. 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;

- how many women hold the position of general counsel in corporate legal offices in the country? How many are representatives of racialized communities?
- what are the 5 and 10 year attrition rates for females at law firms in Canada?

- how many federally and provincially appointed judges are representatives of racialized communities?

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 members of the legal profession have an obligation to 'lift as they climb'. It should be unacceptable for lawyers who have entered the mainstream of the profession to 'hoist the ladder' after their own entry has been assured.

Finally, I turn to the issue reflected in one of the major themes of this Colloquium. I refer to the need to instil cultural competencies in both new and experienced lawyers.

People see and understand what their education and experiences have equipped and trained them to see and understand. Thus, as Walter Lippman commented 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.”¹⁶

Our commitment to enduring professionalism is, in part, a quest for understanding. 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 justice systems are critical factors in assuring and achieving justice. For example, aboriginal peoples now expect to present cases in court drawing upon their own cultural traditions and information systems, to speak in their own ‘voice’ and to have lawyers who understand that. Women expect judicial decision-makers and lawyers to take into account and to understand their needs and experiences.¹⁷ Thus, the legal profession, if it is truly to be populated

¹⁶ Walter Lippman, *Public Opinion* (New Brunswick, New Jersey: Transaction Publishers, 1997); See also (New York: Macmillan, 1922).

¹⁷ Lynn Smith, Justice, British Columbia Supreme Court, *Legal Education and Civil Justice Reform*, prepared for Civil Justice for the 21st Century National Conference, Canadian Bar Association, February 1996, Toronto.

by professionals, must adapt to changing clients and new expectations of justice.

V. “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 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 last year 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 about 6 months ago. 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.¹⁸

The story begins with Mr. Stevenson's agreement to represent a black man who had served six years on death row in south 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 challenge 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

¹⁸ Bryan A. Stevenson, *Confronting Injustice*, April 2004, in *International Society of Barristers Quarterly*, Vol. 39, No. 2 at 362.

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 south 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 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 been changed considerably. A metal detector that you had to walk through

had been placed just inside the door and, on the other side of the metal detector, a huge German shepherd dog had been positioned. 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 looking 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 after six years.

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, I tell you this story 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 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 lawyers who aspire to the finest tenets of professionalism, 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 justice in Canada is unacceptable.” They are people who can ask of our politicians, our governments, our

Crown Attorneys, our judges, other lawyers, and themselves, “**Are they here?**”

Like Mr. Stevenson, I *know* that when lawyers 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?**”

So my rhetorical questions today – as we again consider the meaning and responsibilities of professionalism and the impediments to justice that unfortunately continue to exist in this country – are simple ones. Each of us must ask ourselves, today and tomorrow: “**Are they here?**” and, critically, “**If not, why not?**”

Thank you for allowing me to participate in this important Colloquium.