Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada

to the Canadian Bar Association Council
CBA Canadian Legal Conference
Saturday, August 13, 2005
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Good morning, Ladies and Gentlemen. **C'est un grand plaisir pour moi d'être parmi vous ce matin. Merci pour ce chaleureux acceuil.**

I value this opportunity to speak directly to you. This past year has been a busy one for the Supreme Court of Canada and for the two organizations that I lead – the Canadian Judicial Council and the National Judicial Institute.

Let me begin with the Canadian Judicial Council, the assembly of federally-appointed chief justices and associate chief justices of the trial and appellate courts in all of the provinces and territories. **Les membres du Conseil canadien de la magistrature sont conscients du fait que la société n'accepte et ne respecte les décisions judiciaires que dans la mesure où elle croit à l'intégrité et à l'indépendance de la magistrature.** The Council's objective is to guarantee to the legal profession and the people of this country an independent, impartial and competent judiciary. The Council is working hard, through its committees, to address issues of judicial conduct, independence, education and the administration of justice, among others.

The Council continues to implement the recommendations made in November, 2002, by the Special Committee on Future Directions to improve its ability to meet current judicial governance needs. Last September, I announced the implementation of one of those recommendations, the creation of an Advisory Group of prominent Canadians to serve as a sounding board on actual and emerging issues confronting the Canadian judiciary. I was gratified and moved that every one of the individuals that I asked to serve immediately accepted. They are Justice Ian Binnie, Lise Bissonette, Justice Bruce Cohen, Mary Coyle, Justice Eleanore Cronk, Peter Lougheed, Associate Chief Justice Jeffrey Oliphant, Dick Pound, Justice John Richard, Roy Romanow, Chief Justice Richard Scott, Janice Gross Stein, Jean Teillet and Milton Wong. We met last March and made an excellent beginning. We will meet again at the end of this month and I am confident that our meeting will result in many useful ideas that will be of assistance to the justice system and lawyers.

At the National Judicial Institute, which is charged with the responsibility for judicial education, we will soon welcome Justice Lynn Smith who will take a leave of absence from her judicial duties on the Supreme Court of British Columbia to take over as Executive Director of the Institute on September 5. George Thomson, who has done a stellar job for the past five years, will step down. **On reconnaît de plus en plus l'utilité de la formation continue pour tous les juges. Sous la gouverne de George Thomson, l'Institut a fait des pas de géant dans l'élaboration de programmes touchant des questions juridiques dont la complexité ne cesse de croître.** I am confident that when George passes on the torch, he

will leave behind a healthy NJI and that Justice Smith will carry on with the same innovative approach to judicial education of Canadian judges.

Moving on to the Supreme Court of Canada, last August 30th we welcomed two new judges – Justice Rosalie Abella and Justice Louise Charron, who were appointed after the departures earlier in the year of Justices Iacobucci and Arbour. Justices Abella and Charron bring diverse experience to our Court and we are lucky to have them. Our period of change is not quite over, however. Earlier this month, Justice John Major notified the Minister of Justice that he will retire on December 25, 2005. I'm not sure if Justice Major intends to make this new phase in his life a Christmas gift to himself. But I do know that he will be greatly missed.

Just as the face of the Court changes, so does what goes on behind the scenes. The Supreme Court of Canada has embarked on the approvals process to obtain funding from the federal government to modernize our court room. We plan to accommodate laptop computers on the bench and at counsel tables with monitors to view evidence, such as transcripts and exhibits, on line. Improvements will be made to the lighting and the acoustics. We also plan to update the television equipment used for taping our hearings in order to improve broadcast quality. We have started the move to electronic filing. Factums are now filed in hard copy form together with a CD version available for downloading onto the Court's internal computer system. This autumn, judges and court staff will have access to electronic copies of all factums filed.

From this review of events at the Canadian Judicial Council, the National Judicial Institute and the Supreme Court of Canada, let me move on to three matters of more general concern – concern to me as a chief justice and to you, I hope, as members of the legal profession. The three matters are judicial appointments, the continuing challenge of improving access to justice and the delay in constructing a building to house the Federal Courts.

As a preliminary comment, let me say how much Canadian judges appreciate the Canadian Bar Association's support of the judiciary in this country. As your president, Susan McGrath, wrote in the April-May edition of the *National*, it is difficult for judges to defend themselves in the face of "misinformed or malicious statements about judges in the media". Ms. McGrath follows in the footsteps of former presidents, including William Johnson and Simon Potter, who have taken seriously the CBA's role in speaking out for judges, who cannot speak for themselves. Thank you.

Despite the intervention of the CBA, I think it is fair to say that the process for the appointment of federal judges has come in for its share of scrutiny and criticism this past year. The result is that the House of Commons Standing Committee on Human Rights and Justice will hold hearings this autumn into the process for the appointment of federally-appointed judges. It is, of course, legitimate for the public to seek the best possible way of identifying individuals qualified to perform the judicial task with skill and impartiality. As I have said before however, it is equally legitimate to insist that whatever reform is considered, judges

should continue to be appointed on the basis of merit and the process of appointing judges should continue to respect judicial independence.

At the Supreme Court of Canada level, a modified process for the appointment of judges has been implemented to provide more transparency. The process incorporates many of the features suggested by William Johnson, on behalf of the CBA, in his letter to the Minister of Justice in March, 2004.

Au départ, le ministre de la Justice établira une liste de cinq à huit candidats après avoir consulté le juge en chef du Canada, les procureurs généraux des provinces de la région, les juges en chef de la région, les barreaux locaux et l'Association du Barreau canadien. The Minister will then provide this list to an advisory committee composed of members of Parliament, professionals and other persons of significant stature and responsibility. The advisory committee, facilitated by the Commissioner of Federal Judicial Affairs, will assess the candidates and provide an unranked short list of three candidates to the Minister with an assessment of their merit and a full record of the consultations conducted. The Minister will then complete such further consultations as considered necessary and provide his advice to the Prime Minister. The Prime Minister will make his recommendation to Cabinet and, in all but the most exceptional circumstances, the appointment will be made from the short list. Finally, after the Prime Minister has announced the choice, the Minister will appear before the Justice Committee to explain the appointment process and the professional and personal

qualities of the appointee. This is the process that will be followed for Justice Major's replacement.

The process for appointments to the Supreme Court of Canada appears to respect the dual requirements of choice based on merit and preservation of judicial independence. We must work to do what we can to ensure that any changes to the appointments process for other federally appointed judges also respect these dual requirements. To me, the sole concern should be to appoint individuals who embody the most valuable judicial qualities of competence, impartiality, empathy and wisdom. From where I sit, the judiciary in Canada today meets these high standards. The committee system for vetting candidates for the judiciary in each province has, on the whole, functioned well. Further reforms will be welcome if they enable us to improve on this excellent record.

My second concern is the need to continue to improve access to justice for Canadians. We in this country are fortunate to possess an independent and impartial judiciary, a skilled legal profession and a justice system based on the rule of law. In my visits to countries where democracy has but recently taken hold, the rule of law and the importance of an independent bar – and judiciary, in some cases – is often not well understood, much less supported.

Yet while we have an excellent justice system, increasing numbers of Canadians do not have access to it. The Canadian Judicial Council has undertaken a study on self-represented (or unrepresented, some would say) litigants. Although the Council has yet to reach definitive

conclusions, there is no doubt that the reasons for the inability of so many Canadians to find adequate legal representation are numerous. Judges across the country report that the number of unrepresented litigants is rising. This has serious repercussions for the justice system, which is based on litigants being represented by lawyers. Even more serious are the repercussions for the public. More and more people are at risk of being denied access to the justice system of which we are so proud. How can we, as judges and lawyers, respond to this?

Nous connaissons tous les pressions de la vie moderne en raison desquelles il est plus difficile pour chacun de nous, avocat ou juge, d'atteindre l'idéal d'un meilleur accès à la justice. Pour les juges, ces pressions peuvent venir de leur charge de travail — de la liste sans fin des causes qu'ils doivent entendre et des décisions qu'ils doivent rendre.

Lawyers face different, more immediate and serious pressures. Many of the lawyers I know who are in private practice talk about the "treadmill". How can a lawyer engage in law reform efforts, undertake pro bono work or attend bar association meetings, if he or she must produce 2000 or more billable hours each year, adding up to sixty-five or seventy hours in the office each week? The treadmill's pressure is partly financial but it also reflects the increased complexity and specialization of law itself.

I do understand the pressures. But if better access to the civil justice system is to be accomplished, the judiciary, the bar and our governments must each play a part. Government has a role to play through its funding of legal aid and ensuring adequate court and judicial

resources. Judges are committed to streamlining the litigation process through appropriate means, for example, through case management and pre-trial conferences where the issues may be narrowed to shorten trial times if appropriate.

Finally, lawyers have a role to play. It is gratifying to see articles in the CBA's monthly publication the *National* extolling the virtues of pro bono work. And I am gratified that the Canadian Bar Association, year after year, places access to justice at the forefront of its goals.

Access to justice is particularly acute on the family law front, where the cost of litigation uses up precious resources that could better be used in providing housing and clothing for children and parents. This is an area where the numbers of unrepresented litigants continues to grow at an alarming pace. The impact of unrepresented litigants on the justice system is felt through lengthier pre-trial procedures and trials. Issues arise in relation to the judge's role in adequately explaining the process to the non-represented party, without unduly favouring, or appearing to favour, that party.

It is true that steps have been taken to try to come to grips with the special pressures that arise in the family law context. Early mediation and counselling are available in several jurisdictions with the aim of resolving disputes about custody and property more quickly, cheaply, and without undue rancour. In many jurisdictions, settlement-oriented rules govern family litigation. In Ontario, the Unified Family Courts are being expanded to provide specialized courts to deal with family matters. Those of you who practise family law are

recognizing that you can play a vital role in alleviating the cost and pressures through creative, skillful lawyering, bringing clients and lawyers together where appropriate to reach solutions obviating the need for conventional, contentious litigation. However, more needs to be done, and we judges look to the bar for assistance in resolving the problems.

This brings me to my final concern, the decision by the government earlier this summer to delay construction of the new Federal Courts building. **Il est essentiel qu'une cour de justice, quelle qu'elle soit, dispose de locaux adéquats, de façon que la cour et ses membres puissent s'acquitter efficacement de leurs fonctions et servir convenablement la population et les membres de la profession juridique. La Cour fédérale attend un édifice depuis 1970, soit depuis 35 ans déjà.**

In 2002, in order to address a critical space shortage in our courthouse, the Federal Court of Appeal moved out of the Supreme Court building to the D'Arcy McGee Building in Ottawa, and the government announced its intention to build a new Federal Courts building to house the Federal Court, Federal Court of Appeal, Tax Court and Court Martial Appeal Court. A site has been chosen; a design has been perfected.

As those of you with a Federal Courts practice know, the Federal Courts operate out of different facilities scattered throughout Ottawa. This means cost and inconvenience for those who work in these courts and for those who appear before them. The Federal Courts, the Tax Court of Canada and the Court Martial Appeal Court – which as of 2002 share the same court

administration service as the Federal Court and the Federal Court of Appeal – need adequate facilities housed under one roof. I believe the government understands the need since it has already chosen a site and approved a design. I urge the CBA to make its voice heard to ensure the project goes forward without further delay. Our country needs a courthouse for its Federal Courts now.

This concludes my remarks. Before I close, let me say once again how much I value the constructive partnership of bench and bar that is fostered by the Canadian Bar Association. Although judges and lawyers have very different roles to play, our common goals are to maintain respect for the administration of justice, improve access to justice and uphold the rule of law. We are – each of us, judge and lawyer – necessary partners in accomplishing these goals.

Thank you. Merci.