Speech Delivered by the Honourable Chief Justice Lance Finch
at Pro Bono Law of BC's Appreciation Breakfast.
Thursday, February 9, 2006

For generations, the lawyers of British Columbia have given generously of their time and professional expertise to help those who would not otherwise have had access to the advice and advocacy of a legally trained person. No one knows in terms of dollar value how much lawyers have contributed in this way to the administration of justice, for the public good. But we do know that because of lawyers' generosity, - although it is little recognized by the media or the public – the scales of justice have been kept in better balance, the rule of law has been served, and many litigants have left the courtroom and the litigation process more confident that their concerns have been understood, and that their interests were given proper attention.

In recent years, in response to an increasing number of unrepresented litigants the bar, both collectively and individually, has taken many positive and progressive steps to better provide for pro bono legal services, and to marshal and coordinate those services in an organized way.

I applaud the work of Pro Bono Law B.C. for its significant contribution in this endeavour. You have secured insurance coverage for those providing pro bono legal services. You have helped to establish the B.C. Supreme Court Self Help Centre. You have provided assistance and support to the pro bono program established for the B.C. Court of Appeal. You have also established the pro bono law website, an important tool for linking the supply of, and demand for, legal services to those in need.

I understand that more recently Pro Bono Law B.C. has also established programs to provide legal assistance in the Federal Court of Appeal, as well as a judicial review program, and a family law program.

In recounting some of Pro Bono Law B.C.'s achievements, I do not overlook the other pro bono efforts that take place outside the Pro Bono Law umbrella. I would like to recognize particularly the contributions of the Salvation Army, and of Dugald Christie's Access to Justice program. I also wish to acknowledge the enormous contribution made by the Law Students Legal Advice Program in the operation of community legal aid clinics, providing information and advice to thousands of citizens every year, as well as Pro Bono Students of Canada at UBC, UVic, and other Canadian Law Schools.

Finally, of course, there are many among you who informally and anonymously help, and have helped, your fellow citizens, or social or community groups, with free legal advice and counsel.

These are all important and valuable efforts for which those responsible may be justly proud. It is the kind of response to need that marks the members of our legal community as truly professional, and that represents the very best qualities of social concern, responsibility and generosity that lawyers have traditionally displayed. May I say on behalf of all courts, and all judges, how very grateful we are for your continuing efforts in this behalf.

One might think that with that wonderful record of contribution and achievement, that all is well, and that there is nothing more to be done.

I regret to tell you that that is far from the case, and there is still a great deal more to do. From this point on, my comments are directed chiefly to our experience in the Court of

Appeal, although I believe the problems I am going to describe are more widely felt, and affect all levels of court.

Let me give you some statistics.

In 2004 there were 833 new appeals filed in the Court of Appeal. Of those new appeals, 190 had at least one in-person litigant – a party with no lawyer representing him or her. That is, in 23% - almost one in four – of all new appeals filed, there was a self-represented party. The proportion was similar for civil and criminal filings – 21% of criminal appeals filed had an unrepresented accused; and 24% of civil appeals had one or more unrepresented party.

The statistics for the year 2005 are very similar. Of the 1,102* new appeals filed last year, 236, or 21%, involved an in-person litigant – 18% of new criminal appeals, and 23% of new civil appeals.

Of course, not all new filings end up with a court hearing. But the statistics for appeals heard are not comforting. Of 285 civil appeals heard in 2005, 37 or 13%, involved an in-person litigant. Of the 184 criminal appeals heard 34 or 18%, involved an in-person accused.

Perhaps the most worrisome statistic of all is that in 2005 only 10 cases were referred for pro bono assistance in the Court of Appeal.

In addition to those appeals which proceeded to a full hearing, another 440 civil appeals were dismissed summarily – either because they were abandoned, leave to appeal was refused, or some similar reason. Of those 440 summarily dismissed appeals, 101 or 23%, involved at least one in-person litigant. We of course have no way of knowing whether legal representation in those 440 cases would have led to a full hearing, or to some disposition other than dismissal.

I should add a note of caution about these statistics. There are a handful of self-represented litigants who, it is clear, will never accept the advice or assistance of a lawyer. Those litigants come to court repeatedly to argue unmeritorious positions. These “frequent flyers” may distort our statistics to some degree.

And on the subject of unmeritorious cases, I believe that some of the most valuable services provided by the bar are in advising or persuading a person that a proposed appeal is misguided and has no merit. Understandably, lay litigants may not appreciate the court’s role as one of review – and not as a place to reargue the case as at trial.

However, to return to the statistics, whether you take the proportion of unrepresented litigants as 1 in 7, or 1 in 5, or 1 in 4, - one thing is clear - that proportion is too high.

The question I ask is, why, after all the bar has done in the last few years to promote pro bono legal services - and after all the time and effort so many of you have put into providing assistance – is there still this unacceptably high number of litigants unrepresented by a legal professional.

Put another way one may ask, what are the obstacles to the provision of available pro bono legal services to those who need them. (I say “available” legal services because I firmly believe there is no shortage of lawyers – young or old, experienced or not – who are willing to provide their help without charge.) I suggest obstacles to the provision of, or access to, free legal services may include the following:

1. The criteria for pro bono services:

The present income levels for eligibility are $1,500 per month for a single person; $2,000 per month for a person with two dependents; and $2,500 per month for a person with three dependents. In addition, to be accepted, a pro bono client may not have an equity in real estate of more than $30,000. These are the Salvation Army's criteria, which have been adopted for the Court of Appeal Pro Bono Program.

I ask whether these criteria are realistic in 2006. Who is able to provide himself or herself with food and shelter on $18,000 per year, or to support a family of four on $30,000 per year, and still have something left over to pay for legal expenses. Is it realistic or fair to ask the low income earner, who has put together $30,000 for a down payment on a condominium, to sacrifice or imperil that equity in order to fight for or protect a legal right? I do not know where the lines for eligibility should be drawn, but I am concerned that the present criteria may exclude some deserving litigants with meritorious claims to advance, or positions to defend.

2. Disbursements:

For the year 2006, I believe for the first time, the Law Foundation has approved a two year grant to cover disbursements in pro bono cases. I understand this coverage for disbursements is limited to cases relating to poverty law issues, and involving full representation.

I am concerned that there may be arguable cases where the cost of the appeal books, or of the transcripts, are a bar to the appeal being pursued. There must obviously be a careful screen for merit in every case – there is no reason why unmeritorious appeals or defence positions should be financed. But given a reasonable prospect of success, it seems wrong to me that a person should not have a lawyer – who might otherwise be prepared to act for free – because the costs of disbursements cannot be found.

I want to suggest the time has come for the bar to address the disbursement issue broadly, and in an organized fashion. I do not think it reasonable for the small firm, or for the sole practitioner, to be asked to take on this burden in an ad hoc way. But surely our large and successful law firms have the capacity to support the costs of meritorious pro bono lawsuits, and the means to defray such expenses in a way that will not cause mortal damage to the bottom line.

Perhaps, there is a role here for the Law Society of British Columbia. If the Law Society is able to raise and manage a multi-million dollar fund to protect the public against the rare dishonest lawyer, could it not also find the way to raise and manage the much more modest sums necessary to finance disbursements in meritorious pro bono litigation.

3. Family law cases:

I do not have useful statistics on this, but I believe that a very large proportion of unrepresented litigants are engaged in family law cases, both in the Court of Appeal and in the trial courts. These are cases where emotions can run high and legal advice and representation are especially valuable. I encourage those of you with an interest and experience in family law to offer your services pro bono in deserving family law cases.

Perhaps there are other obstacles to, or problems with, the provision of pro bono legal services that you are aware of, which are not evident to me. I would hope that the demands of modern practice in big cities like Vancouver are not among them. I would hope that every law firm, large or small, actively encourages and promotes pro bono work by its members and associates. I would hope for a legal culture in British Columbia in which every

lawyer – yes, and every managing partner, - would see it as part of a lawyer's professional duty to provide free legal assistance where it is needed. I would hope that next year, or perhaps the year after, I can report to you that our numbers of in-person litigants have diminished to the point of insignificance.

May I remind you, members of the court do not consider seniority at the bar to be a prerequisite for pro bono advocacy in the Court of Appeal. Recent graduates are often well suited for appellate practice – perhaps with some guidance or advice from an older hand. We have had appearances by a number of young lawyers who have done an excellent job on behalf of their clients.

I would like to add a word or two about pro bono work in the trial courts – the Supreme Court of British Columbia and the Provincial Court of British Columbia. However important legal representation may be in the Court of Appeal, I believe it is at least equally important in the trial courts. Those are the courts where the "record" is made, based on the issues raised and the evidence adduced. Sometimes in the Court of Appeal we see cases where a legal wrong has occurred that cannot be corrected on review in our court, because the right issue was not identified before trial, or the evidence necessary to resolve the real issue was not adduced at trial. One of the trial lawyer's most important jobs is "making the record", and the unrepresented litigant is at serious, if not fatal, disadvantage in that task.

Finally of course trials – especially in the Provincial Court of British Columbia – are a wonderful training ground for the aspiring advocate.

Let me end my comments by telling you about a real case.

Two years ago we dismissed the appeal, and the application for judicial review, of a Canadian citizen whose extradition was sought by the United States. The fugitive was facing 50 years imprisonment in Montana for sexual offences against children. His case went on in our courts and before the Minister of Justice, for over five years. It involved Charter issues as to the legality of the committal order, and the jurisdiction of the requesting state to seek extradition. It also involved the legality of the Minister's surrender order, allegations of ministerial delay, and the adequacy of the Minister's reasons for surrender.

We were told that the fugitive had had the assistance of a lawyer in the preparation of his written submissions. But he appeared in our court without legal representation. Counsel for the requesting state treated him fairly and courteously, as you would expect. I believe all three of us who heard the case did our very best to address each and every issue that might have helped his cause. I believe the orders we made dismissing his appeal, and application for judicial review, were well founded in the law and in fact.

However I was, and remain, dissatisfied that the fugitive did not have his case presented to us by a capable lawyer. I believe the result would have been the same. But as we all know there is more to the law than the result. There is also the process, and the appearance of fairness, and the sense of confidence – especially in the losing litigant - that everything that should be said, has been said (and nothing more). Not all cases have the same grave consequences as that extradition case. But every case is important in presenting the face of justice to the world, and in maintaining the rule of law in an adversarial judicial system.

So I thank you for all you have done thus far. I wish you well in addressing the continuing challenges that face all lawyers who seek through the provision of free legal services, to advance the public good.

Thank you.