Address of Chief Justice Finch

to the Canadian Bar Association – B.C. Branch

at Scottsdale, Arizona, Saturday, November 20, 2010

Access to Justice: The Elephant in the Room

[1] As I am sure all of you will know, this year we have been celebrating the 100th anniversary of the British Columbia Court of Appeal. The Court was created by provincial legislation proclaimed in force in November 1909, and it heard its first case in Victoria in January 1910. To mark this milestone the Court has held a number of events throughout the province which have included special sittings of the Court, meetings with local bar associations, celebratory dinners, and an academic symposium held in Vancouver last April.

[2] In addition, the Court participated in and collaborated with the Justice Education Society and the Knowledge Network in the production of an historical video on the Court, a written history of the Court by Christopher Moore – "The First 100 Years", a special edition of B.C. Studies with scholarly articles by UBC and UVIC law professors on various aspects of the Court's work, and a special edition of the Advocate with biographical profiles of leading B.C. counsel in the Court of Appeal over the last century.

[3] I wish to say that none of this could have been accomplished without the spontaneous and generous support and participation of the legal profession of British Columbia. I, and all of my colleagues in the Court, have been overwhelmed by the enthusiasm and energy the bar has shown in planning and organizing the various events and publications to which I have referred.

[4] In particular, I wish to record our deep gratitude to the Canadian Bar Association – BC Branch, for its many contributions, including financial support, to these various endeavours. Your efforts have added greatly to the festive tone of our celebrations, and more importantly, to the creation of an historical record of the Court, and of the legal community in British Columbia. Your presidents during 2010, James Bond and Stephen McPhee, have been tireless and enthusiastic participants. You have all helped to create an enduring resource for generations to come. Thank you so much.

[5] During the course of the last year we have had many opportunities to reflect on, and to speak about, the rule of law as the foundational principle of our Canadian society, of the importance of an independent and impartial judiciary as the third branch of government, and of an independent bar as a critical component in the administration of justice.

[6] Our centennial year followed the 125th anniversary of the Law Society of British Columbia, celebrated in 2009. The president of the Law Society that year,

Gordon Turriff, Q.C., spoke far and wide, and most eloquently on the independence of lawyers as a constitutional value. In a number of his addresses on the subject he said:

> Judicial independence is a foundational element of the rule of law, the need for which not even the most cynical commentators question. If independence of judges demands constitutional protection, then so must independence of lawyers. One need only ask: what useful work could independent judges do if there were no independent lawyers to bring them cases to decide?

[7] In answer to his rhetorical question, I am recorded as saying that the answer was "self evident". Lest there be any doubt as to my meaning, I would say that without independent lawyers, the work of an independent judiciary as we know it would be next to impossible. An independent and self-regulating bar ensures lawyer independence, which is fundamental to the relationship between the citizen and the state.

[8] However, in addition to the question about what useful work an independent judge could do if there were no independent lawyers, there is another important question that needs to be asked. That question I suggest is:

> What quality of justice can a litigant receive when he has no lawyer to represent him, whether independent or not?

[9] About 15 percent of all appeals heard in the British Columbia Court of Appeal have no lawyer on one side or the other, sometimes both. Some of these cases are without any apparent merit. But we believe there is a significant number of appeals where there is a meritorious argument to be advanced, that cannot be made or made adequately without a lawyer.

[10] And we also believe that at least some of these litigants are unrepresented because they cannot afford the cost of a lawyer, and do not qualify for legal aid or *pro bono* services.

[11] In short, the high cost of legal services appears to be one of the obstacles to access to justice. This is not a new phenomenon. In the submission of the B.C. Supreme Court presented by Chief Justice McEachern to the Hughes Commission in 1988 the Court said:

> By far the greatest part of the cost of litigation to the public is lawyers' fees. This is a delicate area we would prefer to avoid but we do not think we can do so. We remind those who will say that the judges should mind their own business, that the perception of the public is that the judges operate the justice system and we are blamed by many for allowing litigation to become so expensive even though we have little control over the cost of litigation.

[12] What the submission refers to as a “delicate area”, I would call the elephant in the room. Everyone knows it’s there, but no one wants to talk about it. I think it is time to open the conversation.

[13] While other changes aimed at increasing access to justice, including simplified court procedures, alternative dispute resolution, legal aid and multi-disciplinary practices, have helped or will help to increase access to justice, consultation with a lawyer or legal advisor is still fundamental. High cost is a disincentive to obtaining legal advice. High cost discourages people from consulting lawyers early, when there may be more opportunity to avoid or minimize legal problems.

[14] In the access to justice debate much is said about the cost of litigation but little is said about reducing legal fees. No matter how much we may all wish to avoid the subject, high legal fees are an issue that must be addressed.

[15] I respectfully suggest it is time for the bar to address this question openly. It touches on the legal profession’s ability to remain independent and self-governing, and it concerns the public interest in access to justice. I want to offer some thoughts about why legal services cost so much, and are therefore unavailable to some who need those services; and say a few words about what might be done to remedy the problems.

[16] Lawyers, as a profession, specifically members of the Law Society of British Columbia, have a monopoly on the practice of law. Section 1 of the *Legal Profession Act* defines the practice of law and s. 15 prohibits those other than practicing lawyers from the practice of law. The apparent purpose of this prohibition is protection of the public. However, the monopoly enjoyed by the legal profession also has the effect of constricting the supply of legal services.

[17] Economics informs us that reducing or limiting the supply of a good or service will increase its price. Limiting the supply of a service increases scarcity and increases the willingness of those who can, to pay for the remaining available good or service. I suggest the high cost of legal services is a result, at least in part, of limited supply. It is not related solely to the inherent cost or overhead of providing legal services.

[18] In 1996 British Columbia’s population was about 3.8 million. In 2010, the Province’s population is 4.5 million, a growth of about 700,000 persons, or 16%.

[19] By contrast, in 1996 there were 9,629 actively practising lawyers resident in British Columbia. In 2010 that number had grown only to 9,984, an increase of 355 lawyers, or about 4%. (Canadian Federation of Law Societies and Law Society of British Columbia.)

[20] Population increase therefore has outstripped growth in the legal profession by a factor of 4, or 400%. For those in need of legal services, the situation is not going to improve. During the decade from 2011 to 2021 an average of about 290

lawyers in B.C. will reach age 65 each year, a total of almost 3,000 in that ten year period. In that same decade, British Columbia's population will increase to 5.1 million. New admissions to the bar will barely replace those reaching retirement age.

[21] As all of you well know, there are several obstacles along the path to becoming a lawyer. Each obstacle operates to limit the supply of lawyers. The first hurdle, of course, is gaining admission to law school. Canada has not opened a new law school in the past 30 years. During that 30 year period, from 1980 to 2010, Canada's population grew by about 10 million from 24.5 million in 1980 to 34.6 million in 2010.

[22] The UBC Faculty of Law recently reduced the size of its first year class from 200 to 180. For the first year law class entering in 2010 there were over 2,100 applicants for those 180 places. The statistics for the law school at the University of Victoria are similar in proportion.

[23] The demand for admission to law school far outstrips available places. It is estimated that 10,000 people seek admission for 2,696 spaces in Canadian common law schools. In the U.S. there were 83,000 applications (as opposed to total applicants) for 45,000 spots at 190 American Bar Association accredited schools. For comparison the total number of applications in Canada is about 24,000. There are fewer than 2 applications per available place in the US. In Canada there are just fewer than 10 applications per available place.

[24] The lack of opportunity to attend Canadian law schools has not discouraged some. Chris Axworthy, founding dean of the new Thompson Rivers University Law School at Kamloops, opening in 2011, estimates that at any given time 200 Canadians are studying law in the UK or Australia. Students spend as much as $90,000 for a three year program at Bond University in Australia. That university has enough demand that it offers courses in Canadian constitutional and criminal law. Clearly there is significant unmet demand for law school spaces in Canada, even with the high and increasing cost of a law degree.

[25] Law school admission is not the only barrier to entry for those wanting to practice law. The next big obstacle is finding a place to article. Dean Bobinski of UBC Law School says they "try to balance admissions standards and enrolments against the availability of articling positions".

[26] The availability of articling positions puts direct control of the supply of lawyers in the hands of the legal profession. In British Columbia a law graduate cannot even enrol in the Professional Legal Training Course without having confirmed articles. Let us be clear on this. The mandate of the Law Society is to regulate in the public interest. The public has no interest in restricting unnecessarily the supply of lawyers. It is lawyers themselves who benefit from the limited supply of legal services, whether that is the purpose of the restrictions or not.

[27] Gordon Turriff has made the point over and over again that the mandate of the Law Society, as the profession's regulatory body, is to serve the public interest, not the interests of lawyers. He has said that included in the obligations of a regulatory body is an obligation not to defend a monopoly of work to benefit lawyers. But it must be apparent that regardless of the purpose identified for maintaining a monopoly, the effect of the monopoly itself can only be to restrict supply and increase cost. This fundamental economic law has been recognized at least since the days of Adam Smith.

[28] The restricted supply of lawyers enables individual lawyers and law firms to choose the best paying (and indeed most interesting) work. Poor paying, or uninteresting, work is left unserved. I do not criticize individual lawyers or their firms for acting in their own self-interest. I practiced law for 20 years in a private law firm. I and my partners and associates wanted to make the best living possible that we could. I am sure that remains the case today, and justifiably so.

[29] Qualifying as a lawyer, and being called to the bar, is a great privilege. Many benefits flow from that privileged position. It is critical however for members of the profession not to confuse privilege with entitlement. Lawyers do not occupy their privileged position as of right. The privilege is the grant of all citizens, acting through government.

[30] The restricted supply of lawyers in British Columbia is neither the fault nor the responsibility of individual lawyers or law firms. The restricted supply is a systemic failure on the part of the legal profession's governing body to ensure that legal services are available to all who need them. That is what the public interest demands. And I suggest that is what the profession must deliver.

[31] I suggest there are three reasons why the profession must address its monopoly on the supply of legal services. The first is the threat to self regulation.

[32] Recently, other jurisdictions have experienced government intervention in the regulation of their legal professions. Those interventions have come about, at least in large part, because of inadequate or ineffective conduct review procedures. We heard this morning from Alan Baynham, President of the Arizona State Bar Association, about that state's legislation to give the executive branch of government powers over lawyers' professional conduct reviews. In my experience, both as a lawyer and judge, that is not an issue in B.C. likely to trigger government intervention. Rather, in my view, the risk is the high cost of legal services. Access to justice for all must be delivered if the profession is to prevent that risk from becoming a reality.

[33] I am aware that the profession has begun to address this problem. The Law Society Task Force on the delivery of legal services dated October 1, 2010 recommends some changes. It proposes expanding the functions that may be performed by articling students. It proposes expanding the scope of duties that may

be performed by paralegals. It proposes special treatment for community advocates, student legal advice programs and others providing free legal services.

[34] I say with respect that these are small steps in the right direction, but they are not enough.

[35] I am, of course, also aware of the CBA BC Branch inquiry into the provision of government legal aid, presently being conducted by Len Doust, Q.C. It has been reported that B.C. is now the third lowest province in Canada in per capita spending on legal aid. I commend the branch for taking this initiative, and look forward to reading Len Doust's report and recommendations. I wish you well in the pursuit of appropriate levels of government funding for legal aid services. I expect that attracting the interest of government on this issue will be more difficult than identifying the challenges to be met.

[36] The second reason to address the profession's monopoly is that other factors are at play in the market for legal services.

[37] Lawyers can expect increased competition for the provision of legal services. These issues are beyond the scope of these remarks. They are more fully addressed by Richard Susskind in his provocatively titled work *The End of Lawyers?* Briefly, the breaking down of trade barriers, the increasing portability of services, and technological advances, will all make it easier and less expensive to provide legal advice from outside Canada. Lawyers will have to adapt to these changes if they are to compete in the new environment. While these changes will go some distance to increasing access to justice there will always be the need for in person legal advice.

[38] Thirdly, access to justice is a constitutionally recognized principle in Canada. It is a necessary element for maintaining the legitimacy of our judicial system. It is also morally wrong that some are able to enforce or defend their civil rights while others, based solely on their inability to pay, are denied access to justice.

[39] The perhaps overly simplistic solution to the restricted supply of legal services is to increase the supply by increasing the number of lawyers. The number of lawyers called to the B.C. bar each year bears no relation to the pool of people who possess the ability to perform the functions of a lawyer. According to the statistics I referred to earlier, there are roughly 7,000 applicants who fail to gain admission to law school in Canada each year. They are not excluded for lack of ability. They are excluded for lack of space.

[40] In my view, there is no need for the legal profession to reduce qualification standards in order to increase the number of bar admissions. The profession, while increasing access, must continue to ensure the highest standards of competence and professionalism. There is no reason to think this could not be achieved if the number of bar admissions were doubled or tripled each year.

[41] Like all of you, I firmly believe that government regulation is to be avoided, and that the profession must strive to protect its independence and self-regulatory powers.

[42] I have raised some of the concerns expressed here with leaders of the bar in British Columbia. I have said that the real risk of outside regulation is more likely to come from public dissatisfaction with the imbalance in the market place created by the profession's monopoly, and with the resultant high cost of legal services, than it is from dissatisfaction with the quality of services, or conduct review process.

[43] Having raised the question, I am usually met with the question – well, what do you suggest should be done?

[44] I am frank to admit that I do not have a clear answer. However, I suggest a more balanced and open market for legal services may be a starting point. Why not admit more applicants to law schools? Why not qualify more lawyers to practice? Why not reduce the articling period from twelve months to six months? A six month requirement for articles would double the number of places available. Why not eliminate the articling requirement for those who have served as law clerks? Why not make the Professional Legal Training Program two weeks in length rather than the present ten weeks. Adequate quality control can still be provided with an appropriate bar admission examination, and requirements for continuing professional development.

[45] In addition, perhaps the criteria for *pro bono* legal services could be expanded so that more persons would qualify for free services. More radical innovations might include provision of free civil legal aid clinics, paid for and operated by the legal profession itself and, the provision of civil legal aid counsel at the profession's expense for certain kinds of cases. There are no doubt many other possible solutions.

[46] But, whatever the solution may be, I say this. An answer to the unmet demand for legal services cannot be beyond the imagination or powers of the legal profession in British Columbia. B.C.'s legal profession devised and implemented one of the first mandatory third party liability insurance plans for all of its members. B.C.'s legal profession created the "special fund" to protect victims of lawyers' dishonesty, a program I understand that has now become insured. B.C.'s legal profession established the Law Foundation of British Columbia, funded by interest from intermingled trust funds, one of the first such foundations in North America, and one which does so much good work. B.C.'s legal profession established the Lawyer's Assistance Program and *Pro Bono* B.C. The list of the legal profession's accomplishments in British Columbia is truly remarkable and one of which all British Columbian lawyers can be proud.

[47] I say to you now that if our noble profession can achieve all of these commendable advancements, that are so much in the public interest, it can also find

a solution to the unacceptable reality of citizens, and especially litigants, going without legal advice and representation because of their cost.

[48] I believe this is the profession's next great challenge. The presence of the elephant has been acknowledged. I wish you every success in finding the right solution.

[49] Thank you again for the invitation to be with you this weekend, and for your fellowship and hospitality.