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9:00 AM – 5:00 PM

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Keith D. Parkkari

EXECUTIVE DIRECTOR:

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lynn.daffe@lawsocietyyukon.com

ADMINISTRATIVE ASSISTANT:

Shannon Kmyta

shannon.kmyta@lawsocietyyukon.com

MEMBER STATISTICS:

(As of November 30, 2010)

Resident Members: 129

Non Resident Members: 152

Total Membership: 281

THE YUKON AMICUS

PRESIDENT'S REPORT

Susan Dennehy, President

THE LEGAL PROFESSION ACT – A NOD TO THE PAST, LOOKING FORWARD TO THE FUTURE

2010 is the 25th anniversary of the incorporation of the Law Society of Yukon. Lawyers have been practicing law in the Yukon since the Gold Rush, but it wasn't until 1985, with the proclamation of the *Legal Profession Act*, that regulation of lawyers became the responsibility of the Law Society of Yukon. We celebrated this milestone at our 2010 Annual General Meeting and at the joint Law Society/Court of Appeal dinner, both held in May.



Susan Dennehy

In the 25 years since the proclamation of the *Legal Profession Act*, the regulatory environment in which the Law Society operates has changed significantly. It goes without saying that the Law Society must respond to these changes, if we are to maintain public and government confidence in the legal profession's ability to regulate itself.

In our 2009 strategic planning exercise, the Law Society Executive identified actions that need to be taken to ensure effective regulation today. A comprehensive review of the *Legal Profession Act* was identified as crucial. The Act is the Law Society's essential tool to carry out its mandate of regulating an independent legal profession in the public interest. This review is underway and will take priority over the next six months. This is an ambitious project but one whose time has come.

Continued on page II

TABLE OF CONTENTS

President's Report	I	A Good Time Was Had By All...	VII
Council Report	II	Something to Celebrate	VII
Executive Director's Report	III	New Member Profile	VIII
New Executive Members	IV	Excess Professional Liability Insurance	VIII
New Board of Directors Named to Canadian Online Legal Research Service	V	Yukon Law Foundation Update	IX
Yukon Community Wellness Court	VI	Withdrawal of Counsel in Criminal Matters - Implications of <i>R. v. Cunningham</i>	X
A Very Special Sitting	VI		

PRESIDENT'S REPORT CONT'D

The Law Society has retained the law firm of McInnes Cooper to assist us with this work. We are excited to be working with a team of individuals, led by Marjorie Hickey, who have extensive experience in the area of self-regulated professions in general and the legal profession in particular. Ms. Hickey's legal practice focuses on the regulation of professions; she has been actively involved in the development of more than a dozen statutes for self-regulating professions. The end product, after research, analysis and consultation, will be an objective and comprehensive policy paper which will support the adoption of modern legislation for governing the legal profession.

A Legislative Review Committee was struck to assist the Executive. Ian Yap, Suzanne Duncan, Andre Roothman, Susan Dennehy and John Wright make up the Committee.

As the project proceeds, there will be consultation with the membership and other relevant stakeholders to identify the areas for regulatory reform, outline different approaches and solicit input, before final recommendations are made in a policy paper. I look forward to your participation in the consultation phase, as it is critical to the quality of the end product.

COUNCIL REPORT

*Keith Parkkari, Council Member,
Federation of Law Societies of Canada*

PERSPECTIVE CAN MAKE ALL THE DIFFERENCE

One of the risks in being involved in an organization for any length of time is the risk of becoming too acclimatized to the organization and the work it does. Another risk is becoming focused on the immediate controversies and issues, and losing sight of the bigger picture. In these circumstances, much of the work that has been completed can be overlooked. It is not until one stops to look back at the organization's accomplishments, that you realize the scope and importance of the work being done.

I was writing and rewriting this article, trying to come up with a balanced and informed epistle on the current issues that have arisen over the differences between the Federation's

proposed model rule on conflicts of interest and the Canadian Bar Association model code, which is currently adopted by the Law Society of Yukon. I was intently focused on trying to understand this issue and how it will affect the practice of law in the Yukon, when I received an email from the Federation, containing a message from the new President, Ron Macdonald. Contained in Ron's email was a list of Federation accomplishments. I felt it was worth sharing with you:



"Over the past several years the Federation has undergone momentous change:

- we have assumed a large and credible presence in our nation's capital;
- we have restructured the way we handle internationally-trained applicants who seek admission to law societies;
- we have transformed CanLII into a professional publishing corporation;
- we are well into the development of national admission, discipline and ethical standards;
- we have asserted core principles of independent regulation in our dealings with the Federal Government while being at the forefront in the fight against money laundering; and
- we have created a system of mobility within the legal profession that has allowed for a truly Canadian lawyer, a system which will be extended to Quebec notaries as well."

The current debate over conflict of interest rules is important. The debate, in part, involves balancing lawyer's duties of fidelity to former clients with access to justice issues. Deciding where to draw the line is a complex and time-consuming process. The advantage of stopping for a moment and finding some perspective is that I realized this is only one piece of the work that the Federation is undertaking on national standards. From the "big picture" perspective, it really is only a small piece of the much larger body of work that the Federation has accomplished and is continuing to work on.



The **FEDERATION OF LAW SOCIETIES OF CANADA** is the national coordinating body of the 14 law societies mandated by provincial and territorial law to regulate Canada's 95,000 lawyers, Quebec's 3,500 notaries and 2,500 Ontario paralegals in the public interest. It is a leading voice on issues of national and international importance relating to the administration of justice and the rule of the law.

For more information on the Federation, please go to: www.flsc.ca.

EXECUTIVE DIRECTOR'S REPORT

Lynn Daffe

TAKING TIME TO PLAN... AND TO REFLECT ON PAST ACCOMPLISHMENTS

Recently, members of the Executive and I took part in a half-day planning session. One of the exercises we undertook was to identify areas where the Society has made progress in relation to previously-identified goals and to identify areas where the Society needs to focus its attention in the coming year(s).

The Executive agreed that some larger-scale projects have now been implemented. This includes the development of an Audit Program (which resulted in trust account audits being carried out annually by the Law Society's auditor) and the development of a comprehensive Discipline Handbook, which gives continuity to the discipline process by providing guidance to the Chair, investigators and appeal panel members. Another large scale initiative which is moving forward is the *Legal Profession Act* review.

We have also achieved progress on a number of smaller-scale projects, which have nevertheless brought benefits to our members. For example, when I started working with the Law Society seven years ago, I was amazed at how many phone calls I received each week from members asking "what is Member X's phone number?" Since that time, the Society's website has been re-vamped and a member's contact information can now be found quickly and efficiently in printer-friendly format.

Do you remember Form 13 in its old design? It was difficult to figure out and many were returned inaccurately completed. In the past few years, many positive changes have occurred, including:

- Most of the Society's forms have been modernized and standardized.
- We communicate regularly with the membership by producing two newsletters annually.
- A Lawyer's Assistance Program is up and running.
- A non-practicing category of membership was created at a reduced annual fee.
- You can complete and submit a form that clearly identifies how to resign your membership, rather than the old option of simply not paying your fees and being suspended.
- We now have a form which clearly identifies how to report trust fund shortages.

- The Society has readily available "how to" checklists for membership applications, certificates of permission, professional corporations, articling students and their principals, and new practitioners.
- For members with a B.C. call who must log CPD hours, we register our CLEs with the Law Society of B.C.
- The "Forms" page of the Society's website was recently re-organized to make it much easier to locate specific forms.

The planning session reminded me not to become overwhelmed or discouraged by focusing only on work yet to be done. It's also important to reflect on what has been achieved.

NEW MEMBERS:

MAY 1, 2010 – NOVEMBER 30, 2010

Sider, Robert | Vancouver
Skuggedal, Nicole | Vancouver
Peters, Lisa | Vancouver
Nguyen, Terri | Whitehorse
Kennan, Hilary | Oakville
DesBrisay, Julie | Whitehorse
Aruliah, Anusha | Toronto
Foy, Christopher | Vancouver
Iyer, Nitya | Vancouver
Kozak, Frederick, Q.C. | Edmonton
Woodley, Matthew | Edmonton
Geluch, Anthony | Vancouver
Madden, Jason | Toronto
Hansen, Sarah | Vancouver
Lawrence, Tess | Whitehorse
Keats, Donna | Whitehorse

ARTICLING STUDENTS:

Brown, Andrew | Yukon Government
Lochrige, Benjamin | Lamarche Pearson

CERTIFICATES OF PERMISSION TO ACT:

80 Active Certificates

NEW EXECUTIVE MEMBERS

The Law Society of Yukon welcomes John Wright and Linda Doll as our newly-appointed public representatives on the Executive. We also thank outgoing public representatives Judy Renwick and Steven Smyth for their work in bringing a public perspective to Law Society decision-making.

We invited Linda and John to write a few words of introduction:

LINDA M. DOLL

I graduated from F.H. Collins Secondary High School in 1980. After a few years of working as a legal assistant and travelling, I moved to Vancouver where I completed the two-year paralegal diploma program at Capilano College.

After graduating in 1989, I returned to Whitehorse where I found employment with Cable, Veale, Morris and Kilpatrick (now Austring, Fendrick, Fairman & Parkkari). I have been continuously employed with Austring, Fendrick as a paralegal since 1989. This has given me the opportunity to work in many areas of law, including criminal, family, litigation, personal injury and conveyancing. I currently work primarily in the area of personal injury law.



I'm married and have two school age children. I have always felt that it is important to contribute to the community in which you live and so I continue to be an active volunteer in a variety of areas, including the Heart and Stroke Association and the Northern Lights School of Dance. In recent years, most of my volunteer activities have been associated with my children's activities, which I have enjoyed a great deal.

As a result of my activities, I have had the opportunity to work with and meet many of the people who make up this community. I am always impressed with the degree of talent and diversity that exists in Whitehorse.

I am excited to be sitting as one of the newly-appointed public representatives on the Yukon Law Society and I look forward to working with the Executive and its membership.

JOHN L. WRIGHT

I have spent most of my working life involved in both criminal and administrative law in an enforcement role, as an adjudicator, as a mediator and as an administrator. From 1961 until my retirement in 1981, I served as a commissioned officer in the Military Police, Security and Intelligence Branch of the Canadian Armed Forces. Since 1981, I have been engaged primarily in adjudication and mediation in a variety of contexts.

I have been a part-time member of the RCMP Public Complaints Commission and was appointed as part-time Vice Chair of the Commission in August 1998, serving in that position for five years.

I was appointed a member of the Yukon Umbrella Final Agreement Dispute Resolution Board panel for a three-year term in 1999 and served as Chair for approximately a third of that time.

I have worked as a conflict resolution consultant and trainer for more than 20 years and as an adjudicator/arbitrator with Labour Canada since early 1993.

From 1987 to 1992, I was the Chair of the Yukon Workers' Compensation Board. I served as a director of the Yukon Registered Nurses Association for four years and continue to serve on the association's Complaints Committee. I also served as the Public Representative on the Board of Directors for the Canadian Nurses Association for four years.

From 1984 to 1987, I served as Chair of the Yukon Public Legal Education Association and in 1983 and 1984, I chaired the Diversion Committee for Young Offenders.

From September 1983 to December 1985, I was a Justice of the Peace in the Territorial Court of Yukon.



DID YOU KNOW...

...that **ATHABASCA UNIVERSITY** offers a new graduate diploma in legislative drafting via distance education? One of our members learned of this and sent us the website, which sets out the details of the program. For more information, go to www.athabasca.ca/gdid/ or <http://pbdid.athabasca.ca/>.

NEW BOARD OF DIRECTORS NAMED TO CANADIAN ONLINE LEGAL RESEARCH SERVICE

News Release, October 18, 2010

The Federation of Law Societies of Canada is pleased to announce the appointment of a new board of directors to the Canadian Legal Information Institute (CanLII), the Federation's free online search engine for Canadian legislation and case law.

The Council of the Federation has also approved the nomination of Sonia Poulin of Alberta as Chair of the new CanLII Board. The appointment of the new Board was done in conjunction with a review and update of CanLII's governance structure, a project initiated in 2008.

CANLII is a non-profit organization created and funded by the Federation of Law Societies of Canada, on behalf of its 14 member law societies. It was launched in 2000 on a test basis to provide efficient and free access to the growing number of judicial decisions and legislative documents available on the internet. In 2001, the Council of the Federation approved a proposal to make CANLII a permanent, not-for-profit service to support the legal profession in the performance of its duties while providing the public with permanent open and free access to the legal heritage of all Canadian jurisdictions.

CanLII is also a member of the Free Access to Law Movement, which includes the primary stakeholders involved in free, open publication of law throughout the world.

In April 2010, the Federation of Law Societies of Canada also signed a new five-year agreement with CanLII's principal technology service provider, Lexum Inc., the successor corporation of the LexUM laboratory of the Université de Montréal.

The CanLII web site currently features 14 legislative databases and 166 court and tribunal databases, representing almost a million cases. The web site registers nearly 23,000 visits per day, and 2,500 new cases are added every week.

"Over the last 10 years, CanLII has been an outstanding achievement of Canada's law societies," says John Campion, President of the Federation of Law Societies of Canada. "CanLII has benefited from crucial contributions from federal, provincial and territorial governments and their official publishers who have all made their legislative texts available."

"With a new Board of Directors and a renewed relationship with Lexum, we have taken important steps to ensure the long-term viability of the CanLII internet service and the free access to Canadian primary legal information not only for the legal profession, but for the public at large," adds CanLII President Darrel Pink.

Access to the CanLII service is available at www.canlii.org, or through the web site of the Federation of Law Societies of Canada www.flsc.ca.

UPCOMING DATES & DEADLINES

CLIA

For those of you with mandatory professional liability insurance coverage, the deadline to submit your 2nd installment payment is Thursday, December 16, 2010.

MEMBERSHIP

Renewals for Law Society membership must be received by Monday, January 31, 2011. If you do not intend to renew your membership, please contact the Law Society well in advance of the deadline, to discuss resignation or change-of-status options.

UPCOMING CLEs

The Continuing Legal Education (CLE) Committee is currently working on offering CLEs on the following topics:

- Civility & Ethics
- Conveyancing Practices in the Yukon
- Procrastination

The Law Society of Yukon makes every effort to ensure that locally offered CLEs are accredited by the Law Society of British Columbia and may be applied toward the British Columbia mandatory 20-hour continuing professional development requirement.

The Federation of Law Societies of Canada's 38th Annual National Criminal Law Program – Criminal Procedure, Ethics and the Charter is scheduled for July 4 – 8, 2011 in Quebec City. Detailed information can be found on the Federation's website at <http://www.flsc.ca/> or by contacting the program coordinator at jmgrant@rogers.com.



YUKON COMMUNITY WELLNESS COURT

Tanya Basnett

Therapeutic Courts Coordinator

*Domestic Violence Treatment Option Court & Community
Wellness Court*

Yukon Department of Justice

The Yukon Community Wellness Court (CWC) is one of two judicially-supervised therapeutic courts in the Yukon. The CWC was created in response to a growing awareness within the Yukon justice community that many offenders, in particular repeat offenders, experience multiple psycho-social issues such as substance abuse, mental health issues, inadequate housing and unemployment. It was also suspected that many offenders have the additional challenge of living with Fetal Alcohol Spectrum Disorder (FASD).

The CWC program is aimed at providing treatment and support for offenders living with addiction to alcohol or drugs, mental health issues and/or an intellectual disability, including but not limited to FASD. This court combines intensive offender monitoring with a comprehensive approach to addressing the psycho-social needs of participants, in order to reduce recidivism.

The Community Wellness Court was formally opened on April 30, 2007, with the first sitting on June 4, 2007. At present, there are 18 individuals involved in the Community Wellness Court, 14 male and four female participants. There have been seven individuals who have been sentenced in the court to date.

While many great things have been accomplished with the therapeutic court, the full vision could not be realized without providing wrap-around services and extended hours of operation for community wellness clients. With this realization, the Department of Justice has opened the Justice Wellness Center. The Center is open seven days per week from the hours of 8 a.m. to 7:30 p.m. and is providing support services and counseling to individuals involved in the Community Wellness Court. Services and supports include life skills, links to resources in the community, addictions programming, spousal abuse programming, etc. All community wellness clients will be directed to attend the center for the duration of their wellness journey.

For further information on the Justice Wellness Center or programming offered there, you may call Tanya Basnett at 667-3466.

Potential Community Wellness Court participants can be referred by the RCMP, Crown Counsel, Defense Counsel, Aboriginal court workers, probation officers and community groups that may consider an offender appropriate for the CWC. An offender may also self-refer to this program.

The CWC referral form can be found on the CWC website at <http://www.yukoncourts.ca/courts/territorial/cwc.html> or by contacting the CWC Coordinator, Tanya Basnett, through the court registry.

A VERY SPECIAL SITTING

The public, members of the Bar and guests attended a special sitting of the Yukon Court of Appeal held in Whitehorse on Monday May 17th, 2010. The special sitting was to commemorate the Court's 50th anniversary and to honour the many men and women who, as judges, lawyers, and staff, have contributed to the history and legacy of the Court. In her address to the Court, the President of the Law Society, Susan Dennehy, noted that the anniversary also served as an occasion to reflect on how a strong and independent judiciary allows us to enjoy the rights and liberties of living in a free and democratic society.

Following the special sitting, members of the Bar gathered on the steps of the courthouse for a photo.



Photo credit: Marten Berkman

A GOOD TIME WAS HAD BY ALL...

Submitted by Ken Oyler

Last August, the Law Society of Yukon once again sponsored an annual golf tournament at the Mountain View Golf Course. This event is the longest continuous social function supported by the Law Society and dates back to 1988. This year, 30 participants enjoyed perfect weather conditions in their admirable quest to chase a small white ball around a large green golf course.

The Law Society always encourages participation from golfers at all skill levels and this year was no exception. In keeping with this philosophy, the first pick during prize selection went to the teams with the worst scores, much to the chagrin of the winning team of Murray Leitch, Monishia Liedtke-Thompson, Ben Lochridge and Sheri Blaker. However, this decision proved to be popular, due to the questionable poaching by Mr. Leitch of a ringer, Sheri Blaker, from one of the other teams.



And so Justice was done. Which is how it's supposed to work.

Following the golf game, participants were treated to a BBQ, at which point the prizes were claimed and the trophy presented to the winning team. (Again, under protest - see above.)

Ladies' KP was Anna Pugh; Mens' KP was Cam Grandy; Ladies' Long Drive was Elmy Harris; and Mens' Long Drive was Jim Tucker. We also held a raffle for a special prize, with all proceeds donated to the Junior Golf Program at Mountain View.

A good time was had by all and we hope to see even more people out next year.



Ken Oyler reading the tournament results.



SOMETHING TO CELEBRATE

Over 110 lawyers and guests attended a dinner held on Monday May 17th, 2010 to mark the occasion of the 25th Anniversary of the Law Society of Yukon and the 50th Anniversary of the Yukon Court of Appeal. The Law Society recognized a number of lawyers, who became members of the Law Society in 1985 and have been members ever since, by presenting them with a special commemorative pin.



Bruce Willis presenting Anne King with her Law Society 25-year pin

In her remarks, the President of the Law Society, Susan Dennehy, acknowledged the lawyers practicing in the Yukon 25 years ago who were instrumental in moving the government to proclaim the *Legal Profession Act*. The Act created the Yukon Law Society as an independent body responsible for regulating the legal profession. She also spoke about the importance of the independence of the Bar in securing the rule of law and the protection of the public.



Court of Appeal Reception

Guest speaker Ken Coates provided an informative and highly-entertaining history of the Yukon Court of Appeal.

INSTRUCTIONAL OPPORTUNITY

YUKON COLLEGE'S SCHOOL OF CONTINUING EDUCATION & TRAINING recognizes the growth of Yukon's housing market. As such, the School is seeking a member of the Law Society to instruct a short course in Condo Board Rights and Responsibilities. Interested persons should contact the School of Continuing Education & Training at (867) 668-5200 or ce@yukoncollege.yk.ca.

NEW MEMBER PROFILE

Tess Lawrence is the newest associate at Austring, Fendrick, Fairman & Parkkari after articling with the firm last year and being called to the Yukon bar in September. She practices mainly in family law and civil litigation.

Tess received her Bachelor of Laws from the University of Calgary (2009) and her Bachelor of Arts in English Literature and Linguistics from the University of Victoria (2002).

Tess was born and raised in Princeton, BC and is the little sister to Andrew and Heather, both of Vancouver, BC. Her parents continue to reside in Princeton, where they own an IRLY building supply and lumber yard. In 1988, the family piled into their mini-van and drove to Whitehorse to attend an IRLY AGM; this was Tess' first trip to the North. Little did she know that 15 years later, she would catch the "northern bug" while working summers at the Arctic Institute on Kluane Lake. While figuring out what she wanted to do when she grew up, Tess lived in Samsun, Turkey for a year on a Rotary Youth Exchange, taught English for two years at a high school in Hamamatsu, Japan, spent a semester in Copenhagen, Denmark and traveled to as many neighbouring countries as possible. When not traveling, Tess enjoys volunteering with various organizations, hanging out with friends, hiking, swimming, golf, skiing, curling, knitting and cooking.



Tess was drawn to the North by its beauty and down-to-earth people. She is happy to finally call Whitehorse "home" and looks forward to becoming part of the community.

EXCESS PROFESSIONAL LIABILITY INSURANCE

As the value of client matters and transactions increase over time, so too does the need to secure adequate levels of errors and omissions insurance. The Canadian Lawyers Insurance Association (CLIA) Voluntary Excess Program (VEP) has been protecting subscribing firms in the Yukon legal community for over 20 years, and continues to be the leading provider of excess errors and omissions insurance in the territory.

The CLIA VEP program is proud to be a not-for-profit plan designed by lawyers for lawyers, with stable coverage and rates during both "soft" and "hard" market conditions. Firm-wide coverage includes partners, employed lawyers, professional corporations and service/management companies, as well as former partners and employed lawyers for services rendered prior to retirement.

Rates for July 1, 2010 are as follows - please keep in mind that there may be further reductions based on a firm's historical participation if claims experience allows for a distribution of existing profit-sharing coming out of prior years. These reductions, if available, will be applied against these rates:

LIMITS	CLIA	PREMIUM DISCOUNT	YOU PAY
\$1M xs \$1M	\$381	\$46	\$335
\$2M xs \$1M	\$560	\$67	\$493
\$3M xs \$1M	\$654	\$78	\$576
\$4M xs \$1M	\$693	\$83	\$610
\$9M xs \$1M	\$971	\$117	\$854

It is important to note that lawyers who have retired from practice continue to be responsible for work performed prior to retirement. Now available is the option for retired lawyers to purchase excess coverage on an individual basis, to address any unforeseen circumstances that may develop after retirement, provided they are retiring as a current member of CLIA's VEP, either as a sole practitioner or as a member of a firm.

CLIA VEP applications are available at www.clia.ca.

YUKON LAW FOUNDATION UPDATE

Deana Lemke, Yukon Law Foundation Executive Director

The Law Foundation puts out a call for grant proposals twice a year — in the spring and fall. The foundation's mandate is to fund law-related activities and programs, such as legal education, legal research, law reform and the maintenance of the Public Law Library.



Deana Lemke

The Law Foundation's income is derived solely from interest it receives on Yukon lawyers' pooled trust accounts (IOLTA). That interest is then used to fund grants and scholarships for Yukon students and projects. As we all know, interest rates have experienced a significant drop in the past couple of years and the Law Foundation's income has been severely affected by the extremely low interest rates.

Interest on trust accounts will be approximately \$22,000 this year, which has resulted in the Board having to make use of funds in its limited reserve.

GRANT RECIPIENTS

This spring and fall, six grants were approved, for a total of \$90,832 in funding, as follows:

- Law Library Society of the Yukon: \$33,461 for subscriptions and new textbooks
- Fetal Alcohol Syndrome Society Yukon: \$33,040 for the project *FASD Research — the Crossover Between Victim and Offender*
- Yukon River Inter-Tribal Watershed Council: \$3,500 for the project *Legal enforcement of water quality standards in the Yukon River Watershed*
- Yukon Legal Services Society: \$15,000 to provide legal services in the area of poverty law
- Yukon Learn Society: \$2,822 for Phase 1 of the project *Raising Awareness About the Law*

The next call for grant applications will be in the spring of 2011.

SCHOLARSHIP AWARDS

Scholarship applications are invited prior to each academic school year to assist students to continue their education in law or law-related studies.

COPING WITH STRESS, ANXIETY, FAMILY PROBLEMS, ALCOHOL OR DRUGS?

YLAP offers each Law Society member up to five hours of private and confidential professional counselling for these and other personal or work-related difficulties.

The service is provided by Nimco & Co., and is available
24 HOURS A DAY, 7 DAYS A WEEK.

**YUKON LAWYERS
ASSISTANCE PROGRAM**
CALL 668-4058 ANY TIME.

The Law Foundation also provides funding to assist Yukon articling students who need to travel outside the territory for their Professional Legal Training Course.

This year, the Board was pleased to award scholarships in the total amount of \$10,000 to the following Yukon students:

- Bhreagh Dabbs
- Monica Fras
- Sue Kemmett
- Kelly McGill
- Krista Mooney
- Simukai Mutiwekuziwa
- Karmen Scott-Lisaingo
- Matthew Nefstead
- Joie Quarton
- Kim Cholette

In addition, funding was provided to articling students Hana Boye, Julie DesBrisay, Tess Lawrence and Benjamin Lochridge to assist with Professional Legal Training Course costs.

Visit our website www.yukonlawfoundation.com for more information or to download grant and scholarship applications or contact Deana Lemke, Executive Director by calling 667-7500, faxing 393-3904 or e-mailing execdir@yukonlawfoundation.com.

WITHDRAWAL OF COUNSEL IN CRIMINAL MATTERS – IMPLICATIONS OF *R.v. CUNNINGHAM*

In the recent case from the Yukon, *R. v. Cunningham*, 2010 SCC 10, the Supreme Court of Canada determined that, in a criminal matter, a court has the authority to require counsel seeking to withdraw from a case to continue to represent an accused when the reason for withdrawal is non-payment of fees. With respect to this aspect of withdrawal, this is a reversal of the law in British Columbia stated in *Re Leask and Cronin* (1985), 66 BCLR 187 (SC), which determined that, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, subject to the court's authority to cite a lawyer for contempt if there is evidence the withdrawal was done for some improper purpose.

While the Supreme Court emphasized in *Cunningham* that refusing to allow counsel to withdraw in these circumstances should truly be a remedy of last resort to prevent serious harm to the administration of justice, it also opined:

If withdrawal is sought because of nonpayment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power. In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

The Ethics Committee expects Chapter 10, footnote 2 of the *Professional Conduct Handbook* to be amended to refer expressly to *R. v. Cunningham*. However, counsel have always been bound by Chapter 10, Rule 7 which states:

A lawyer must not withdraw because the client has not paid

the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

In the committee's opinion, counsel's obligation has not changed because of *Cunningham*; Rule 7 has always prevented counsel from withdrawing when it is unfair to a client to do so. What has changed is that it is now clear the court has the power, in certain circumstances, to refuse to permit counsel to withdraw from a criminal case. Such a refusal may occur if the proposed withdrawal results from the client's failure to comply with the financial terms of the retainer, and if the court is of the opinion that the withdrawal will leave the client with insufficient time to retain and instruct new counsel and the client's inability to do that will cause serious harm to the administration of justice. The Law Society continues to have power to discipline lawyers for breaches of Rule 7.

HOW CAN LAWYERS COMPLY WITH RULE 7?

A lawyer who proposes to withdraw because of a client's failure to comply with the financial terms of a retainer should take the following steps:

- Advise the client in writing the lawyer will withdraw from the case unless the client provides the necessary retainer by a certain date. The date must be one that leaves the client sufficient

time to retain other counsel if the client is unable to come up with the necessary funds, or

- Act for the client in a limited capacity only, and do not go on the record for the client until the client has provided the necessary retainer for the trial or other matters requiring representation. When acting in a limited capacity for a client, a lawyer must comply with Chapter 10, Rule 10 of the *Professional Conduct Handbook*, which states:

A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

WHAT CAN LAWYERS SAY TO THE COURT?

In the Cunningham decision, it was determined that, if a lawyer's reason for withdrawal goes to the merits of the case or would cause prejudice to the client, solicitor-client privilege may attach to the information. In that circumstance, a lawyer may not disclose it to the court. If the reason for withdrawal does not involve these considerations, a lawyer may give the following explanations to the court:

If the lawyer's withdrawal is for ethical reasons

If a lawyer seeks to withdraw from a case because the lawyer is in a conflict, has received instructions from the client that require the lawyer to cease acting or for other reasons relating to the lawyer's ethical obligations, the lawyer may advise the court that he or she is withdrawing "for ethical reasons."

If the lawyer's withdrawal occurs under Chapter 10, Rules 2 or 3

In other circumstances, if the lawyer is permitted to withdraw under Chapter 10 of the *Professional Conduct Handbook*,

but the circumstances do not engage the lawyer's ethical obligations, the lawyer may be permitted to advise the court that the lawyer's reasons for withdrawing do not involve the lawyer's financial arrangements with the client.

Such circumstances could occur under Chapter 10, Rules 2 or 3, which permit a lawyer to withdraw when there has been a serious loss of confidence between lawyer and client and the withdrawal is not unfair to the client or done for an improper purpose.

A lawyer may amplify this explanation by providing other non-confidential information to the court in support of the withdrawal. For example, a lawyer may be compelled to withdraw because another trial might have lasted longer than anticipated or for other reasons related to the lawyers workload.

If the lawyer's withdrawal is for non-payment of fees

If a lawyer seeks to withdraw because a client has failed to pay the lawyer's fees, the lawyer must disclose that information to the court when asked to explain the withdrawal.

WHAT IF A LAWYER CANNOT DISCLOSE THE REASON FOR WITHDRAWAL?

If a lawyer is unable to answer a court's request for the reason for withdrawal because the reason goes to the merits of the case or the client will be prejudiced by disclosing the information, the lawyer should simply advise the court of that fact. A lawyer who expects to be in such a position may want to consult a Benchler or Law Society practice advisor.

WHEN MUST COUNSEL APPEAR IN COURT TO WITHDRAW FROM A CRIMINAL MATTER?

If counsel's withdrawal raises no issue about adjournment of the case, counsel may withdraw from a criminal case by notifying the client, the Crown and the

appropriate registry of the withdrawal. If the withdrawal may raise such an issue, however, counsel should attend at court to withdraw.

Further analysis of *R. v. Cunningham* can be found in the Case Comment by David Layton in the Spring 2010 issue of *The Verdict*, published by The Trial Lawyers Association of BC. The article may be obtained from the Trial Lawyers Association by contacting Moya Larkin at moya@tlabc.org.

Note:

In September 2010, the Professional Conduct Handbook, Chapter 10 was amended to add footnote 3, referencing the Cunningham decision.