

News

Honours

■ **J. Douglas Cunningham** and Ontario Lieutenant Governor **David Onley** have been presented with the degree of Doctor of Laws, *honoris causa* (LLD), at the Law Society of Upper Canada's Call to the Bar ceremonies in Ottawa and Toronto earlier this month. Cunningham, former Associate Chief Justice of the Superior Court of Justice and commissioner of the City of Mississauga Judicial Inquiry, and Onley, a tireless accessibility advocate on behalf of people with disabilities, received the honours in recognition of outstanding achievement in law and the cause of justice.

Moves

■ Former Law Society of Upper Canada treasurer **Gavin MacKenzie** has joined the Toronto office of *Davis LLP* as a litigation partner. MacKenzie, formerly at Heenan Blaikie, is a Fellow of the American College of Trial Lawyers with over 36 years of professional experience.

■ Business law firm *Lawson Lundell* has added five associates to their offices in western Canada. In Vancouver: **Aaron D. Lightman**, previously with Farris, Vaughan, Wills & Murphy, joins with a practice focused on corporate finance & securities, and M&A; **Amaan Gangji**, previously with Clark Wilson, practises in the areas of commercial law and M&A, and **Jon Buysen**, formerly with Stikeman Elliott, joins the litigation department. In Calgary: **Shailaz Dhalla**, previously with the Alberta Utilities Commission, practises in the areas of public utilities and litigation, and joining the firm's Yellowknife office is litigation lawyer **Glen Rutland**, formerly with the Department of Justice of the N.W.T.

Appeal judge rules for \$1 million payout

B.C. widow of man killed in charter crash entitled to insurance benefit

GEOFF KIRBYSON

A British Columbia Court of Appeal judgment that awarded the widow of a man killed in a 2008 plane crash \$1 million in an insurance settlement points to the need for careful drafting of a contract's fine print.

In a case of one judge's clarity being another's ambiguity, Justice Kathryn Neilson reversed a 2012 lower-court decision and ruled that the fact that the Pacific Coastal Airlines Ltd. plane carrying Mark McLean and his co-workers from Seaspans International Ltd. had been chartered for private use didn't detract from the fact that it was a "common carrier" available to the public, and therefore covered by the victim's policy. McLean, a log-barge loader, was among those killed when the plane crashed en route from Port Hardy to Chamiss Bay.

The year before the ill-fated flight, he bought a group multi-benefit coverage policy from Canadian Premier Life Insurance Company that, for a premium of \$14.05 a month, provided an accidental death benefit of \$25,000 and a rider providing for a \$1-million payment if he died while travelling in a "common carrier."

"It is clear the aircraft that crashed was licensed, provided and operated to transport the general public...I am satisfied it is unclear whether it had to be so engaged at the time of the accident, and this ambiguity must be resolved in favour of the appellant," Justice Nielson wrote.

Last year, a B.C. Supreme Court judge took the polar opposite view, saying because the aircraft had been chartered by Seaspans and wasn't operating on a regu-



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Alexander Holburn
Beaudin + Lang

larly scheduled service, it was not a common carrier. In *McLean v. Canadian Premier Life Insurance Co.* [2012] B.C.J. No. 198, Justice Keith Bracken denied Debra McLean's claim for \$1 million, calling the words of the contract "clear and unambiguous."

David Asper, a lawyer, businessman and former law professor at the University of Manitoba, said both levels of court took a very linear approach to the case and reached completely different conclusions.

"It really comes down to the principle of interpreting the language. There's nothing earth-shattering about what (either court) did. They reached different conclusions but they're trying to apply the same principles of law," he said.

This sort of case is how contracts develop and evolve over time and how the common law gets applied and evolves as well, he said.

"When you have ambiguity, it goes against the drafter of the document," he said. "Draft contracts with language that clearly and comprehensively states the intent of the parties, that's the message."

Asper said the case identifies deficiencies in the language of a contract, and he expects news of the decision will spread quickly.

"Insurance companies will likely review all of their policies and tighten up the language to the extent that they want to exclude that coverage, or it may be included but your premium goes up," he said.

On the flip side, workers who are constantly being shuttled around to remote places on chartered aircraft definitely will want to ensure they have coverage, he said.

The decision does not break new ground regarding the general principles of contractual interpretation, according to Krista Prockiwi, Vancouver-based associate counsel at Alexander Holburn Beaudin + Lang. The judge's detailed focus on the policy wording and reluctance to imply terms highlights the importance for insurers of careful policy drafting, she said.

"It does highlight that it can be a costly mistake for insurers to not be concise in their policy wording and attempt to imply terms which are not clearly set out. As illustrated in this case, the failure to have an express provision can result in an ambiguity, which will be interpreted in favour of the insured," she said.

"(The judge) noted that the insurer could easily have either created a clear temporal requirement for each of the required definitional elements of 'common carrier' or created a clear exclusion for charter flights and that it must bear the consequences of its failure to do so," she said.

While the decision may not necessitate a complete global rewrite of insurance contracts, she said it's always a good idea for insurers to take a close, critical look at their policies.

"If they want a disjunctive provision found in one part of the policy to apply to a separate provision, they should clearly spell this out," she said.

Asper said he doesn't believe the tragedy of the McLean case impacted the decision to any degree but it will cause many people to think twice about life insurance.

"I don't think the nature of the incident is relevant. You're just applying contract law in a fairly clinical way," he said.

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