

Case Name:

**McNaughton Automotive Ltd. v. Co-operators General
Insurance Co.**

Between

**McNaughton Automotive Limited, (applicant), and
Co-operators General Insurance Company, (respondent)**

And between

Mrozinski, (plaintiff), and

Allianz, (defendant)

James, (plaintiff), and

AXA, (defendant)

Mathews, (plaintiff), and

Belair, (defendant)

O'Donnell, (plaintiff), and

CAA, (defendant)

Jory, (plaintiff), and

Canada Life (Primmum), (defendant)

Veley, (plaintiff), and

CGU, (defendant)

White, (plaintiff), and

Citadel, (defendant)

Ross, (plaintiff), and

Coseco, (defendant)

D. Polowin R.E. Ltd., (plaintiff), and

Dominion, (defendant)

Big Canoe, (plaintiff), and

Economical, (defendant)

Johnston, (plaintiff), and

Federation, (defendant)

Beh, (plaintiff), and

Federated, (defendant)

Gross, (plaintiff), and

Guarantee, (defendant)

Farquhar, (plaintiff), and

Liberty Mutual, (defendant)

Somerset, (plaintiff), and

Lloyd's, (defendant)

**Venturi, (plaintiff), and
Lombard, (defendant)
Sharma, (plaintiff), and
Motors, (defendant)
927417 Ontario Inc., (plaintiff), and
Old Republic, (defendant)
Marra, (plaintiff), and
Personal, (defendant)
McAlister, (plaintiff), and
Pilot, (defendant)
Segnitz, (plaintiff), and
Royal & Sun Alliance, (defendant)
Empke, (plaintiff), and
Security National, (defendant)
Hornick, (plaintiff), and
TD General, (defendant)
Hayner, (plaintiff), and
Trafalgar, (defendant)
Duclos, (plaintiff), and
Wawanesa, (defendant)
Morreel, (plaintiff), and
York Fire, (defendant)
Shaw, (plaintiff), and
Zurich, (defendant)**

[2003] O.J. No. 6040

10 C.C.L.I. (4th) 273

49 C.P.C. (5th) 383

126 A.C.W.S. (3d) 393

Docket Nos. Y30273/99, 20688/A1, 37165, 02-CV-226093CM,
20908/A1, 51966/2001, 01-555, 37278, 02-CV238158CP,
01-CV-18969, 39025, 20996/A1, 39180, 02-CV-238156CP,
21091/A1, 993/02, 20998/A1, 01-CV-217562CP, 31766,
02-CVC-226520CP, 38733, 37188/01, CP-01-132990,

02-GD-53485, 995/02, 20809/A1, 37202, 01-CV-213320CP

Ontario Superior Court of Justice

R.J. Haines J.

Heard: October 20 and 21, 2003.

Judgment: November 4 2003.

(7 paras.)

Counsel:

Michael McGowan, M. Paul Downs, Gabrielle Pop-Lazic for Applicant, Plaintiffs, Mrozinski, James, O'Donnell, Jory, Veley, White, Beh, Venturi, Sharma, 927417 Ontario Inc., McAlister, Segnitz, Empke, Hornick, Duclos, Morreel, Shaw

T.H. Rachlin, Q.C., Michael Eizenga for Respondent

Michael McGowan, M. Paul Downs, Gabrielle Pop-Lazic, A.M. Mullins for Plaintiff, D. Polowin R.E. Ltd.

Michael McGowan, M. Paul Downs, Gabrielle Pop-Lazic, R.D. Elliott for Plaintiffs, Big Canoe, Johnston, Farquhar

K.M. Baert for Plaintiffs, Mathews, Ross, Gross, Somerset, Marra, Hayner

E. Cherniak, Q.C., K. Ross, I. Leach for Defendants, Allianz, AXA, Personal, Pilot, Royal & Sun Alliance, Trafalgar

P. Martin for Defendants, Belair, Wawanesa

H.B. Kohn for Defendants, CAA, Federated

T.P. Charney for Defendants, Canada Life (Primum), Cosesco, Security National, TD General

A. Abbott for Defendant, CGU

G. Adair, Q.C. for Defendant, Citadel

J. Champion for Defendant, Dominion

A.L.W. D'Silva for Defendants, Economical, Federation, Liberty Mutual

T.R. Shillington for Defendant, Guarantee
 G. Mew, K.P. Earl for Defendant, Lloyd's
 R. Potts, M. Selznick for Defendant, Lombard
 J.C. Blouin for Defendant, Motors
 B.R. Mitchell for Defendant, Old Republic
 P. Tushinski for Defendant, York Fire
 L. La Horey for Defendant, Zurich

1 R.J. HAINES J.:-- The attached order together with form of notice are approved. The orders can, with appropriate adjustments, be issued in each of the following actions:

Plaintiff	Defendant	Court File No.	Counsel for Plaintiff	Counsel for Defendant
O'Donnell	CAA	20908/A1	M. McGowan, M.P. Downs & G. Pop- Lazic	H.B. Kohn
White	Citadel	37278	M. McGowan, M.P. Downs & G. Pop- Lazic	G. Adair, Q.C.
D. Polowin R.E. Ltd.	Dominion	01-CV-18969	M. McGowan, M.P. Downs G. Pop- Lazic & A.M. Mullins	J. Champion

Big Canoe	Economical	39025	M. McGowan, M.P. Downs G. Pop- Lazic & R.D. Elliott	A.L.W. D'Silva
Beh	Federated	39180	M. McGowan, M.P. Downs & G. Pop- Lazic	H.B. Kohn
Venturi	Lombard	20998/A1	M. McGowan, M.P. Downs & G. Pop- Lazic	R. Potts & M. Selznick
McAlister	Pilot	38733	M. McGowan, M.P. Downs & G. Pop- Lazic	E. Cherniak Q.C., K. Ross & I. Leach
Duclos	Wawanesa	20809/A1	M. McGowan, M.P. Downs & G. Pop- Lazic	P. Martin
Morreel	York Fire	37202	M. McGowan, M.P. Downs & G. Pop- Lazic	P. Tushinski
Matthews	Belair	02-CV-	K.M. Baert	P. Martin

226093CM

2 Counsel for the defendants have submitted that the orders for certification should not issue until all of the motions for judgment have been heard and all of the actions capable of certification have been certified. They suggest that this course of action would be consistent with the management of these matters to date and would avoid the actions going forward piecemeal. It seems to me, at this stage, that these are submissions that would be better made on the scheduling of the leave applications.

3 It is the position of the plaintiffs that notice to the class should be published forthwith in each action while the defendants submit a single notice relating to all actions should be published but not until the outstanding appeals and motions for judgment have been heard and resolved. The outcome of the appeals which are pending in virtually all of these actions could significantly alter the information to be provided to class members. For example, a successful appeal on the limitation period issue could expand the class substantially. I cannot see any advantage in ordering publication of any notice until these issues are resolved. Indeed, it seems to me, that publication at this time could very well be counterproductive since any changes to the structure of the class that may result from the appeals could require further notices and create potential confusion among class members. I am, therefore, of the view that there should be a single notice and publication should await the outcome of the appeals.

4 The primary purpose of providing notice is to advise members of the class that the action can be certified and to give them an opportunity to opt out if so advised. In my view, having due regard to the nature of the claims and the relatively modest amounts at stake for each class member, the publication ordered is appropriate and sufficient. I have also determined that efficiency dictates the appointment of one person to receive all "opt out" coupons.

5 The last matter I wish to address in relation to the settlement of the order for certification is the submission by certain defence counsel that no order for certification should issue because the plaintiffs have failed to produce a workable plan for the advancement of the action. In my view, the plaintiffs have produced a satisfactory litigation plan as supplemented by the addendum filed since reasons were released August 14, 2003.

6 In those reasons, I came to the following conclusion at para. 41:

In these cases, there are potentially thousands of relatively modest claims that arise from a long-standing practice that was common throughout the insurance industry. I agree with the submission of the plaintiffs that this case is, in those respects, the very type of case that the CPA was intended to embrace. As indicated above, I am satisfied that the plaintiffs have demonstrated that these are proper cases for certification as class proceedings. The motions are therefore granted and these actions are certified as class proceedings conditional on the formulation of a workable plan.

7 In holding that "these actions are certified as class proceedings conditional on the formulation of a workable plan" I was simply referring back to the comments I had made earlier in my reasons at paras. 36 and 37 where I was suggesting certification might be in jeopardy if the individual issues could not ultimately be dealt with in a summary manner under s. 25 of the Class Proceedings Act, 1992 S.O. 1992, c.6 once the common issues had been determined.

Application granted.

Ontario Superior Court of Justice
The Honourable Mr. Justice Haines
Thursday, the 14th Day of August, 2003.
BETWEEN: McNaughton Automotive Limited, Applicant
-and
Co-operators General Insurance Company, Respondent
Proceeding under the Class Proceedings Act, 1992

ORDER
(Certification)

THIS MOTION, made by the Applicant for certification was heard in September 2002, at the Court House, 80 Dundas St., London, Ontario.

ON READING the affidavits of Gary McNaughton, Sharon Bros, Michael Christensen, and Glenn Gibson, filed, and the cross examinations of Sharon Bros, and on hearing the submissions of counsel for the Applicant and the Respondent,

AND HAVING REGARD to the orders made in this proceeding on July 14, 2003 relating to jurisdiction, applicable limitation periods, OPCF 43 Endorsements, and the meaning of "actual cash value";

Certification

1. THIS COURT ORDERS that this proceeding be maintained as a class proceeding on behalf of the following class (herein after referred to as the "Class"):

All persons:

- (a) who leased or owned a motor vehicle which was insured against loss or damage by Co-operators General Insurance Company through an insurance policy issued in Ontario, and
- (b) who suffered a total loss of the motor vehicle by reason of collision, or

- vandalism between January 1, 1994 and September 30, 2003, and
- (c) to whose claim Co-operators General Insurance Company applied a deductible and failed to pay the actual cash value upon taking title to the salvage pursuant to statutory condition 6(7) of O.Reg. 777/93; and
 - (d) whose claim is not barred by operation of the applicable limitation period, being one year from the date that the respondent took title to the salvage and in the event of fraudulent concealment, one year from such time as the insured discovered the wrongful conduct or, with the exercise of reasonable diligence, ought to have discovered it.

with respect to the following claims against the Respondent:

- (a) compensatory damages in the sum of \$50 million;
- (b) punitive and exemplary damages in the sum of \$100 million;
- (c) a declaration that the respondent has violated statutory condition 6(7);
- (d) prejudgment interest pursuant to the Courts of Justice Act;
- (e) costs on a substantial indemnity scale, together with GST;

and

- (f) such further and other relief as the court deems just.

2. THIS COURT ORDERS that, subject to further order of the court, McNaughton Automotive Limited be and hereby is appointed as the representative Applicant on behalf of the Class and that M. Paul Downs and McGowan Elliott & Kim LLP be and hereby are appointed as Counsel for the Class.

Common Issues

3. THIS COURT ORDERS that the issue of liability for compensatory damages for breach of statutory condition 6(7) and the issue of liability for punitive damages be common issues for the Class.

Opting Out

4. THIS COURT ORDERS that a class member may opt out of the class proceeding by delivering to M. Paul Downs, Barrister and Solicitor, the Opt Out Coupon contained in Schedule "A" or some other legible, written, signed request to opt out containing substantially the same information as the Opt Out Coupon on or before the expiry of the 60 day after the date the notice is published under paragraph 7 below.

5. THIS COURT ORDERS that Class Members may not opt out after the expiry of the 601 day after the date the notice is published under paragraph 7 below.
6. THIS COURT ORDERS that M. Paul Downs, Barrister and Solicitor, serve on the Respondent and file with the court, within 74 days after the date the notice is published under paragraph 7 below, an affidavit exhibiting a list of persons who have opted out of the class proceeding.
7. THIS COURT ORDERS that notice be provided to the Class by the Respondent causing notices substantially in the form attached hereto as Schedule "A" to be published once in The Globe and Mail and The Toronto Star on a date to be determined by this Court.
8. THIS COURT ORDERS that the cost of publishing the aforesaid notice shall be apportioned between and borne equally by the representative Applicant and Respondent subject to further order of this Court.

Costs

9. THIS COURT ORDERS that the Respondent forthwith pay the Applicant its partial indemnity costs of the certification motion, including cross-examination costs attributable to the issue of certification in an amount to be agreed by the parties or fixed by this Court.

THIS ORDER BEARS INTEREST at the rate of percent per year commencing on , 2003.

Schedule "A"

(to order)

ONTARIO SUPERIOR COURT OF JUSTICE

Notice published under the Ontario Class Proceedings Act

TO ALL PERSONS WHOSE AUTOMOBILES
HAVE BEEN INSURED BY THE FOLLOWING INSURANCE
COMPANIES:

(LIST OF DEFENDANT INSURERS)

If you owned or leased a motor vehicle which was insured by any of the above-insurers pursuant to a policy of insurance issued in Ontario, and which was lost or damaged beyond repair by reason of collision or vandalism, this notice will be important to you.

This notice is published by order of the Honourable Mr. Justice Haines of the Superior Court of Justice in Ontario and explains:

1. The lawsuits;
2. Who might benefit from the lawsuits;
3. Your right to choose whether or not to be part of the lawsuits;
4. Financial consequences to you;
5. Other matters.

1. The Lawsuits

The insurance companies named in this notice have been sued for damages for allegedly subtracting a deductible and failing to pay you the actual cash value of your damaged vehicle when it paid your claim and took possession of your wrecked vehicle. Each claim is based on a provision of the insurance policy regarding the salvage of motor vehicles.

In these lawsuits both compensatory and punitive damages are claimed against the defendant insurers. On August 14, 2003 Justice Haines certified these cases as class proceedings.

An order certifying a class proceeding is not a determination of the merits, and questions of liability and entitlement to damages, if any, have yet to be decided by the Court.

Further proceedings will take place to determine whether each defendant insurer should pay damages to the class members. The claims are based on the alleged failure of each defendant insurer to pay the proper amount in cases where a vehicle was damaged beyond economical repair.

2. Who might benefit from the case

Justice Haines allowed each representative plaintiff or applicant in these actions to represent the following class of people (the "Class) in what is known as a "class proceeding" lawsuit:

All persons:

- (a) who leased or owned a motor vehicle which was insured against loss or damage by any one of the subject insurers through an insurance policy

- issued in Ontario; and
- (b) who suffered a total loss of the motor vehicle by reason of collision, or vandalism between January 1, 1994 and September 30, 2003; and
 - (c) to whose claim a subject insurer applied a deductible and failed to pay the actual cash value upon taking title to the salvage pursuant to statutory condition 6(7) of O.Reg. 777/93; and
 - (d) whose claim is not barred by operation of the applicable limitation period, being one year from the date that the subject insurers took title to the salvage and in the event of fraudulent concealment, one year from such time as the insured discovered the wrongful conduct or, with the exercise of reasonable diligence, ought to have discovered it.

The application of a limitation period means a person with a claim is only allowed to pursue that claim if it is made within a certain period of time after the loss occurs. In these cases that period of time is ordinarily one year. Therefore, only those losses which occurred within a period of one year preceding the commencement of the lawsuit and those that occurred thereafter but before September 30, 2003 will be allowed unless the doctrine of fraudulent concealment applies. In that event, a claim that arose as long ago as January 1, 1994 could be allowed if it is shown that the defendants wrongly concealed the insured's entitlement pursuant to the provisions of statutory condition 6(7) and the subject policy of insurance. The commencement date for each of the subject actions is listed next to the name of the defendant insurer in Schedule "A" to this notice.

3. Your right to choose whether or not to be part of the lawsuit

(a) How to be Included in the Class

If you are a person falling within the Class described above, then you will automatically be included in the Class unless you opt out of the Class.

(b) How to be Excluded from the Class

To opt out of the Class you must fill out the coupon below and send it to M. Paul Downs, Barrister and Solicitor, one of the lawyers for the Class. The deadline for opting out is [60 days after the same date publication of the newspaper notices]. If your written request to opt out is not received by that date, you will remain a member of the Class.

4. Financial consequences for you

In each class proceeding lawsuit, the court will determine whether class members are entitled and, if so, the amount of any entitlements.

If a particular class proceeding lawsuit is not successful on the common issues, the members of the relevant Class will not be responsible for any legal costs of their class proceeding lawsuit and will

not have any other financial obligations because of that class proceeding lawsuit. If individual hearings are required, class members may, if unsuccessful, be responsible for the costs relating to their individual hearing.

All members of the Class who do not opt out of their class proceeding will be bound by the judgment. This means, for example, that after the lawsuit is over you could not start your own lawsuit against your defendant insurer for the same claims.

5. Other matters

The individuals and corporations who have brought these lawsuits have retained, respectively, the law firms indicated below to represent them and the Class in each indicated lawsuit. The law firms will be paid legal fees only if the lawsuit is successful. If the lawsuit is successful, the legal fees requested will be no more than 25% of the amounts recovered plus GST and some or all of any legal costs awarded against the defendants. These cases are all financially supported by the Class Proceedings Fund and there will be a levy on any award or settlement funds in this case. The amount of the levy will be 10% of the award or settlement funds plus the amount of financial support paid by the Class Proceedings Fund under s. 59.3 of the Law Society Act, excluding any amount repaid by a plaintiff.

If you wish to participate personally in the lawsuit affecting you, you may apply to the Court for permission to do so.

For further information about the class proceeding lawsuit you may contact:

a. In relation to lawsuits against the following defendant insurers:

M. Paul Downs McGowan
Barrister and Solicitor
489 Talbot Street
London, Ontario
N6A 2S4

Elliott & Kim LLP
Barristers and Solicitors
Suite 1400
10 Bay Street
Toronto, Ontario
M5J 2R8

Attn: Paul Downs
Tel. (519) 679-0063
Fax (519) 663-0799

Attn: Gabrielle Pop-Lazic
Tel. (416) 363-2182
Fax (416) 362-6204

and

b. In relation to lawsuits against the following defendant insurers:

Koskie, Minsky
Barristers and Solicitors
20 Queen Street West
Suite 1900, Box 52
Toronto, Ontario
M5H 3113

Attn: Kirk M. Baert
Tel. (416) 595-2117
Fax (416) 204-2889

Please DO NOT CALL Justice Haines or the registrar of the Court. They will not be able to answer your questions about the lawsuit.

OPT OUT COUPON

To: M. Paul Downs
Barrister and Solicitor
489 Talbot Street
London, Ontario
N6A 2S4

I wish to opt out of the class proceeding against ... please print name of insurance company

... Signature

Name: Please print

Address:

Postal Code:

Telephone:

Note: To opt out this coupon must be properly completed and received at the above address before [60 days after notice published], 2003.

Schedule "A"

Subject Insurer

Lawsuit Commenced

cp/e/qw/qlafr/qlesm