

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT

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Court No.: 500-17-015722-039

DAIMLERCHRYSLER INSURANCE  
COMPANY,

Plaintiff;

c.

ALLIED SYSTEMS (CANADA)  
COMPANY

Defendant;

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**AFFIDAVIT**

I, the undersigned, **Jean-François Lépine**, Attorney-at-law, practicing within the firm **CAIN LAMARRE CASGRAIN WELLS G.P.**, located at 630 René-Lévesque West Blvd., Suite 2780, in Montreal, being duly sworn, solemnly affirm:

1. I am a member of the Barreau du Québec since 1987;
2. My past practice has been focussing on Insurance Law but at times, I have worked on insolvency and bankruptcy files which included an active involvement, between 1998 and 2005, in the winding-up proceedings before the Superior of Court of Quebec in the matter of the liquidation of Kansa International Insurance Company, under the *Winding-Up and Restructuring Act*, R.S., 1985, c. W-11;
3. I do at times appear before the Commercial Division of the Superior Court of Quebec and, though not being a full-fledged bankruptcy specialist, I have acquired knowledge and expertise in the area of Bankruptcy and Insolvency Law in Canada, in addition to my expertise in Insurance Law;
4. I am *inter alia* familiar with stays of proceedings in the context of insolvency proceedings in Canada;
5. I was retained by the Plaintiff, DaimlerChrysler Insurance Company ("DCIC"), DCIC's loss in respect of the theft of two (2) vehicles namely a Jeep Grand Cherokee of the year and model 2003, bearing



serial number 1J4GW58N136556423 and a Jeep Liberty, year and model 2003, bearing serial number J4GL38K63W550506, further to circumstances more fully described in the Amended Motion in Introduction of Action or Statement of Claim dated July 9<sup>th</sup>, 2003, the original French version being attached as Exhibit A-1;

6. Basically, in the said Amended Motion, DCIC alleges that the loss was caused by the negligence of the Defendant's driver or employee, when he failed to drop the vehicles' keys inside a box at the DCIC dealership so to be out of a thief's reach, after he had delivered the two (2) Jeeps in question;
7. The original French version of the Defendant's Statement of Plea, dated August 27<sup>th</sup>, 2003, is attached hereto as Exhibit A-2;
8. Basically, the Defendant is alleging that it has acted in a careful and prudent way and that its driver has committed no fault or negligence having caused any damage to DCIC's dealership;
9. I produce as Exhibit A-3, the computer print-out of the Court record in file 500-17-015722-039 updated to March 13<sup>th</sup>, 2006, showing *inter alia* that the case had been scheduled for Trial and Hearing on December 13<sup>th</sup>, 2005, at 9 O'clock, in room 15.07 of Montreal's Courthouse;
10. On November 17<sup>th</sup>, 2005, DCIC was formally notified, by the Defendant, of its change of legal status under Article 255 C.C.P., as appears from the said notice and the attached Ontario Superior Court documents pertaining to Allied Systems (Canada) Co.'s Notice of Intention to file a proposal to its creditors, attached herewith as Exhibit A-4;
11. The proceedings in the Province of Quebec are therefore stayed by the effect of the Superior Court of Ontario's Stay of Proceedings, as confirmed by Exhibit A-4;
12. On December 8<sup>th</sup>, 2005, DCIC served a motion titled "Amended Motion to communicate the Defendant's insurance policies under articles 2501 Q.C.C. and 2 and 20 C.C.P.", as appears from the original French version and its literal translation to English, both attached herewith as Exhibit A-5;



13. As appears from said Motion, its purpose is/was to obtain copy of the liability insurance policies issued to the Defendant at the time of the event;
14. As appears from said Motion, both the Information Officer, Mr. Ray Godbold of Grant Thornton and his Counsel Mr. Heath Whitely, of Gowlings in Toronto, are refusing and/or are neglecting to voluntarily communicate said policies to DCIC;
15. As a matter of information to this Honourable Court, it is useful to summarize the specific features of the Laws of Quebec concerning disclosure of the defendant's liability insurance policies during a civil liability dispute and the right to continue the proceedings against said liability insurer, once his identity is established;
16. Referring to two (2) Ontario authors, Snowden & Lichty in *Annotated Commercial General Liability Policy*, loose leaf binder updated December 2005, from pages 2-45 to 2-48, it is accurate to say that the injured third person (which includes its subrogated direct damage insurer) can sue both the insured and the insurer in a legal suit for damages instituted in the Province of Quebec;
17. This is the effect of Article 2501 of the *Quebec Civil Code* that reads as follows:

“An injured third person may bring an action directly against the insured or against the insurer or against both.

The option chosen in this respect by the third person injured does not deprive him of his other recourses.”
18. As pointed out by Snowden & Lichty, although the *Civil Code of Quebec* does not provide that the insured or the liability insurer must disclose the policy to an insured third party, once the suit is actually filed, the Court has “at times” ordered the production of the defendant's liability insurance policies;
19. In *Champagne vs. Collège d'enseignement general et professionnel de Jonquière*, [1996] R.J.Q. 2229 (C.A.Q.) the Court of Appeal of Quebec has approved a *sui generis* motion based on Article 2501 Q.C.C. and s. 41 and 57 of the *Interpretation Act*, R.S.Q., c. I-16, for the communication of insurance policies held by a defendant;



20. In the reasons of Mr. Justice Forget, writing for the majority, the Court of Appeal wrote (literal translation):

“I cannot conceive that the legislator has granted a right without having allowed, at the same time, a procedural corresponding remedy to exercise such right; should it be necessary for the purpose of this demonstration, I would refer to sections 41 and 57 of the Interpretation Act: (...)”

as appears from page 4 of the case report, attached herewith as Exhibit A-6;

21. Subsequently, in *Wightman vs. Bankgesellschaft Berlin AG*, Q.A.C. 500-09-003278-967 (December 6th, 1996), the Court of Appeal of Quebec has affirmed the first instance judgment in *Bankgesellschaft Berlin AG vs. Wightman*, [1996] R.R.A. 1215 (C.S. Hon. J. Irving J. Halperin), confirming the right to obtain by writ of subpoena *duces tecum* the liability insurance policies issued to the defendant Coopers & Lybrand in that case;
22. The judgments in the Court of Appeal and in the Superior Court are both attached as Exhibit A-7;
23. As appears from the original English Language reasons of the first instance Justice, the insurance policies of a Defendant are relevant to the issues in dispute and as such, must be disclosed to the Plaintiff if he requests;
24. Amongst other reasons, the Honourable Mr. Justice Halperin correctly points to Article 2500 Q.C.C. which says:
- “The proceeds of the insurance are applied exclusively to the payment of third persons injured.”
25. Adding to Snowden & Lichty’s remarks as to the time limitation for the direct action against the insurer, the Court of Appeal of Quebec in *CGU v. Wawanesa*, rendered on April 4th, 2005, decisively ruled that the legal relationship between the insured and the insurer sued under Article 2501 Q.C.C. is “solidary” or at the very least “*in solidum*”, as appears from the original French version and the English literal translation of the said judgment attached as Exhibit A-8;



26. To my knowledge, “solidarity” and “*in solidum*” liabilities in Quebec Civil Law are somewhat similar to “joint and several” liability, which is already familiar to Common Law lawyers;
27. As a matter of fact, “solidarity” was formerly designated as “joint and several” liability under the Civil Code of Lower-Canada, in force until December 31, 1993;
28. According to *CGU v. Wawanesa*, prescription of the right of action against a defendant’s liability insurer is, in any event, interrupted, as long as the action is taken against the insured within the three-year limitation period;
29. I hereby refer the reader to Ms. Anne Bélanger’s article titled “The Direct Recourse of a Subrogated Insurer”, published in *In Fact and in Law*, Lavery, DeBilley, October 2005, offering a good summary and analysis of the case, attached herewith as Exhibit **A-9**;
30. I note that in *Bankgesellschaft Berlin AG vs. Wightman*, that is before *CGU v. Wawanesa*, the argument of prescription at the discovery stage was, for the reasons stated, dismissed by Mr. Justice Halperin (p. 1218 of the case report);
31. As far as what appropriate proceedings are available to obtain communication of a defendant’s liability insurance policies, I must say that the Supreme Court of Canada, in *Lac d’Amiante Québec vs. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, eventually stated that when the Code of Civil Procedure already provides a remedy, a motion judge is not at liberty to invent or create a remedy different than the one already provided for by the legislator;
32. In light of this Supreme Court of Canada ruling, it is possible that the Courts of Quebec will, one day, reconsider the type of remedy that is currently available to obtain communication of a defendants’ liability insurance policies, since Article 398, al. 1 C.C.P., attached as Exhibit **A-10**, does provide for the compulsory communication by a defendant of a document relating to an issue, which includes as seen in *Champagne vs. Collège d’enseignement general et professionnel de Jonquière*, [1996] R.J.Q. 2229 (C.A.Q.), the defendant’s liability insurance policies. I note that no objection was made as to the form of the Plaintiff’s request, at least during the December 19, 2005 hearing, by either of the two (2) counsel present for the defendant, as discussed below;



33. As a matter of fact, on December 19, 2005, I have presented DCIC's Motion to communicate insurance policies to the Honourable Madam Justice H el ene Lebel of the Superior Court of Quebec;
34. A complete transcript of counsel's representations was obtained as appears from a copy of the transcript and its literal translation filed herewith under Exhibit A-11;
35. It clearly appears from Mtre. Pierre Bazinet's representations, that he was and is still acting under the instructions of a risk manager appointed by a liability insurance carrier;
36. On the same date, December 19th, 2005, the Honourable Madam Justice H el ene Lebel granted the Plaintiff's Motion insofar as its subsidiary or alternative conclusion is concerned, specifically issuing the following Order (literal translation):

"Subsidiarily, suspend the adjudication of this Motion to allow the Plaintiff to address itself to the Superior Court of Ontario *to obtain permission to present this Motion.*"

(my emphasis)

as appears from the official minutes of the hearing and the signed judgment filed as Exhibit A-12;

37. I was present during the argument and I can testify that the Honourable Madam Justice H el ene Lebel, at the outset of the hearing, strongly invited both counsel acting for the Defendant, including Mtre. Julie Fr egeau, at Gowlings, Montreal, to make the necessary efforts towards their respective clients so that they provide DCIC with the requested information;
38. Although the following does not require my testimony, I file herewith as Exhibit A-13 the Honourable Mr. Justice Andr e Denis' French and literal translation of his judgment in the matter of the proposal of Steinberg Inc., referred to in the argument before Madam Justice Lebel, where issues similar to those involved are discussed. It appears from such judgment, that the liability insurer of a debtor should not be allowed to take advantage of a CCAA proceeding to avoid his liabilities towards a third-party victim;



- 39. The Stay of Proceedings issued by the Superior Court of Ontario currently prevents DaimlerChrysler Insurance Company, a legitimate claimant before the Superior Court of Quebec, to either present its motion to communicate insurance policies or to issue a writ of subpoena *duces tecum* to compel the defendants to communicate its liability insurance policies, at least those in force at the time of the loss;
- 40. The purpose of the Motion that will be made before the Superior Court of Ontario (Commercial List) is not to disrupt the debtor's plan of arrangement or reorganization, nor does it have that effect;
- 41. The purpose of this Motion is simply to allow DaimlerChrysler Insurance Company to enforce its procedural right to receive information from the defendant (or from the Information Officer), to eventually enforce its substantive right to sue the Defendant's liability insurer;
- 42. In addition to the above, it is appropriate that only for the purposes of establishing the Defendant's liability and/or to liquidate the Plaintiff's claim against the Defendant, DaimlerChrysler Insurance Company be also authorized by this Court, to continue its proceedings against the Defendant in the Province of Quebec, at the costs and expenses of its liability insurance carrier(s);
- 43. All of the above facts are true;
- 44. All of the statements of law are true to the best of my knowledge and expertise in Quebec Law;

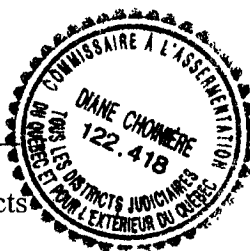
AND I HAVE SIGNED:

Jean-François Lépine

Solemnly affirm before me in Montreal  
this 4<sup>th</sup> day of May, 2006

*Diane Choinière #122418*

Diane Choinière, # 122 418  
Commissioner of Oaths for all judicial districts  
of Quebec and for outside of Quebec.



CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT

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Court No.: 500-17-015722-039

DAIMLERCHRYSLER INSURANCE  
COMPANY,

Plaintiff;

c.

ALLIED SYSTEMS (CANADA)  
COMPANY

Defendant;

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**LIST OF EXHIBITS**

- A-1: Original French version of Amended Motion in Introduction of Action or Statement of Claim dated July 9th, 2003;
- A-2: Original French version of the Defendant's Statement of Plea, dated August 27th, 2003
- A-3: Computer print-out of the Court record in file 500-17-015722-039 updated to March 13th, 2006;
- A-4: Notice and the attached Ontario Superior Court documents pertaining to Allied Systems (Canada) Co.'s Notice of Intention to file a proposal to its creditors;
- A-5: Original French version and its literal translation to English of DCIC's Amended Motion to communicate the Defendant's insurance policies under articles 2501 Q.C.C. and 2 and 20 C.C.P. dated December 8<sup>th</sup>, 2005;
- A-6: Case report of *Champagne c. Collège d'enseignement général et professionnel de Jonquière*;



- A-7:** The judgments in the Court of Appeal and in the Superior Court in *Wightman vs Bankgesellschaft Berlin AG*, Q.A.C. 500-09-003278-967 (December 6<sup>th</sup>, 1996) and *Bankgesellschaft Berlin AG vs Wightman*, [1996] R.R.A. 1215 (C.S. Hon. J. Irving J. Halperin);
- A-8:** Original French version and the English literal translation of *CGU v. Wawanesa*;
- A-9:** Ms. Anne Bélanger's article titled "The Direct Recourse of a Subrogated Insurer", published in *In Fact and in Law*, Lavery, DeBilly, October 2005;
- A-10:** Article 398, al. 1 C.C.P.
- A-11:** Copy of the transcript and its literal translation of counsel's representations;
- A-12:** Official minutes of the hearing and signed Order;
- A-13:** The Honourable Mr. Justice André Denis' French and literal translation of his Order *In the matter of the proposal of Steinberg Inc.*;

Montreal, this May 4, 2006

*Cain Lamarre Casgrain Wells G.P.*  
CAIN LAMARRE CASGRAIN WELLS G.P..  
Attorneys for plaintiff



**COUR SUPÉRIEURE  
DISTRICT DE MONTRÉAL**

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**Court No. 500-17-015722-039**

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**COMPAGNIE D'ASSURANCE  
DAIMLERCHRYSLER,**

Demanderesse-REQUÉRANTE;

c.

**ALLIED SYSTEMS (CANADA) COMPANY**

Défenderesse-INTIMÉE;

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**LIST OF EXHIBITS**

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**ORIGINAL**

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Code : BC-2587

Notre dossier : 102567-3024939

Me Jean-François Lépine  
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