MILINKOVICH V. CANADIAN MERCANTILE INSURANCE CO.[1]

Insurance — Fire — Insured Building and contents destroyed by fire — Proofs of loss — What constitutes delivery — Proofs sent by mail but not received — Mandate of agent — Waiver — Whether action premature — Civil Code, Art. 2478 — The Quebec Insurance Act, R.S.Q. 1941, c.299, S.240(13), (17).

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The notion of the agency of the post office in relation to contracts by correspondence, a point of dispute in the law of Quebec since the case of *Charlebois v. Baril*,[2] was once more applied, and seems now to be established in the jurisprudence, by the recent decision of the Supreme Court of Canada in the case of *Milinkovich v. Canadian Mercantile Insurance*, where the problem was considered in the context of insurance law. Nevertheless, it is respectfully submitted, the theory espoused seems not to be the most consonant with the civil law principles applicable to this topic.

The cause of action arose when the business premises of Milinkovich, the holder of a fire insurance policy from the respondent company, were razed by fire on Feb. 2, 1952 at Arntfield, P.Q. After the investigators' inspection, the appellant signed a declaration and moved to Ontario, where he was visited by a supposed representative; upon receiving no further word from the company, however, Milinkovich informed his lawyer, a Mr. La Marsh, of the facts, and the latter wrote to Canadian Mercantile Ins., requesting information. Blank proof of loss forms were then remitted to La Marsh in Niagara Falls by a Mr. Callaghan, who disclosed that he had been fully empowered by the company to handle the policy claim and directed that the forms be sent to him upon completion.

The advocate, after Milinkovich signed, placed the completed documents in a properly stamped envelope, which he personally mailed to Callaghan. There matters stood until a Montreal lawyer, vested with the interests of the insured, instituted an action against the company to claim the amount of the policy (ten thousand dollars).[3]

In the Superior Court, the company's only plea was that the action was premature because it hadn't received the forms of proof of loss.[4] Casgrain, J.

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[1][1960] S.C.R. 830.

[2][1928] S.C.R. 88.

[3]See *Quebec Insurance Act* R.S.Q. 1941, ch. 299, S. 240, No. 22: an action on the policy must be instituted within one year from the loss.

[4]*Ibid.*, S. 240, No. 13.

found for the plaintiff, reasoning that the proof of loss would not have revealed anything the company didn't already know, and since good faith had to prevail, La Marsh's testimony was accepted.

On appeal,[5] Choquette, J., disagreeing with the Superior Court, held the plaintiff had failed in his obligation. The learned judge noted: "L'obligation de transmettre un document n'est accompli, à mon sens, que si le document est reçu.[6]" St. Jacques, J., dissenting, maintained that the insured had adopted the ordinary means, accepted by Callaghan, to transmit the forms, and, following the precedent of *Magann and Auger*, the insured by posting the letter fulfilled the statutory requirements.[7]

Fauteux, J., who rendered the judgment *per curiam* in the Supreme Court, was of the opinion that the company, *via* its agent Callaghan, *had modified the requirements of delivery* to which it was entitled.[8]

> Dans l'exécution de ce mandat et l'exercice de cette discrétion, Callaghan invitait virtuellement, par sa lettre, Me La Marsh à lui retourner les formules par le service des postes, intermédiaire dont lui-même s'était servi pour les lui envoyer. A cela s'arrêtait l'obligation de Me La Marsh et, à cette obligation, il s'est conformé.[9]

In support of this contention that the mailing of a letter completes the insured's obligation because the post office is the intermediary through which Callaghan wished the forms to be sent, the learned judge quotes *Magann v. Auger*,[10] where, in determining when there was a meeting of minds in contracts entirely negotiated by correspondence, it was decided that the law of Quebec was the same as England's:

> Qu'il n'était pas nécessaire, pour la perfection du contrat que l'acceptance de l'offre soit parvenue à la connaissance de celui qui l'avait faite, et que le contrat s'était formé au moment et au lieu où l'acceptation de l'offre faite par la poste, avait elle-même été mise à la poste.[11]

The principle, however, on which the decision is really founded is expressed in *Charlebois v. Baril*,[12] a Supreme Court case which explained *Magann and Auger*, by affirming

> Que celui qui fait une offre en utilisant le service des postes constitue ce service comme son *agent* pour recevoir l'acceptation et la lui transmettre.[13]

The above theory is endorsed by two classic English cases, *Household Fire Insurance v. Grant*[14] and *Henthorn v. Fraser*.[15]

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[5][1959] C.B.R. 186.

[6]*Ibid.*, 189.

[7]*Ibid.*, 196-197.

[8]By virtue of *Quebec Insurance Act*, *op. cit.*, S. 240, No. 13.

[9][1960] S.C.R. 835.

[10](1902) 31 S.C.R. 186.

[11][1960] S.C.R. 835.

[12][1928] S.C.R. 88.

[13][1960] S.C.R. 835.

[14][1879] Ex.D. 216 at 221.

[15][1892] 2 Ch. 27.

The former embodied the root of the "agency" theory:

> As soon as the letter of acceptance is delivered to the post office, the contract is made as completely and absolutely binding as if the acceptor himself had put his letter into the hands of a messenger sent by the offeror himself as his *agent* to deliver the offer and receive the acceptance.

The latter inserts a subtle variant:

> Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a *means of communicating* the acceptance of the offer, the acceptance is complete as soon as it is posted.

Accordingly, as Anson demonstrates, the risk is on the offeror.[16]

Finally, although in the case under discussion "Il ne s'agit pas ici de la formation d'un contrat . . .", nevertheless, there was "Une modification, *suggérée et acceptée*, aux conditions de son exécution," and since the insured could reasonably consider his requirement satisfied by posting, the appeal is upheld.

The issue in this case clearly revolves around condition No. 13 (b) of the Quebec Insurance Act:

> No. 13 Every person entitled to make a claim under this policy shall observe the following directions: b) he shall *deliver*, as soon after as practicable, as particular an account of the loss as the nature of the case permits.

Fauteux, J. while taking cognizance of the fact that ordinarily the insurer is entitled to the "remise" or delivery of the proofs of loss, which entails actual possession by the insurer, holds that in this case, there was a new agreement (or contract upon a term or condition of an already existing contract) upon the aspect of delivery between the original parties to the contract: the insurer on the one hand, offers the post office as his agent or intermediary[17] to receive the delivery,[18] and on the other hand the insured by the very act of sending the proof of loss forms by mail, accepts the offer to utilize this agent or intermediary and thus entirely complies with condition 13.[19] And, since the learned judge considers that there is an offer and an acceptance, and since the parties communicated *inter absentes*, it is submitted that the case can validly be treated as falling within the four corners of contracts negotiated and entered into by correspondence, for the purposes of this discussion.

Before embarking upon an analysis of this "agreement" or "modification", with deference to the learned judge, a distinction must be made between an agent, which implies a special type of contract, regulated as to its general

[16][1960] S.C.R. 836.

[17]From the cases employed, the learned judge appears to use "agent" and "intermediary" interchangeably.

[18]By instructing La Marsh to "kindly have Mr. Milinkovich complete and sign this form and return to us", and then sending this directive itself by mail.

[19]"Il ne s'agit pas ici de la formation d'un contrat, mais d'une modification, suggérée et acceptée, aux conditions de son exécution."

scope by the Civil Code,[20] and an intermediary, which in this context implies but a common mode or vehicle of transmission of an agreement and which can be wholly passive. Secondly, it is at least open to question whether or not the words and actions of Callaghan could conclusively be interpreted as involving an offer.

The real point of contention, however, for the writer, in this case, is whether the post office can truly be constituted the "agent" of both parties,[21] such that a modification of the requirement of delivery is created by the parties as soon as the completed forms have been mailed. Or, in other words, is the post office deemed to be authorized to receive the acceptance, as the agent of the insurers, so that there is then compliance with the virtual invitation to use the post, making the contract thereby executory?[22]

If the affirmative view is chosen, as is expounded in this case, mailing the forms, it is submitted, not only will be an acceptance of the modification of the delivery, it will be actual delivery into the hands of the insurer.[23] On the other hand, if it is considered that in civil law, the post office cannot be the "agent" of the parties, the indication of the postal service as merely the common intermediary, in the writer's opinion, will or will not affect the insured's obligation to deliver the proofs of loss to the insurer, depending on which theory of formation of contracts by correspondence is adopted; for, since the process of offer and acceptance is undergone *inter absentes*, acceptance of the offer to modify delivery, manifested by actual posting, binds either when this assent is given (at this moment of posting there is deemed to be a meeting of minds that this posting is sufficient) or when the offeror, Callaghan, is aware of this acceptance *i.e.* that the post office has been utilized, with retroactive effects to the moment of posting (there is considered to be delivery at the moment of posting). However, the distinctive mark in the latter instance is that there is no agreement and no retroactivity if the insurer does not know of the acceptance of his offer, *i.e.* that the post has been utilized, because the proof of loss forms have not reached him; this would then mean the insured's action was premature.

It can now be inquired if the theory of "agency" subscribed to by the learned judge is sanctioned by Quebec law; in this endeavour it is expedient to examine the general principles of contracts by correspondence, the fabric into which the agency theory has been woven.

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[20]Art. 1701—1761 C.C.

[21]As in *Charlebois v. Baril*, which Fauteux, J. quotes to substantiate the court's view of this point.

[22]Save for the requirements of S. 240, No. 17 of the *Quebec Insurance Act*: the loss shall not be payable until sixty days after completion of the proofs of loss unless otherwise provided for by the contract of insurance.

[23]As is ordinarily necessary by S. 240, No. 13 of the *Quebec Insurance Act*: every person entitled to make a claim under this policy shall observe the following directions: a) he shall forthwith after loss give notice in writing to the company; b) he shall *deliver* as soon after as practicable, as particular an account of the loss as the nature of the case permits.

The distinctive feature of contracts by correspondence is to be found in the element of consent, one of the four requisites for any valid contract,[24] which Mignault describes as "l'accord de deux ou plusieurs volontés,"[25] and Baudouin more precisely defines as: "La manifestation extérieure et juridique d'un accord des volontés destinée à créer un contrat."[26]

In addition, there are two stages involved in consent, offer and acceptance:

> L'étymologie du mot "consentir" indique que deux personnes veulent une même chose; l'une d'elle fait une offre, c'est-à-dire déclare vouloir ce qu'on lui propose. Il y a donc deux éléments dans le consentement: l'offre et l'acceptation.[27]

However, whereas the meeting of minds of the parties in the presence of each other can be immediately and reciprocally ascertained by means of speech or a writing, when the parties are apart, the normal psychological process ("Avant de s'unir les volontés se recherchent puis se rencontrent. Jusqu'à cette rencontre, il n'y a et ne peut y avoir de contrat."[28]) is modified to the extent that one of the parties cannot know with incontrovertible certainty that this "rencontre" has been achieved. As a result, various theories have ensued, the principal controversy being whether the acceptance of the offer is sufficient to create the contract (because the will of the acceptor is considered as united to that of the offeror, who is deemed to make a continuing offer, from the moment of acceptance) or whether actual knowledge by the offeror that there has been an acceptance is necessary (for just as the spoken word must be heard, the written word must be seen). It is in connection with the remedy for this disagreement that the concept of "agency" is pertinent.

In the case under discussion, by relying on *Magann and Auger*, the learned judge adopts the expedition theory, *i.e.* that there is consent and formation of the contract at the moment and place where the acceptance of an offer made by post is itself posted. Nevertheless, by embracing also the reasoning of *Charlebois v. Baril*, which explains the *raison d'être* of the above case as being that the post office was the agent to receive the acceptance because

> to make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended or to his authorized agent,[29]

the reception-information theory is endorsed, too, for in law, reception by the agent is reception by the principal, the offeror, and, once received, knowledge

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[24]Art. 984 C.C.

[25]Mignaulr, P. B., *Droit Civil Canadien* (1901), Vol. 5, p. 197.

[26]Baudouin, L., *Le Droit Civil de la Province de Québec* (1953), Montréal, p. 656. See also Mazeaud, *Leçons de Droit Civil* (1955), Paris, Vol. 2, p. 108: "Notre droit positif, s'il considère la volonté interne comme nécessaire, exige cependant que cette volonté, pour produire effet, se manifeste, s'extériorise." And, at p. 109: "seul l'accord de volontés, complémentaires l'une de l'autre, est créateur d'obligations."

[27]Mathieu, J., *Hislop et Bernatz* 3 Q.P.R. 451 at p. 457.

[28]Mignault, *op. cit.*, Vol. 5, p. 197.

[29]*Op. cit.*, Note 12 at p. 89.

is presumed and thus a contract is formed because there is knowledge of acceptance and not because there has been a definitive acceptance.[30]

One can validly conclude then, that in this case, posting is both a definitive acceptance of the modification of the obligation of delivery (expedition theory) and the original delivery required by the policy, since communication to the agent (the post office), the representative of the principal,[31] is deemed to be communication to the principal, Callaghan (reception-information theory). This dichotomy, it is submitted, has arisen because "agent" is not used in its proper civil law sense. Furthermore, it will be shown it is not even the prevalent concept in the English law of contracts by correspondence.

The principal support for the post office as agent derives from the *Household* case and in particular from the judgment of Thesiger, L. J.[32] However, this notion was an attempt to reconcile the formation of contract at acceptance with the need for communication: "I see no better mode than that of treating the post office as the agent of both parties."[33] Yet, in that very case, Baggalley, L. J., swerving from the agency theory, considers that mailing the acceptance forms the contract when the acceptance of such offer by a letter through the post is expressly or impliedly authorized.[34] It is therefore really this latter view which is adopted in *Henthorn v. Fraser*[35] and quoted by the Supreme Court in this case.[36]

By the decision in the *Henthorn* case, therefore, the offeree is not obliged to use the same method of communication as the offeror, (in that case, offer was made by hand and acceptance was sent by mail) and thus, the 'agency theory' explanation of the *Household* case is overruled.[37]

Moreover, Anson admits the artificiality and questionable logic of agency,[38] and in *Henthorn v. Fraser*, Kay, L. J. says of the post office:

> They are agents to convey the communication, but not to receive it. The communication is not made to the post office, but by their agency as carriers.[39]

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[30]Kahn, A., "Contracts by Correspondence" (1959-60) 6 McGill L.J. 98 at p. 119.

[31]Mignault, *op. cit.*, Vol. 8, p. 4. Also, on the same page: "le mandataire, en effet, n'agit et ne parle qu'au nom du mandant et c'est celui-ci qui acquiert les droits et contracte des obligations à l'égard des tiers et non pas le mandataire."

[32]*Op. cit.*, Note 14.

[33]4 Ex. D. 221.

[34]*Ibid.*, 228.

[35]*Op. cit.*, Note 15, at p. 33.

[36]"Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as a *means of communicating* the acceptance of the offer, the acceptance is complete as soon as it is posted."

[37]For a concise exposé of the incompatability of the cases, see Kahn, *op. cit.*, Note 30, at pp. 112-120.

[38]Anson, Sir William, *Principles of the English Law of Contract* (1959), 21st ed., Oxford, at p. 47.

[39]*Op. cit.*, Note 15, at p. 35.

In Chitty's treatise on the Law of Contracts, the following is to be found:[40]

> 1) Therefore when the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a *means of communicating* the acceptance of an offer, whether or not the offer was made itself by post, the acceptance is complete as soon as it is posted—*Henthorn v. Fraser.*
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> 2) *Whether or not* the post or telegraph is to be regarded as expressly or impliedly designated by the offeror as his agent for the purpose of receiving the acceptance, there is no doubt that as he has the privilege of dictating the mode of acceptance, he takes any risk attaching to his option—*Hebb's Case.*
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> 3) A frequent use by particular persons of postal or telegraphic communication for contractual purposes raises by implication a recognition of such methods as being the *medium* agreed upon between them for entering into binding contracts.—*Bruner v. Moore.*

Pollock is even more explicit:

> It is clear that the proposer may specify the mode, at least any reasonable mode, of acceptance; but in most agreements by correspondence the post or telegraph is used as a matter of course; it appears simpler to say that the usual means of communication between parties at a distance are deemed to be authorized by him who opens the correspondence than to call the post office, as some of the earlier cases do, the common agent of both parties.[41]

Finally, Corbin remarks that the theory of agency of the post office has been disproved.[42]

Turning to Quebec law and the Civil Code, art. 1701 is as follows:

> Mandate is a contract by which a person called the mandator, commits a *lawful business to the management of another*, called the mandatary, who by his acceptance obliges himself to perform it. The acceptance may be implied from the acts of the mandatary and in some cases from his silence.

Proceeding from this premise, the post office, it is to be demonstrated, is not an agent in Quebec law.

First, representation, the dominating feature of mandate (agency) presupposes a conscious volition to act for another:

> Il faut qu'il ait agi au nom du maudant et non pas en son propre nom.[43]

But, there must also be knowledge of the agent when he *accepts* the mandate, or there could be no contract ("Il est de l'essence du contrat de mandat . . . que le mandataire, de con côté, ait la *volonté* de s'obliger à faire cette affaire "),[44] and knowledge when he *executes* the mandate he has accepted. The mandatary is bound to exercise in the execution of the mandate reasonable skill and all the care of a prudent administrator.[45] As regards acting for another, this criterion isn't met by the post office, which is strictly regulated as to its own

[40]*Chitty's Treatise on the Law of Contracts* (1947), 20th ed., London, at p. 31.

[41]Pollock, Sir Frederick, *Principles of Contract* (1936), 10th ed., London, at p. 35.

[42](1916-17) 26 Yale L.J. 169 at p. 204.

[43]Mignault, *op. cit.*, Vol. 8, p. 35.

[44]*Oeuvres de Pothier*, Edition Bugnet (1861), 2nd ed., Paris, Vol. 5, p. 179. See also Mignault, *op. cit.*, Vol. 8, p. 14.

[45]Art. 1710 C.C.

procedure and operation.[46] The second point, knowledge of the acceptance of the mandate, is included in the later discussion of the contract of lease or hire of services. Lastly, in execution of the mandate, the post office does not have the requisite knowledge:

> Si je nomme un agent pour recevoir un consentement, il n'a pas exécuté son mandat, s'il a reçu un écrit dont il n'a pas connu le contenu, et il n'y a pas de mandat, s'il n'a pas le droit de le remplir et de prendre connaissance de la lettre. L'objet de la lettre n'est pas atteint tant que son contenu reste secret.[47]

The justification for labelling the contract with the post office as rather one of lease or hire of services, is most lucidly illustrated by Mignault's distinction between a contract of mandate and a contract of lease or hire:

> Celui qui loue son travail ou ses services ne représente pas celui qui accepte ce louage, tandis qu'il n'y a pas de mandat sans représentation.[48]

In another volume he states:

> Pour déterminer si un contrat renferme un louage d'ouvrage ou un mandat, on doit se demander si celui qui travaille ou agit pour autrui, accomplit ou non un *acte juridique*, tel qu'une vente, un achat, un emprunt ou une affaire quelconque. Il y aura louage d'ouvrage toutes les fois que l'acte accompli n'offrira pas ce caractère juridique, et mandat dans les autres cas.[49]

It is, however, the next passage which truly inspects the core of agency and prescribes the exclusion of the post office:

> Or, par ces mots, 'la gestion d'une affaire', on entend évidemment l'accomplissement d'un acte juridique capable de produire des obligations ou de transférer des droits, ou d'en opérer l'extinction, et non pas l'exécution d'un simple ouvrage, quelque noble et quelqu'intellectuel qu'il soit.[50]

Consequently, it is respectfully submitted that the post office does not perform any juridical act, since the contents of the letters with which it is entrusted are unknown to it and so cannot be acted upon and[13] therefore there is no '*gestion*' and no agency. Alternatively, the relation with the post office should be characterized as a lease or hire of services, whereby for a price (stamp), the post office undertakes to do a specific thing,[51] or, utilizing Mignault's standard "*l'exécution d'un simple ouvrage*", *i.e.* convey the mail to the addressee, save for its non-liability in the case of loss. It therefore only assumes the rôle of a hired messenger, as soon as a letter is dispatched, on the terms and conditions set out in the Post Office Act.

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[46]*Post Office Act*, R.S.C. 1952, c. 212, in particular SS. 5 & 6, where the postmaster is given the power to administer, manage, and make regulations for the efficient operation of the post office, and for carrying the purposes and provisions of the act into effect.

[47]Dorion, J., *Association Pharmaceutique de la Province de Québec v. T. Eaton Co. Ltd.* (1931) 50 C.B.R. 482 at p. 485.

[48]Mignault, *op. cit.*, Vol. 8, p. 4.

[49]Mignault, *op. cit.*, Vol. 7, p. 240.

[50]*Ibid.*, p. 240.

[51]Art. 1602 C.C.: "the lease or hire of work is a contract by which one of the parties called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay."

Finally, three articles of the code, although they can neither individually nor collectively refute conclusively the "agency" of the post office, militate against this perspective of the post office. Article 1709 cc. decrees the liability of the mandatary for damages resulting from the non-execution of his mandate; article 1710 states that the mandatary must exercise, in the execution of the mandate, reasonable skill and all the care of a prudent administrator; and art. 1713 says that the mandatary is bound to render an account of his administration. Yet, the *effect* of these three articles, if the post office were agent, would be eradicated by S. 40 of the Post Office Act, to wit:

> Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.[52]

The upshot of this provision[53] would be a substantial diminution of the mandatary's obligations *i.e.* the 'agent' would be excused not only if he were negligent, but also if he did not act at all, a concept diametrically opposed to the idea of '*gestion de l'affaire*' the basic element which goes to the root of agency itself.

In summary, with the rejection of the post office's 'agency' as a valid civil law concept, the issue becomes simply the choice of a theory of formation of contracts by correspondence applicable to the fact situation presented to the court. Since this case held there is a modification of delivery upon posting, the learned judge has opted in favor of the expedition theory, *i.e.* posting entails modification of delivery because the parties are deemed to have agreed that that will constitute definite acceptance binding upon both parties. Accordingly, it is incongruous to cite *Charlebois and Baril* (or *Household Fire Ins. v. Grant*), since they endorse the reception-information theory.[54]

The 'ratio' of the case, then, it is submitted, should be that the insured nas fulfilled his obligation of delivery of the proof of loss forms by posting them, not because the post office is the 'agent' to receive them, but because posting is a binding acceptance of the implied offer by the insurer that mailing suffices to satisfy the obligation of delivery.

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[52] *Op. cit.*, Note 46, S. 40.

[53] If the post office could be an "agent" in civil law.

[54] Kahn, *op. cit.*, at p. 119.