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THE BROKER AS AGENT: THE TWO-HAT SYNDROME

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Article abstract

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II – THE BROKER AS AGENT : THE TWO-HAT SYNDROME [4], by John I.S. Nicholl [5]

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Introduction

Many of the legal difficulties which arise in relation to the professional activities of insurance brokers and agents are the result of the fact that in relation to any particular policy of insurance, a broker or agent may be acting at different times on behalf of the insurer, on behalf of the insured, or on behalf of both, and his allegiance and legal duties may thus change direction many times during the course of a period of coverage. To complicate matters, the broker or agent is often part of a chain which may include as many as three intermediaries between the insurer and the assured, and the different intermediaries in the chain may have different duties and allegiances while they are transmitting information back and forth.

The purpose of this paper is to outline the importance to the broker or agent of determining at any given time on whose behalf he is acting, and to whom his duties are owed, and to focus on the legal issues which arise in analysing the role of the broker or agent as a *go-between.*

The law of mandate

The rights and obligations of any person who agrees to act on behalf of another in connection with a contract of insurance (henceforth *insurance intermediary*) are governed in Quebec law by the law of mandate, which is codified in Articles 1701 and following of the Civil Code. The contract of mandate is among those known as *nominate,* (as opposed to *innominate*), which means essentially that

[4] Allocution prononcée dans le cadre d'un séminaire organisé par la Faculté de droit de l'Université McGill, sous le thème *Le rôle du courtier : nouvelles tendances et responsabilités.*

[5] Me Nicholl est avocat de l'étude Ogilvy, Renault.

in the absence of express provisions to contrary, its contents are as detailed in the Civil Code, and need not be specified by the parties. In other words, the contract of mandate is *ready-made*, and a mandatary (agent) automatically acquires rights and incurs obligations of which he is often only vaguely aware.

In his recent book on Lloyd's (*A View of the Room ; Change and Disclosure*), Ian Hay Davison, the first Chief Executive and a Deputy Chairman of Lloyd's from 1983 to 1986, commented that many of the troubles that Lloyd's had experienced in the early 1980's were a result of the lack of awareness of Lloyd's brokers and members' agents that their actions and responsibilities were governed by the law of agency (mandate). It seems fair to say that this lack of awareness also exists on this side of the Atlantic.

The salient features of the mandate provisions of the Civil Code may be summarized as follows :

i) the acts of the mandatary bind the principal towards third parties, so long as he is acting within his mandate ;

ii) the mandatary must render an account of his actions and any monies he received to his principal ;

iii) the principal is bound to indemnify the mandatary for expenses, obligations and losses incurred in the exclusion of the mandate ;

iv) the mandatary is not personally liable to third parties with whom he contracts so long as he acts in the name of his principal and within his mandate.

In addition to these specific rights and obligations, the role of the mandatary necessarily involves a duty of allegiance to his principal : where in the course of the mandate the mandatary deals with third parties whose interests are *not* those of his principal, it is logical that his duty should require that he defend his principal's interests alone, rather than attempting to act on behalf of more than one party. This duty of allegiance is difficult to reconcile with the fact that Article 1735 of the Civil Code (see below) expressly recognizes that a particular category of mandatary, the *broker*, may act on behalf of both parties to a transaction at once. The nature of the mandate itself may of course require that the mandatary act as a *double*

agent, and in such a case neither principal can complain if the mandatary's role is somewhat equivocal. While this situation is acceptable in theory, however, in practice it is problematic, as when the issue arises it often transpires that although each principal knew that the mandatary was acting in a dual capacity, each principal also expected the mandatary to place *his* interests above those of the other !

The obvious solution to this apparent contradiction between broker's role of *double agent* and the duty of allegiance of the mandatary towards his principal is to say that the broker may only act for both parties *where their interests are not conflicting* ; this is clearly suggested by Mr. Justice Howard in *Ménard vs. Arvisais*, infra, at page 69 :

> ". . . or possibly the agent may act for both in matters in which their interests are not conflicting, and his duty to one is not unconsistent with his duty to the other".

The difficulty is of course to define situations in which the interests of the principals are *not* in conflict or in peril of conflict where their commercial interests clearly differ. This is particularly the case in an insurance context, where it is difficult to see *any* aspect of the relationship between the assured and the insurer (other than mitigation, subrogation or salvage) which does not involve an actual or apprehended conflict.

In insurance, therefore, the fact that a mandatary who is a broker may apparently act on behalf of both insurer and assured at once is a two-edged sword : if the interests of the principals are inevitably in conflict, and one of the principals must necessarily bear any loss caused by actions on the broker's part which favour the other, that same principal will equally certainly sue him for the loss according to the principles of mandate. The conflict of interest has placed him in a position in which he cannot avoid betraying his trust.

It is thus evident that as the conduct of insurance intermediaries is governed by the law of mandate, there is a considerable risk involved where such an intermediary acts for both the assured and the insurer *at the same time*, even though this double role is contemplated by Article 1735 C.C. (see below). Can this problem be avoided simply by arranging matters so that the broker, although he acts for both assured and insurer at various times throughout the life of a particular insurance policy, never actually acts for *both* at any point

in time ? In other words, is breach of the duty of allegiance a function of a coincidence in mandates, or is the notion of conflict of interest broader in scope ?

In matters of legal malpractice there has grown up a doctrine of *institutional conflict of interest* to deal with situations in which, although there is no actual temporal coincidence between the allegiances owed by the lawyer to two parties whose interests are conflicting, the continuing relationship between the lawyer (or his firm) and one of those parties is such as to make it unlikely that the lawyer will be able to give himself whole-heartedly to the representation of the other party. Although it is beyond the scope of this paper to analyze the concept of conflict of interest in an insurance industry context in depth, we submit that it is *not* safe for the insurance intermediary to assume that he can avoid conflicts of interest no matter how often he switches his hats, so long as he never actually wears both at the same instant.

Brokers* and *agents

In applying the law of mandate to an insurance intermediary we encounter a definitional problem. In practice, the terms *agent* and *broker* are often used interchangeably, and even knowledgeable insurance professionals have difficulty in explaining precisely what the difference is between the two concepts, and what are the legal consequences of those differences. The definitional problem is particularly important because the courts have evolved their own ideas about *agents* and *brokers*, and as will be seen below the duties of the intermediary in question may vary considerably according to the label he is given : an *agent* is more likely to be viewed as the mandatary of the insurer, for example, whereas a *broker* is viewed as being a *freelance* whose allegiance varies according to the transaction in question.

In Quebec, the global category is that of *insurance agent.*

The Insurance Act, R.S., c.A-32, defines *insurance agent* in Section 1 i) as follows :

> "Every person who, on behalf of another and for remuneration or on behalf of his employer but not on behalf of a person who, in the field of insurance, offers or enters into only contracts of additional warranty contemplated in paragraph a, transacts the business of

insurance by negotiating for or placing risks, soliciting or obtaining applications for insurance, issuing policies of collecting premiums, *including a special broker contemplated in Section 346 and an insurance broker within the meaning of the Insurance Brokers Act (Chapter C-74)*". (Emphasis ours)

The Act specifies in Section 340 that "notwithstanding any agreement to the contrary, the insurance agent is the mandatary of the insurer when he collects premiums from the insured and when he receives amounts from the insurer intended for the insured or beneficiaries of the insured". Aside from this provision, however, the rights and duties of the insurance agent are defined by the provisions of the Civil Code on mandate : see, for example, *Therrien vs. Dionne* (1978) 1 S.C.R. 884, Dickson J. at 890.

The general rule, therefore, is that *i)* the category *insurance agent* includes the category *insurance broker* as defined by the *Insurance Brokers Act ; ii)* all insurance agents are mandataries ; *iii)* therefore, all insurance brokers are mandataries.

For purposes of clarity we will call a person who is an *insurance agent* but *not* an *insurance broker* within the meaning of the *Insurance Brokers Act* a *simple agent.*

The *Insurance Brokers Act,* R.S., c.C-74, defines *insurance broker* in Section 1 e) as :

"An agent within the meaning of subsection i) of Section 1 of the Act respecting insurance (Chapter A-32), who does not deal exclusively in insurance of the person and who, with respect to other categories of insurance, does not deal with only one insurer or only one group of insurers under joint management, whether or not he has an agency contract with such insurer or group of insurers ;"

Act goes on to specify in Section 31 that :

"Any person acts as an insurance broker, who, not dealing with only one insurer or only one group of insurers under joint management, transacts for another or other insurance business other than insurance of the person :

1. by negotiating or placing risks ;
2. by delivering policies ;
3. by collecting premiums or ;

4. by receiving a commission or remuneration other than a salary (. . .).”

We thus have the concept of the *insurance broker* who *i)* is licensed under the *Insurance Brokers Act* and a member of the *Insurance Brokers Association* ; *ii)* does not deal with only one insurer or set of insurers ; and *iii)* does not deal exclusively in life and health insurance.

The provisions on conduct and discipline in the By-law of the Insurance Brokers' Association of the Province of Quebec, c.C-74,
226 r.1, in Section 48 includes the following duties of a member of the Association :

“d) to account for the execution of any mandate ;

e) to be honest and to act as a conscientious advisor towards his clients by informing them of their rights and obligations, by explaining clearly the purposes, conditions, variations, exceptions, duration and cost of insurance, and by giving them any other information deemed necessary or useful ;

f) to treat as confidential all information given him in a professional capacity unless authorized in writing by his client or by any other person having an interest in such information ;

(. . .)

h) to give insurers the information to which they are rightfully entitled ;”

This all seems relatively straightforward, until we refer to Article 1735 of the Civil Code, which *also* defines *broker* in a general sense *without reference to the Insurance Act or the Insurance Brokers Act* :

> “A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions.
>
> He may be the mandatary of both parties and bind both by his acts in the business for which he is engaged by them”.

Pursuant to Article 1737 C.C., a *broker* in this sense, to whom we will refer as a *general broker* from now on, is subject to the general rules of mandate contained in Articles 1701 and following, save where they are inconsistent with Article 1735.

What then is the correlation between the *insurance broker* as defined by statute and the *general broker* as defined in the Civil Code ? It appears that the *insurance broker* is merely a specific example of the *general broker*, and this interpretation is corroborated by the terms of the first paragraph of Article 1735, which seem to contemplate a mandatary of the *freelance* variety, rather than an individual, such as the simple agent, who only works for one insurer or pool of insurers. Certainly, those cases which do address the question assume (without analysis) that the *insurance broker* is a *general broker* within the meaning of Article 1735 C.C. : see, for example, *Alliance Insurance Company of Philadelphia and Others vs. Laurentian Colonies and Hotels Ltd.* (1953) B.R. 241 at page 255 ; *Italchain vs. J.A. Madill* (1984) R.L. 175 at page 180 (C.S.). 227

The question arises, however, whether a simple agent who is *not* an *insurance broker* as defined by statute may nonetheless be a *general broker* within the meaning of Article 1735 C.C. and may therefore act on behalf of both insurer and assured alike. This issue is complicated by a number of factors. Firstly, it is obvious that a specific individual or firm may be a mere simple agent in relation to a certain book of business (personal lines, for example) and at the same time be doing a thriving trade as an *insurance broker* in relation to commercial property and casualty. Can it be suggested that the individual in question is not a person who "exercises the trade or calling" of a *general broker* simply because he also acts as a simple agent from time to time ?

Secondly, the second paragraph of Article 1735, which authorizes the *general broker* to act as the mandatary of both parties to a transaction at once, seems to imply that a person who is *not* a *general broker* cannot assume this dual role. If a simple agent cannot in some circumstances come within the definition of a *general broker*, therefore, the result would be that a simple agent is *not* empowered to act on behalf of the assured and the insurer at once. Simple agents regularly do so, however, and the legislator cannot be assumed to have been ignorant of this reality in drafting Article 1735.

We submit therefore that, although in the field of insurance the *general broker* within the meaning of Article 1735 is *often* a person who is also an *insurance broker* as defined by statute, the two categories are not co-extensive.

We propose the following summary of the definitional problem :

i) an *insurance agent* is someone who acts as an intermediary in connection with an insurance transaction ;

ii) *insurance agents* are divided into two subsets : the *simple agent* who only deals with one insurer or set of insurers, and the *insurance broker*, who *a)* is licensed under the Insurance Brokers Act and is a member of the Insurance Brokers Association ; *b)* does not deal only with one insurer or pool of insurers ; and *c)* does not deal exclusively in life and health insurance ;

iii) any *insurance agent*, whether he is an insurance broker or a simple agent, is subject to the provisions of the Civil Code on mandate ;

iv) any *insurance agent*, whether he is an insurance broker or a simple agent, *may* act as the mandatary of either the assured or the insurer, or both, in connection with an insurance transaction ;

v) in this sense, it is not necessary to be an insurance broker properly so-called to act as the mandatary of both the assured and the insurer as contemplated by Article 1735 C.C. ;

vi) generally speaking, it is more likely that a simple agent than that an insurance broker will be held to have been acting as the mandatary of the insurer, give the *freelance* nature of the insurance broker's role.

Problems defining the mandate

In light of the considerations outlined above, the identification the principal (or principals) on whose behalf the insurance intermediary is acting at any given stage of an insurance transaction is obviously a complex task, with which the courts of Quebec and other jurisdictions have struggled on numerous occasions.

This is particularly the case because the courts have a tendency to put the cart before the horse. As will be seen below, the reasoning generally adopted is to proceed firstly to label the intermediary in question as a *broker* or an *agent* according to whether or not he has an institutional relationship with the insurer, and then secondly to

apply the law of mandate according to preconceived notions as to the allegiance of a *broker* or *agent*, as the case may be, at that particular stage of the transaction.

It is submitted that although it is obviously relevant to the determination of the rights and obligations of the intermediary in question to decide whether he is a simple agent or an insurance broker, this decision can hardly be conclusive in relation to the law of mandate, and should be only one of many indicia which enable a court to decide on whose behalf the person in question was acting. It is true that a simple agent is, by definition, an individual who deals only with one insurer or pool of insurers. This does not mean, however, that in the circumstances of a particular case the simple agent could not have undertaken to act on behalf of the assured, whether while continuing to act for the insurer or otherwise.

A recent example of the application of the law of mandate to an insurance intermediary in this Province is the decision in *Paquette vs. Société Nationale d'Assurance* (1987) R.R.A. 772, where the Defendant insurer was attempting to deny coverage under a fire insurance policy on the grounds that there were omissions and misrepresentations in the insurance application. The assured retorted that the *broker* had been negligent in failing to keep the insurer properly informed with respect to the risk. Mr. Justice Paul Reeves had to decide whether in the circumstances the *broker* was the mandatary of the Defendant insurer, in which case the Defendant could not invoke his omissions and misrepresentations as a ground for denying coverage, or, on the other hand, was the mandatary of the Plaintiff assured, in which case the description of the risk had been inadequate and the contract was null.

Mr. Justice Reeves cited Article 1735 C.C., and then referred to an article by Douglas A. Barlow entitled *Le courtier professionnel d'assurance devant la loi* (1946) 6 R. du B. 464, who in turn cited the French authority Sumien for the following proposition :

> «***L'agent d'assurance ne doit pas être confondu avec le courtier.*** *L'agent est le mandataire, le préposé de la compagnie, son employé stable ; il la représente. Le courtier est la personne qui apporte des affaires aux sociétés, sans s'astreindre à ne servir qu'une seule compagnie : il n'y a pas de lien exclusif entre lui et une société. C'est un simple intermédiaire, rémunéré par une commission sur chaque af-*

faire, mais qui n'est pas le préposé de la société et qui apparaît même, suivant les circonstances, plutôt comme le préposé de l'assuré. » (Emphasis ours)

After referring to English and American authorities in support of the view that an insurance broker is usually the agent of the assured, Mr. Justice Reeves settled the matter by stating that "the facts of the case will always govern". According to the evidence, he said, there was no doubt that the *broker* was the agent of the assured for the purposes of gathering information with respect to the risk and inserting that information in the application for insurance so as to submit it to the Defendant insurer.

This *case-by-case* approach is in line with Quebec jurisprudence for the last 50 years. In *Ménard vs. Arvisais* (1933) 55 B.R. 68, Mr. Justice Howard stated the law as follows at pages 68-69 :

> "(. . .) ordinarily an insurance agent is one who is employed by the insurance company to solicit applications for and effect insurance with it, while an insurance broker is one who, like any other broker, acts as a middleman between the applicant for the insurance and the company and is primarily the agent of the one who first employs him.
>
> It is the common practice for an insurance company to have a written contract with its agent, by which the agent is authorized not only to solicit applications for insurance, but also to issue interim receipts, to collect premiums and remit them, less his commission, to the company, and the policy, when issued, is sent to the agent to be delivered to the insured. There is no doubt that, in such case, the agent is the agent of the company and, like any other agent, owes a duty to the company within the scope of his employment.
>
> On the other hand, it is not customary for an insurance broker to be bound to serve any company exclusively, but he usually has arrangements with a number of companies that they will, subject to inspection, accept risks obtained by him, he reserving the right to make such distribution of the business obtained by him, among his companies, as he sees fit. He owes no duty to any special company, even though he may be authorized to receive and accept risks for it, but he is generally the agent of the insured for all matters within the scope for which the insured employs him and, like any other agent, he binds the insured and not the company for anything he

does within the scope of his authority. But it often happens that the broker has authority from both the assured and the insurer, that is, he may be both an insurance agent and an insurance broker-agent for the assured for procuring the insurance and agent of the insurance company in all other respects.

But all that is implied in the first paragraph of these notes. *To put it in a nutshell, the ordinary rules of agency govern the respective rights, duties and responsibilities of the insurance agent and his principal : The principal may be the applicant for the insurance or the insurer, or possibly the agent may act for both in matters in which their interests are not conflicting, and his duty to one is not inconsistent with his duty to the other ; which is the principal is a matter of fact.*" (Emphasis ours)

The waters are equally muddy in other Canadian provinces, as appears from the judgment of Cameron J.A. of the Saskatchewan Court of Appeal in *Piggott Construction (1969) Ltd. vs. Saskatchewan Government Insurance Office*, (1986) 16 C.C.L.I. 204 at page 229 :

"In the course of a single transaction an insurance agency will perform a number of acts. Some may be done at the instance of, and as agent for the insured. Others will be performed on behalf of, and as agent for the insurer. The agency's role may be a dual one ; it may at once be both agent or the insured, in relation to one or more of its acts, and for the insurer, in relation to others. Brown and Menezes, Insurance Law in Canada (1982), p. 43, para. 3:2:5, comments on this as follows :

"It is now trite law that an agent can be agent of both contracting parties. The person acting for the insured in making and forwarding an application for insurance could be acting for the insurer in receiving information regarding a change in risk. However, this concession to realism does not eliminate the difficulties associated with the role of agents in insurance ; it merely redirects the inquiry. *Instead of having to determine whether the insured or insurer should bear the entire burden consequent in relying on an agent, the question becomes which of the two should bear the consequences of a particular act or acts by that agent.*" (Emphasis ours)

This makes it necessary :

i) to examine carefully each of the material acts of the agent ;

ii) to decide for which of the two principals the acts were performed ; and

iii) to determine the consequences of those acts for the principle on whose behalf they were done."

In *Gilmore Farm Supply Inc. vs. Waterloo Mutual Insurance Co. et al.* (1984) 3 C.C.L.I. 221, the Ontario Supreme Court held both the Defendant insurer and the Defendant agent liable to the assured for portion of a loss which ought to have been fully covered if the agent had informed the insurer as to the risk. O'Brien J. had this
232 to say at page 229 :

> ". . . it is first necessary for me to consider whose agent Wylie was at the material times. In my view, he was a dual agent, acting for both parties. I believe Wylie was entrusted with various duties by both the Plaintiff and the Defendant insurers, *and in many instances these duties overlapped.* There is clear judicial support for the proposition that an insurance agent may be an agent for both the insured and the insurer." (Emphasis ours)

In his very substantial treatise *La déclaration initiale du risque dans le droit des assurances de la province de Québec* (1973) 14 C. de D. 167 at page 225, Mtre. François-Xavier Simard, Jr. noted an earlier appeal to the legislator to clarify the situation by none other than Mr. Gerard Parizeau (*Considérations sur les fonctions du courtier et de l'agent d'assurance* (1943-44) 11, «*Assurances* », 161-162) :

> «*Si, avec Monsieur Parizeau, nous pouvons convenir que généralement le courtier est avant tout le mandataire de l'assuré, que les actes qu'il pose lient ce dernier et que l'agent, lui, représente l'assureur qu'il lie dans la mesure des pouvoirs qui lui sont conférés, il n'en demeure pas moins vrai aussi de dire que l'un et l'autre peuvent être, selon les circonstances, le mandataire de l'assuré ou de l'assureur. Une revue de la jurisprudence sur cette question ne nous laisse pas de doute à ce sujet.* ***Monsieur Parizeau lui-même a qualifié le courtier « d'être hybride dont le statut juridique est mal défini »****. Il n'en fallait pas plus pour qu'il lance un appel pressant au législateur québécois afin qu'il définisse clairement les pouvoirs respectifs de chacune de ces fonctions, et conséquemment, la responsabilité civile de l'agent et du courtier.* » (Emphasis ours)

The legislator has now responded. The recent *avant-projet de loi* proposing amendments to the provisions of the Civil Code on insur-

ance includes a new Article 2484 which would presume the *agent or broker* to be the representative of the *insurer* at all times. We will reserve comment on this proposed solution for another occasion. Suffice it to say for our present purposes that the draft Article 2484 represents a radical departure from the law as it now stands with respect to mandate and the insurance intermediary.

Musical chairs

As if the distinctions among the *simple agents, insurance brokers* and *general brokers* within the meaning of Article 1735 were not sufficiently confusing, there are of course many books of insurance business in relation to which there will be as many as three different levels of intermediaries between the assured and the insurer, to each of whom a new and different label is applied which is wholly irrelevant to his legal duties and allegiances.

In the context of a special risks coverage placed at Lloyd's, for example, there may be a local or *producing broker*, a *general agent* in Montreal, and a London or *placing broker*. Throughout the history of the coverage in question, information and instructions will constantly be passed up and down this unwieldy chain of intermediaries, each of whom may at any given time be acting on behalf of the assured, on behalf of the insurer, on behalf of both or for his own account. As legal duties shift back and forth from insurer to insured many times in the course of any individual insurance transaction, it is inevitably a complex question to decide who is responsible for what when information gets lost, the risk is misrepresented, or the premium fails to reach its ultimate destination.

By way of illustration of the constant changes in mandate undergone by this chain of intermediaries, we offer the following attempt to isolate a number of separate functions which each may perform in relation to a particular book of business.

1. Firstly, the insurance program itself may very well originate with the general agent and the London placing broker with which he is affiliated. The general agent will conceive of the coverage concept, identify the potential market, prepare analyses of past and future loss ratios, draft the policy and then try to interest underwriters in becoming involved.

At this stage, the general agent is presumably acting on his own behalf, with the intention of deriving profit from the eventual sale of the product. The London placing broker is acting as a mandatary on behalf of the general agent in making representations to the market in order to induce individual syndicates to *write a line.*

In order to keep the roles of the general agent and the placing broker in perspective, it may well be asked whether they are not in a conflict of interest position when they participate at a much later date in the coverage disputes which will inevitably arise. Was it not the general agent himself who designed and drafted the policy wording ? Was it not the general agent who (all too often) was responsible for having the wording translated for Quebec with less than perfect results ?

2. Once the program has been placed, the general agent and the producing broker then become involved in marketing it. The general agent issues brochures which are distributed by the producing broker to his clients. The producing broker responds to telephone inquiries, writes letters to individual assureds, and generally does his best to sell the coverage.

In this context, is the producing broker's role that of mandatary in the legal sense for the prospective assureds, or rather that of mandatary for the general agent who is trying to market the program ? The producing broker's commercial interest in selling the product clearly favours the view that he is acting on behalf of the general agent, rather than for the benefit of the assureds. Moreover, prospective assureds (as opposed to existing clientele) do not yet have a relationship with the producing broker which could give rise to a contract of mandate.

At this stage, representations made by the producing broker (in the form of letters summarizing the coverage available in terms more advantageous to the assured than the actual policy wording, for example) may thus be binding on the general agent. We submit, however, that it is not clear that responsibility for these representations can be passed on up the line to the insurer, since the general agent, in marketing the product, is clearly furthering his own commercial interests as well as those of the insurer.

3. Once the prospective assured is identified, however, the producing broker puts on another hat and becomes the professional counsellor of the assured.

The law is clear that if at this stage, or at the time of a subsequent renewal, the producing broker is negligent in advising the assured, he may be held liable in damages. In other words, there is a contract of mandate between the producing broker and the assured. If the producing broker telephones the general agent and inquires as to the implications of a specific coverage situation, does the general agent also become the mandatary of the assured, or is the general agent's duty owed only to the producing broker ? It is easy to imagine a situation where the producing broker is insolvent, and the assured's only viable recourse for inaccurate advice emanating from the general agent is a direct one.

4. The producing broker then gathers together the information required by the insurer with respect to the risk to be underwritten.

Generally speaking, the law is and has been for some time that in this process, the producing broker is acting on behalf of the assured - see, for example, *Paquette, supra ; Zurich Cie d'Assurances vs. Rossignol* (1984) C.A. 264, Nichols J.A. at page 264 ; *Lebrasseur vs. Canada Health & Accident Corp.* (unpublished : C.S. Hauterive 6394, May 23, 1972 ; appeal dismissed (1976) C.A. 131) ; *Turgeon vs. Atlas Insurance Co.* (1969) S.C.R. 286 ; *Laurentienne vs. Juneau* (1950) B.R. 77 ; *Tétreault vs. Cie d'Assurance Canadienne Britannique* (1924) 36 B.R. 402 ; *Lamothe vs. North American Life Assurance Co.* (1907) 16 B.R. 178 ; aff'd (1907-08) 39 S.C.R. 323.

This does *not* mean that in some circumstances the producing broker may not also be acting for the insurer as well : see *Alliance Insurance Company of Philadelphia and Others vs. Laurentian Colonies & Hotels Ltd., supra.* There are many cases in which it has been held that where the producing broker is in fact the mandatary of the insurer, or is reasonably perceived to be the mandatary even if he is not, and interprets a policy or an application, his representations are binding on the insurer ; see : *Great West Life Assurance Company vs. Paris* (1959) B.R. 349 ; *Compagnie Équitable d'Assurance contre le Feu vs. Gagné* (1966) B.R. 109 (appeal to S.C.C. dismissed (1968) S.C.R. v) ; *Demers vs. Mutual of Omaha* (1977) C.S. 662 ; *Legault vs. Metropolitan Life Insurance Co.* (1968) C.S. 577.

The question arises whether the placing broker's duties as mandatary, whether of the assured or the insurer, are reflected in the duties of any other intermediaries between him and the insurer. In sum, it appears to us that where the placing broker is the mandatary of the insurer, necessarily anyone further up the chain must also be the insurer's mandatary. If, on the other hand, the placing broker is acting on behalf of the assured, this does not necessarily mean that the general agent and the placing broker, if any, are also the assured's mandataries. It may well be that the general agent will on the evidence be shown to be acting on behalf of the insurers, with the result that the
236 producing broker and the general agent are no longer on the same side of the equation.

5. At some point, the intermediary closest to the assured in the chain collects the premium, and passes it along to the insurer.

Pursuant to Section 340 of the *Insurance Act* (quoted above) an *insurance agent* is clearly the mandatary of the insurer when he collects premium from the insured.

An interesting question arises, of course, when the premium is in fact paid by a third-party finance company, which then receives payments from the assured on a monthly basis. The common arrangement is to attempt (usually without success) to have the finance company declared the mandatary of the *insurer* for the purposes of cancelling the policy in the event that the monthly payments are not made ; see *Kerwood vs. Wawanesa Mutual Insurance Co.* (1973) C.A. 684 ; *Lareau vs. Compagnie d'Assurance Halifax* (1975), C.A. 659 (Motion for Leave to Appeal to the Supreme Court of Canada dismissed November 3, 1975) ; *Fratar Transport Inc. vs. La Prévoyance* (1978) C.S. 976 (appeal dismissed C.A.M. 500-09-001471-788). An unusual situation arose in *Association de Taxis LaSalle vs. Blais* (1971) S.C.R. 643, reversing (1969) B.R. 446. In that case, the Association was a cooperative which provided liability insurance for its members. The premiums were collected and remitted to the insurer. The insurer became insolvent, and the liquidator claimed accumulated premiums from the Association. The Supreme Court held that the Association was acting as the mandatary of the *assureds* rather than mandatary of the insurer in collecting the premiums, and accordingly that the liquidator of the insurer had no claim to the premiums (It is submitted that this would

not be the case, however, since the enactment of Section 340 of the *Insurance Act* : see above).

6. During the currency of the coverage issued to the assured, the producing broker will continue to send information to the insurer with respect to any changes in the risk (Article 2566 C.C.) and also with respect to changes in the coverage which may be requested by the assured.

As with the application stage, the producing broker's position is ambivalent : it has been held, for example, that the producing broker's knowledge as to a change in the risk may bind the insurer : see *North American General Insurance Co. vs. Goyer* (1967) B.R. 611 ; *Parent vs. General Accident, Cie d'Assurances du Canada. J.E. 84-231 (C.S. Hull 550-05-000314-826, February 28, 1984 : contra : La Sécurité, Compagnie d'Assurance Générale du Canada vs. Phaneuf* (1955) B.R. 647.

Further, there is the matter of renewals.

The general view, as with applications for coverage, is that the agent is acting for the assured. In *Guardian Insurance Co. of Canada vs. Victoria Tire Sales Ltd.* (1979) 2 S.C.R. 849, however, Laskin C.J.C. relied on Article 1705 C.C. ("powers granted to persons of a profession or calling") to find that for the purposes of application for a renewal, the agent had inherent powers to represent the *insurer* without the assured being obliged to prove actual or ostensible authority.

Although renewals are in many cases viewed by all the intermediaries concerned as being a matter of routine, litigation inevitably results from time to time where the placing broker proceeds with the renewal and then attempts to collect the premium from an unwilling assured. There is considerable authority to the effect that the assured is liable for the premium : see, for example, *Lavigne vs. Desruisseaux* (1945) C.S. 280 ; *Levin vs. Feldman* (1948) C.S. 374 ; *R.C. Coull & Co. Limited vs. Latrémouille* (1968) R.L. 78 ; *Mainguy vs. Crispo* (1971) R.L. 65.

This same *routine* approach is however unacceptable where the broker is *cancelling* a renewal certificate which is no longer required. In *Lavigne vs. Rosario Pauzé Inc. et al.*, (unreported, C.S.M. 500-05-012868-780, March 14, 1984), the Defendant broker re-

turned a homeowner's policy to the insurer for cancellation, and a fire occurred in the assured's residence. The assured was successful in recovering the loss from the broker. Mr. Justice Fraser Martin recognized that :

> ". . . it is an established practice in the insurance industry in the case of home owners coverage, for the insurers to issue automatically certificates of renewal as the expiry date of the policy approaches. In the interest of practicality there has grown up a proper procedure for the cancelling of policies for which renewal certificates have been issued but which are no longer required. The
> *238* procedure involves a minimum of formality and, in most instances, there is no charge to the broker or client.
>
> It is not (. . .) only applicable prior to the coming into force of the renewal but rather is routinely employed in the weeks and even months following the renewal as a means of simply and quickly effecting cancellation of a policy which is no longer required by the insured. Whether the broker will have to pay the earned portion of the premium up to the date of cancellation will depend on the practice followed by the individual insurer concerned and, of course, on the terms of his agency contract. (. . .)
>
> It is my view it is a procedure which should only be employed where there is full understanding and agreement between the broker and his client. It is not designed as a means of effecting cancellation for non-payment of premium. It follows that when the broker, by this procedure, requests the insurer to cancel, the insurer is entitled to rely on the fact that the broker is speaking with the authority of his client, the assured. The cancellation may, therefore, be effected in accordance with the broker's instructions without any prior formality or notice on the part of the insurer.
>
> The question rather is whether in effecting cancellation unilaterally Pauzé failed to fulfill his obligations toward his client, thereby causing him prejudice. Even if I were to accept his testimony that there was no communication with Lavigne prior to June 15, 1977, it follows that he elected to take a calculated risk that his client was no longer interested in the coverage. His purpose in using the *non requis* procedure was, of course, to take advantage of the provisions of his agency contract while within his delays to do so and thereby avoid being required to advance the premium. Otherwise, Pauzé would have had no choice but to request the insurer to follow the cancellation procedure foreseen by Article 2567 C.C.

with the added difficulty of recovering the earned portion of the premium from Plaintiff after cancellation.

If he elected to proceed in this matter without first informing his client then he did so at his peril. His actions were clearly contrary to the interests of his client." (Emphasis ours)

Similarly, it has been held that where the broker proceeds with the renewal and the assured refuses to pay the premium, the broker must sue the assured rather than cancelling the policy of his own accord : see *Gérard Hamel Assurance Inc. vs. Enseignes Victo Ltée* (1979) C.P. 170 ; *J. Dufresne Inc. vs. Thomas Bellemare et Fils Ltée,* J.E. 78-387 (C.S. St-Maurice 410-05-000319-75, April 11, 1978) ; *Briggs vs. Halifax Insurance Co.* (1973) R.L. 570 ; *Roch vs. Jouin* (1966) R.L. 511.

In other cases, it has been held that a tacit mandate to renew the insurance policy is not unlimited, in the sense that it does not permit renewal on any terms (*St-Onge vs. L.P. Forrest Ltée* (1977) R.L. 543) and that in some circumstances a tacit mandate to renew will *not* be implied (*Garneau Turpin Ltée vs. Gravelle* (1969) R.L. 498) ; *Dorion vs. Savard* (1959) R.L. 497.

7. When a loss occurs, the assured inevitably gives notice to the producing broker, whether or not direct notice to the insurer is specified in the policy.

Given that in Quebec late notice continues to be a valid ground for the denial of coverage regardless of whether or not the insurer has suffered prejudice (*Marcoux vs. The Halifax Fire Insurance Company* (1948) S.C.R. 278 ; *Canadian Shade Tree Service Ltd. vs. Northern Assurance Co.* (1987) 4 Q.A.C. 102, it becomes particularly important to know whether or not the producing broker is the mandatary of the insurer for the purposes of receiving notice. Similarly, if the producing broker gives notice to the general agent, which then omits to advise the insurer, does notice to the general agent nonetheless bind the insurer ? In the event that any of the intermediaries between the assured and the insurer is in fact acting as the insurer's mandatary for the purposes of receiving notice, and if the message does not get through to the insurer, the intermediary responsible would then be liable to the insurer for failure to execute his mandate pursuant to Articles 1709 and 1710 C.C. in the event that any prejudice were to be caused by the delay.

Conversely, the insurance broker or simple agent who is acting as the mandatary of the *assured* and who fails to pass notice of a loss on to the insurer would then be liable to the assured in the event that coverage were to be denied on the grounds of late notice.

8. A dispute arises with respect to the coverage available to the assured.

In this situation, the chain of intermediaries between the assured and insurer are placed in the invidious position of having to transmit to the insurer information received from the assured
240 (whose mandataries they may be) which is relevant to the coverage dispute, and at the same time to plead the assured's case with the insurer. Further, in the case of coverage placed in the London market, the only practical means of getting information to the underwriters on the risk from their own legal representatives may be to pass that same information through the placing broker, who is the farthest point in the chain of intermediaries leading back to the *assured.*

Unless the placing broker can be said to be acting on behalf of the *insurers* in this role, therefore, they are privy to information which may or may not be directly relevant to their principal's (the assured's) interests, and two problems arise. Firstly, it would appear that they have a duty to transmit that information to their principal through the producing broker. And, secondly, any privilege which might otherwise have attached to the information is destroyed because it has been revealed to the assured's agent.

Similarly, one or more of the intermediaries, in making fervent representations to the insurers in favour of coverage for the assured, are interpreting a policy which they may in fact have drafted, and are directly affecting the loss experience in a program whose continued success is in their direct commercial interest. As noted above, although Quebec law contemplates the possibility that a *general broker* may act on behalf of two parties at once, it does *not* countenance a situation where the broker acts as a mandatary in circumstances where his own interests conflict with those with his principal.

9. In the absence of a dispute with respect to coverage, the loss has to be adjusted, or a defence of the assured arranged, and the assured will inevitably look to the producing broker for advice and instructions.

A recent example of this situation is *Epic Import Export Canada Limited vs. British Columbia Insurance Company* (unreported – Vancouver County Court, March 4, 1986) where the agent told the assured that there was coverage and suggested that he proceed to repair the damage caused by vandalism. The insurer later attempted to repudiate this advice. The court held that in processing the assured's claim, the agent was acting on behalf of the *assured*, and not the insurer, with the result that the insurer was not bound by the agent's advice.

While it seems reasonable to view the insurance agent as the assured's representative in some post-loss situations, however, it is clear that in other respects he must act as the mandatary of the *insurer*: as noted above, Section 340 of the *Insurance Act* deems the insurance agent to be acting on the insurer's behalf when he receives amounts (such as loss payments) from the insurer which are intended for the assured.

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An interesting question which arises in relation to the intermediaries between the assured and the insurer is whether they have any duties to one another. In *Armstrong and Bruce Insurance Ltd. vs. Drost Insurance Ltd.* (unreported, N.B.C.A., May 28, 1987) it was held that a general agent, by placing insurance at the request of the local agent and by being a conduit for the exchange of information between the insured and the insurer, owed a duty *to the local agent* to respond properly when crucial information was being requested or sent by either the insurer or the local agent. Accordingly, the general agent was held liable to the local agent for damages which the local agent was in turn obliged to pay an assured because the local agent failed to secure a vacancy permit under an insurance policy.

In this Province, we submit that the legal characterization of the relationship would again be one of mandate *as between the general agent and the local agent.* This would only be necessary, of course, to the extent that the general agent was not acting as mandatary of the insurer, so that its negligence bound the insurer to extend coverage.

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Conclusions

In summary :

1. In Quebec all insurance intermediaries are defined by statute as *insurance agents* ;
2. The category *insurance agent* includes both *insurance brokers* as defined by statute, and other agents whom we have called *simple agents* ;
3. All insurance agents are subject to the rules of mandate set out in the Civil Code, and owe pre-defined duties and obligations to their principals ;

4. The question as to the principal or principals on whose behalf the insurance agent may be acting at any given time is not defined by statute, and must therefore be determined on the facts of every individual case ;
5. The obligations and liabilities of insurance agents vary substantially according to the principal or principals for whom they may be acting at any given time ;
6. Although the insurance agent owes a duty of allegiance to his principal, the law allows him to act simultaneously on behalf of more than one principal, *provided that their interests do not conflict* ;
7. The allegiances of an insurance agent acting in relation to a specific insurance program or with respect to coverage granted to a specific assured may switch back and forth between the assured and the insurer many times (and may occasionally be owed to *both*) before coverage expires or a loss is paid ;
8. It is not necessarily the case that all insurance agents in the chain of communication between the assured and the insurer will at any given time be acting as mandataries of the same party.

This paper, like the law of Quebec, raises more questions than it answers with respect to the role of the insurance agent as a *go-between*. This is not to say, however, that an increased awareness by insurance intermediaries of the implications of the law of mandate, and of the necessity of attempting to identify the principal to whom their allegiance is owed at any given stage in a transaction, would not

help to mitigate against the possibility of professional liability in the event that things go wrong. As with any game of musical chairs, the essential survival skill is to know which way you must leap when the music stops.