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## THE BACKDATING OF A LIFE INSURANCE POLICY AND THE SUICIDE EXCLUSION

In the recent case of *Goldstein v. London Life Insurance Co.* (24130), the Supreme Court of Canada ruled that an insurer which chose to backdate an insurance policy in order to offer the Insured a more favourable premium rate, and which was paid premiums retroactively from that date, thereby agreed that the effective date of the contract would be the date so chosen. Therefore, the suicide exclusion, which applied during the first two policy years, ran from such date.

### CHRONOLOGICAL RECAPITULATION

- On September 8, 1980, the Insured signed and submitted to the insurer an application for insurance on his life in the amount of \$500,000.
- The original policy was dated September 26, 1980 (the policy date). The parties had agreed to use that date in order to allow the Insured to benefit from lower premium rates, since the Insured was born on September 27, 1947. Conversely, the premiums were to be paid from the September 26, 1980, should the application be accepted.
- On November 11, 1980, the original policy was issued. Two dates are mentioned thereon, namely September 26, 1980 (the policy date) and November 11, 1980 (the issue date).
- On November 14, 1980, the insurer received the first premium.
- On January 12, 1981, the Insured requested an amendment to the policy in order to increase the sum insured to \$1,000,000, to designate a new beneficiary and to change the policy date to January 26, 1981.

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- On February 9, 1981, after the Insured had provided new evidence of insurability, the modified policy was issued and dated January 26, 1981 (the amended policy date). February 9, 1981 was specified as the issue date.
- On October 20, 1982, the Insured committed suicide.

### THE INSURANCE CONTRACT

Both the original policy and the amended policy provided that the benefit of insurance was lost in the event of the Insured's suicide within two years of the issue date of the policy.

The contract also provided that the policy was not to take effect *unless* the first premium had been paid, the policy had been remitted to the policyholder and no change had occurred in the Insured's insurability since the application and its acceptance by the insurer.

In addition, the contract provided that policy years ran from the policy date and that the first premium due date was set as the policy date.

### THE SUPERIOR COURT JUDGMENT, [1989] R.J.Q. 2197

The trial judge held that September 26, 1980 was the starting point of the suicide exclusion period and ordered the insurer to pay the insurance benefit. According to him, although the insurance coverage had only become effective on November 11, or November 14, 1980, the parties' decision to backdate the policy caused the two-year period provided for under article 2532 C.C.L.C. to run from September 26, 1980. Since the suicide did not occur within two years of that date, the insurer was liable to pay the original coverage in the amount of \$500,000. With respect to the additional coverage obtained in 1981,

the trial judge held that as it did not involve a new contract but simply an amendment to the existing contract, no new delay was created by reason of a simple amendment of an insurance contract which had remained in force. The insurer was therefore liable to pay the additional sum based on a coverage of one million.

### THE COURT OF APPEAL JUDGMENT, [1994] R.J.Q. 627

Mr. Justice Baudouin departed from a common law decision on which the trial judge had relied, namely *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, on the ground that this case could not be imported into the civil law. In interpreting article 2532 C.C.L.C., Mr. Justice Baudouin stated that the two-year delay could only start to run from the time the risk was covered; no contractual relationship could exist before that time, and the date to be used was the effective date of the contract, not the date upon which it was concluded. It should be kept in mind that a contract only becomes effective upon fulfillment of the conditions provided for in article 2516 C.C.L.C., being the insurer's acceptance without modification, the payment of the initial premium and the absence of any change in the insurability of the risk from the signing of the application. In the learned judge's view, the sole purpose of the backdating was to favour the Insured, and no intent that the insurance coverage would carry retroactive effect could be inferred therefrom.

### THE SUPREME COURT JUDGMENT

Mr. Justice Gonthier notes that suicide is no longer a statutory exclusion and that it must be the subject of a contractual exclusion. However, this exclusion must comply with the maximum provisions set forth in article 2532 C.C.L.C., that is, it shall not exceed two years of uninterrupted insurance. The key issue to be determined is as of when the insurance

comes into being: the date of the conclusion of the contract or the effective date thereof.

Under article 2476 C.C.L.C., a life insurance contract is concluded upon the insurer's acceptance of the application, but its effective date is deferred until the fulfillment of the three conditions set forth under article 2516 C.c.L.C., as the Supreme Court held in the matter *General Trust of Canada v. Artisans Coopvie, Société coopérative d'assurance-vie*, [1990] 2 S.C.R. 1185. Although in that matter the Court came to the conclusion that the two-year delay ran from the effective date of the contract, in the present case, Mr. Justice Gonthier was of the opinion that, since the premiums had been paid retroactively, the effective date of the contract may correspond with the date on which the contract was concluded. In other words, a period for which the insurer would receive payment in the form of a premium began to run on September 26, subject to the subsequent fulfillment of the other conditions to the contract becoming effective. It was also as of September 26, 1980 that the risk was assessed and the benefits insured. The contract therefore took effect retroactively to the date agreed upon by the parties (policy date) as, in theory, nothing prevented the parties from providing an effective date which was prior to the acceptance of the application.

Mr. Justice Gonthier rejected all the insurer's arguments to the effect that the policy provisions reflected the parties' intention to the contrary, and that the mere backdating in itself did not truly indicate their intent to set retroactively the starting point for the computation of the delay. Mr. Justice Gonthier acknowledged that, at first glance, the insurer's position might appear to be well founded. However, he went on to say, the parties' true intent was to be determined. The contract had to be interpreted in its entirety, and the suicide

exclusion which mentioned the date upon which the policy became effective, could not be considered in isolation.

According to the learned judge, numerous factors indicated that the parties actually desired the insurance to begin on September 26, 1980, and Mr. Justice Gonthier considered it to be a deciding factor that the premiums were to be paid retroactively to the 26<sup>th</sup> of September and that this date had also been fixed as the first premium due date. He also noted that the clause providing that the contract would not become effective "unless" the stated conditions were met (premium payment, delivery of the policy and absence of change in insurability) implied the possibility of retroactive effect. Had the insurer wished otherwise, it could have provided that the contract would not become effective "until" such conditions were met.

Mr. Justice Gonthier acknowledged the influence of common law jurisprudence in insurance matters and, although, admittedly, the *McClelland* case could not be relied upon as an authority in this matter, it was interesting on a comparative basis. Insurance Law should develop harmoniously with the rest of Québec Civil Law of which it is an integral part, but North-American practices, such as backdating, should not be disregarded.

With respect to the increase in coverage applied for in January 1981 and confirmed on February 9, 1981, Mr. Justice Gonthier accepted Professor Bergeron's view that the suicide exclusion period could not run more than once within a single contract. One must therefore determine in each case whether the new contract merely reproduces the essential provisions of the contract for which it is substituted or whether in replacing it it adds thereto with the effect that there is no continuity between the two documents and the

obligations thereunder. Based on this analysis, he was convinced, like the trial judge, that the policy had simply been amended and that the principal contractual provisions had remained unchanged. Thus, there had been only one contract, and the insurer could not rely on the February 1981 amendment to refuse to pay the second half of the sum insured, since there had been uninterrupted insurance since September 26, 1980.

### **CONCLUSION**

As appears from this decision, had proper wording been used, the period for the purposes of the suicide exclusion during the first two years could have run from the contract's effective date, rather than starting from the backdating, but the terms used by the insurer in the rest of the policy and its decision to collect premiums between the policy date and the actual effective date thereof had definite consequences. The Court did not rule out that a different wording could have led to

the conclusion that the starting point of the two-year delay for the suicide exclusion should be the actual effective date of the policy. The question also comes up as to the impact of this Supreme Court decision on the solution of the issue arising from an insured's suicide before the expiry of two years of the effective policy date, where a conditional binder has been previously issued.

A careful drafting of contractual documents is therefore recommended.

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