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Background

CCEL Report no. 3/ BCLI Study Paper no. 2—Study Paper on Viatical Settlements

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A viatical settlement is a transaction in which an insured person with diminished life expectancy transfers the entitlement to receive the death benefit under the policy of insurance to another person. This other person agrees immediately to pay the insured person an amount that is less than the face value of the death benefit and undertakes to pay the premiums for the insurance policy as they come due.

In most jurisdictions in Canada, legislation directed at trafficking in insurance policies, which has its origins in the Depression, renders viatical settlements illegal. There is a small viatical settlement industry in this country, based in the provinces that lack this legislation. At the end of the last decade, Ontario gave serious consideration to repealing its anti-trafficking provision, and enacting a modern framework for a viatical settlement industry. In the five years since the major Ontario report was published, the viatical settlement industry in the United States has transformed itself from an industry focused on AIDS patients and others suffering from terminal diseases to one focused on senior citizens. This shift in focus, coupled with the rising numbers of senior citizens, has led to a notable expansion of the viatical settlement industry in the United States.

The aim of this study paper is to provide the groundwork for a law reform project that will make recommendations on whether Canadian provinces and territories should remove their barriers to the creation of a viatical settlement industry and, if they do, what sort of legal framework should be created for the new industry.

This study paper contains seven parts. After a brief introduction, the second part examines a typical viatical settlement. Drawing on American academic articles, it describes the most common elements of a viatical settlement. Then, it traces the historical development of the viatical settlement in the United States, from its origins as a transaction marketed to AIDS patients, through early attempts at state regulation, to the development of an industry focused on senior citizens and the evolution of more mature regulatory frameworks.

Part three examines the current law in Canada. It highlights four legal issues that affect viatical settlements: the anti-trafficking provision found in most provincial and territorial *Insurance Acts*; the concept of insurable interest; the treatment of the proceeds of a viatical settlement for income tax purposes; and the applicability of securities laws.

Part four surveys the leading policy arguments for and against removing the legal barriers to viatical settlements in Canada.

Part five examines in detail the leading Canadian model for law reform, the draft regulation published in 2001 by Ontario's Financial Services Commission, describing how the draft regulation treats the main players in the viatical settlement industry. The part also touches on legislative reform in the United States.

Part six sets out several issues for reform. Several of these issues are addressed in the Ontario draft regulation, but the passage of time and developments in the viatical settlement industry open the possibility of taking a fresh look at them. A few issues pick up on ideas found in the American legislation that are not addressed in the Ontario draft regulation.

Part seven is a brief conclusion to the study paper.