McKellar
STRUCTURED SETTLEMENTS

McKellar Structured Settlements Inc.

Pre-Budget Submission to the Ontario Standing Committee on Finance and Economic Affairs

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McKellar Structured Settlements Inc. (“McKellar”)

McKellar is Canada’s oldest and largest structured settlement provider. For 40 years, McKellar has worked closely with injured people, plaintiff and defence lawyers, casualty companies, life insurers, disability support associations, and Canada Revenue Agency (“CRA”) in making sure that the settlements received by injured people can meet their ongoing medical and care needs. Our founder, Frank McKellar, worked closely with what was then Revenue Canada to create a tool that would allow seriously injured accident victims to obtain financial security with virtually no risk.

Structured Settlements: The Basics

A “structured settlement” or “structure” is the tax-free periodic payment of a personal injury damage settlement or award. Instead of an injured person receiving a single lump sum in settlement of their personal injury damage claim, that individual receives part of their damages by way of a lump sum to address immediate injury-related expenses, and part as a series of future payments (“structure payments”) to meet future needs. Most structure recipients are catastrophically injured—they need to access the capital of their settlement or award funds on a consistent basis, but they have essentially no tolerance for investment risk.

Technical Aspects

Since their inception in Canada in the late 1970s, CRA has created a framework for structured settlements to provide the greatest degree of security and protection for the funds of injured people who receive structures. CRA requires that structured settlements be funded by specialized annuities issued by highly rated Canadian federally registered life insurers (The Canada Life Assurance Company, Sun Life Assurance Company of Canada, and BMO Life Assurance Company). An annuity that funds a structured settlement must be owned by the casualty company settling the claim or, if the casualty insurer chooses, by its Assignee. Assignees are affiliates of the annuity-issuing life insurer, but are separate entities with their own individual asset base and financial strength rating. The Assignee assumes ownership of the structure, in

addition to all the structure obligations of the assignor casualty insurer. Once an assignment is effected, the casualty insurer is in the same position as it would be had it settled for cash. It receives a full release and discharge in all respects.

Certainty and Security

Structure payments are guaranteed on three levels: first, by the life insurer underwriting the annuity that funds the structure payments. Second, in the very unlikely event of the life insurer's insolvency, structure payments (up to $2,000 per month or 85% of the monthly payment, whichever is greater) are then guaranteed by Assuris, a non-profit organization funded and comprised of the entire Canadian life insurance industry that protects policyholders in the event a member life insurer cannot meet its financial obligations. Finally, in the remote event a shortfall remains, structure payments are fully guaranteed by the casualty insurer or Assignee that owns the annuity funding the structured settlement. Structure payments are protected to a much greater extent than traditional investments or bank deposits. In the history of Canadian structured settlements, every single structure payment owed has been paid in full, consistent with the underlying annuity contract. There has not been a single penny lost.

It is a requirement of CRA that, once established, a structure cannot be assigned, commuted, or transferred. This restricts the misuse of settlement funds and ensures structured settlement recipients have the best opportunity to use those funds for their ongoing needs. Further, there is no cost to the casualty insurer for implementing a structure. Structures are virtually infinitely flexible in the design of the periodic payments and can easily respond to fit the future needs of the claimant. Structures prevent the premature dissipation of settlement funds—a claimant with a structure who may be tempted to squander their settlement funds can only do so one periodic payment at a time.

Structured settlements have the highest rate of return of any guaranteed investment in Canada and are the ideal financial vehicle for personal injury settlement funds, which are intended to meet the long-term care needs of the injured individual and which should not be subject to risk. Structures carry no ongoing fees of any kind. In accordance with CRA's IT-365R2 Bulletin[i], structure payments are tax free in the hands of a recipient and are not required to be reported on the recipient's income tax return. As a result, structure payments allow a recipient to maintain their eligibility for means-tested (based on income tax return) government benefits such as the Canada Child Benefit, HST Credit, Ontario Disability Support Program, and more.

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A Word on Interest

When structured settlements were in their infancy in Canada, CRA permitted casualty insurers to self-fund their periodic payment obligations, meaning that the structured settlement agreed upon by the parties was paid, ongoing, by the settling casualty insurer directly out of its own funds. CRA soon realized that self-funded periodic payments were only as secure as the casualty insurer paying them, and that self-funded structures were ineffective in providing lasting protection for the resources of injured people. If a casualty insurer became insolvent, the recipients of that insurer's self-funded structures would suffer.

CRA began requiring that all structured settlements be funded by annuities underwritten by federally registered Canadian life insurers. Casualty insurers (or their Assignees) own these annuities, and, importantly, **the annuity owner is the recipient of the tax advice slip for interest earned on the annuity**[ii]. The structure payments themselves contain no interest—real or imputed—for the payment recipient. Irrespective of whether CRA were to permit periodic payments to be self-funded, funded by an annuity, or funded by some other type of investment, each structure payment is entirely a payment of damages and is, technically and actually, without interest. "An award of damages for personal injury or death that decrees that it be paid in periodic payments is not, despite such periodic payments, considered to be an annuity contract…and the periodic payments themselves are not considered to be annuity payments."[iii]

Ontario Recognizes the Value of Structured Settlements

Since their inception more than 40 years ago, the Ontario government has been a proponent of structured settlements—both by requiring them in circumstances where provincial funds are used to settle a personal injury claim, and by enacting legislation that mandates structured settlements. The Ministry of Finance (through the Motor Vehicle Accident Claims Fund) mandates the use of structured settlements in almost every taxpayer-funded Accident Benefits case. Casualty companies throughout the province have, for decades, mandated the use of structured settlements, particularly in settling accident benefits claims. Insurance Act (at Section 267.10, with O.Reg 461/96, s.6.(1)), and the Ontario Courts of Justice Act (Sections 116 and 116.1[iv]) directly mandate structured settlements. Experienced plaintiff's lawyers and casualty companies alike make use of structured settlements and regularly recommend or require they be implemented as a term of any Accident Benefits settlement.

A structure already forms part of the settlement in almost all cases involving a minor or an incapable adult—the Ontario Courts, the Public Guardian and Trustee, and the Children's Lawyer all prefer the use of structured settlements to any other alternatives.

Ontario is aligned with other provincial jurisdictions in Canada where there are similar legislation/regulations that encourage or mandate the use of structured settlements.[v]

Structured Settlements and the Ontario Disability Support Program (ODSP) – Ministry of Children, Community and Social Services (MCCSS)

A real case: Jay

Jay was a twenty-four year old mortgage agent, living in the GTA. One night, Jay was driving home after a date and was hit head-on by a drunk driver who had crossed the centre line. Jay suffered life-threatening injuries, including a debilitating brain injury. After months of hospital care and rehab, Jay tried returning to work. He failed. Jay just wanted his life back, so he tried again. And again he failed, despite his employer's accommodations and support. Jay resigned himself to the reality that because his brain and body will never function as it did before he was catastrophically injured, his life has veered permanently off course.

Jay had no income and was relying on the Ontario Disability Support Program and his accident benefits payments to meet his living, treatment, and drug needs. He was living in a basement apartment, barely scraping by, without the resources to access all the treatments his health providers recommend he receive.

Jay ultimately received $1 million in settlement of his no-fault accident benefits claim when he was 27 years old. After legal fees and debt repayment, Jay had about $500,000 left. In essence, Jay was now effectively retired and profoundly injured. He needed to figure out how to make that $500,000 cover his substantial medical needs for the rest of his life—needs that will only increase as he ages. Jay knew a structured settlement was right for him, and he chose to accept periodic payments in place of $500,000 of his settlement. ODSP would cover some of Jay's basic living and drug expenses, while his periodic payments would address the extraordinary care costs he will incur as a result of being catastrophically injured.

What seems like a rather ideal resolution for a very sad situation isn't actually so perfect. The problem Jay now has is that even though his structured settlement is funded entirely by tax-free future care funds, under the current ODSP eligibility regime in Ontario, MCCSS is going to find Jay ineligible for ODSP when he is 41 because he has a structured settlement.

At that time, Jay will lose access to his ODSP housing, income, medical, and dental support for as long as he continues to receive a structure payment. Of course, the irony under this eligibility regime is that if Jay had just taken a $500,000 lump sum of cash and spent it, his eligibility for ODSP wouldn't be threatened. His desire to make sure that his funds will last as long as he needs them has jeopardized his much-needed social assistance.

Jay's basic needs won't disappear when he is disentitled from ODSP. Without ODSP supports covering the his basic subsistence needs, Jay will use his treatment funds to pay living expenses and ultimately look to the government to fund the medical treatment and drugs he needs but can no longer afford. Disentitling Jay from ODSP with a structured settlement penalty may save MCCSS a little money years from now, but the Ministry of Health and Long-Term Care will most certainly be charged to pick up the life-long tab for the treatment and care Jay's structured settlement was intended to address—and be doing so later in Jay's life, when his needs and expenses are even greater.

The Problem: Structured Settlement Penalty

Jay's story highlights a pressing problem with the current ODSP regime. When an individual accepts a structured settlement as part of a personal injury damage settlement or award, ODSP erroneously imputes interest income to the structure recipient, rather than to the casualty insurer who owns the investment that funds the structure.

As you may recall from the interest discussion above, CRA has explicitly stated that structure payments are not annuity payments—they are not an investment for the payment recipient. A structure recipient does not receive a tax advice slip related to their structure. Rather, the owner of the investment funding the periodic payment obligation—the casualty insurer or their assignee—receives the T5 slip and is responsible for the tax associated with the interest income arising from that investment. Factually speaking, **each and every payment from a properly constituted structured settlement is entirely a payment of damages, with zero interest blended in.** CRA has been crystal clear on this point, and attribution of interest income to a structure recipient is fundamental misunderstanding of the technical underpinnings of structured settlements.

The result of MCCSS' inaccurate imputation of interest income to structure recipients is the actual or potential loss of ODSP benefits for those in the province who can least afford to lose them. By treating tax-free damage payments differently when they are paid periodically instead of as a lump sum, the Ministry is effectively dissuading individuals from choosing periodic payments and encouraging them to spend those

funds quickly to avoid any impact on their ODSP eligibility. The effect of this penalty is contrary to good fiscal policy by encouraging long-term dependence on the panoply of government supports, rather than encouraging injured people to responsibly protect the long-term availability of their future care funds. The penalty also impacts injured people who are required by statute, by a casualty insurer, or by the Motor Vehicle Accident Claims Fund to accept periodic payments as part of their settlement.

Proposed solution: ODSP Eligibility Should be based on Taxable Income

The solution to this problem is simple and in keeping with the Ministry's current approach toward social assistance: i**n determining eligibility for ODSP, the Ministry of Children, Community and Social MCCSS should rely on the definition of "income" used by CRA**. In the alternative, structured settlements funded with money from settlements or awards for future medical care or pain and suffering should be completely exempt from consideration for social assistance eligibility.

This change requires revision to the MCCSS directive on compensation awards (Directive 4.6, related to Legislative Authority Sections 28(1)14, 14.1, 14.2, and 41(13) and 42 and 43(1) 4, 9, (5)). It is also consistent with what the province of Alberta has done, since 2007, with Assured Income for the Severely Handicapped (AISH), Alberta's analogous program to ODSP.[vi] Structured settlements are completely exempt from consideration for AISH eligibility.

The impact of this change on people like Jay is monumental. There is no dispute that Jay is the type of person ODSP was designed to assist, and he is receiving ODSP support now. By removing the structured settlement penalty and allowing Jay to remain on ODSP as long as he is otherwise eligible, the province can be assured that Jay will be able to meet his own basic living and drug needs as well as his extraordinary care costs without future undue burden on the Ministry of Health and Long Term Care (MHLT). Not only is it the right thing to do, this change creates the opportunity for cross-ministry savings.

Savings and Efficiencies

As the government works to find further efficiencies in an effort to meet their deficit-reduction targets, **the government must break down silos and look for cross-ministry savings opportunities.** In the context of this submission, it means that a simple ODSP directive change at MCCSS allowing structured settlement recipients to maintain their ODSP benefits will likely alleviate the pressure MHLT will bear if catastrophically injured Ontarians with normal life spans have no access to private treatment funds.

This change will help MHLT find savings and avoid expending public dollars on treatments and care that private settlements were intended to pay for, contributing to the government-wide savings efforts. We encourage the government to take a cross-ministry approach lens when working to reduce the deficit.

Structured Settlements and Auto insurance reform – Ministry of Finance (MOF)

Settling Statutory Accident Benefits Claims With a Structure

Certainty of Payment

Personal injury damage settlements or awards, particularly in the Statutory Accident Benefits ("SABS") context, are designed to meet the ongoing medical and/or care needs an individual has as the result of a serious injury. Catastrophically injured individuals are by definition vulnerable—they may or may not have a support network of trustworthy family members, friends, and advisors to assist in protecting their settlement funds. Historical anecdotal evidence throughout North America shows that lump sum settlements in personal injury cases are often misspent, lost in bad investments, or otherwise dissipated—often just a few years after those settlement funds were received. An injured individual still needs treatment or care as a result of an injury, whether or not the funds remain available to pay for such treatment or care. Structures eliminate these risks.

Cost Savings for Claimants

This government understands that allowing for the settlement of catastrophic SABS claims makes sense for all parties involved. Catastrophic claims involve serious injuries, often with complex treatment plans. Claimants want the opportunity to pursue the treatments of their choice with the providers of their choice, without the approval or oversight of the casualty company. Service providers often charge a premium for their services if they are billing to and dealing directly with a casualty company. Once the casualty company is no longer paying a provider's bill, a claimant can negotiate directly with that or another provider, often for treatment at reduced rates. As a result, leaving undisturbed the opportunity for parties to settle catastrophic claims may have a cooling effect on potential treatment provider excess billing and fraud in the province, while allowing claimants the independence to design their own future care plan.

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Administrative Efficiency for Insurers

Casualty insurers are interested in settling claims to reduce the immense expense associated with administering those claims. Unlike long term disability insurers, who are automated to issue monthly cheques in fixed amounts, casualty insurers managing SABS claims have the burden of evaluating each and every individual expense and treatment claim for thousands of claimants in Ontario every year. Payments made relating to the various SABS are reviewed and reassessed constantly. This administrative process is burdensome and comes at a significant cost. Casualty insurers pay the highest rates for care and often cannot effectively police costs of individual treatment providers. Casualty insurers recognize that claimants are better off having a realistic monthly budget that they can manage themselves through a structured settlement, rather than remaining on claim for life.

Care, Not Cash: A Leading Example

As mentioned, MOF already supports the widespread use of structures – its Motor Vehicle Accident Claims Fund ("MVACF") effectively mandates structured settlements in all catastrophic and most non-catastrophic cases. MVACF regularly requires that a very large portion of any settlement be structured (often 70% or more), which necessarily limits the amount of non-structure cash provided to a claimant as part of the settlement. MVACF's rationale is that the funds used to settle claims are taxpayer funds and should be used to meet the long-term treatment needs of the claimant.

In requiring that a large portion of a settlement be structured and in limiting up-front cash, MVACF indirectly addresses legal fees. Legal fees are necessarily limited to whatever non-structure cash a claimant receives as part of a settlement. If, for example, a claimant received 30% of a settlement as a lump sum and 70% as structure payments, immediate needs of the claimant, such as debt repayment, would have to come from the 30%, as well as the legal fees of the lawyer assisting the claimant. A lawyer who takes a case for a claimant who is negotiating with MVACF knows that their fee will be limited by the amount of non-structure cash the claimant receives from MVACF.

Potential Cost Recovery Through Reversions

MVACF also has a policy of obtaining a reversionary guarantee (or "reversion") on all its SABS structured settlements. A reversion is a guarantee on some or all of the structure payments that returns some funds to the settling casualty company in the event that the claimant dies prior to the expiry of the guarantee. The cost of the guarantee is over and above the structure payments generated by the settlement and is usually paid by the casualty company.

A reversion leaves the claimants who die in the same position as if they had remained a SABS claimant and never settled; in such a case, their payments would cease upon their death. The reversion affords the casualty company the opportunity to recoup funds, which decreases the overall cost of settlement and can potentially be passed along to consumers in the form of reduced auto insurance premiums.

It is important to note that reversions do not reduce the value or quantity of benefits provided to the claimants who need them; those benefits remain the same, whether a reversion exists or not. In some cases, claimants can benefit from higher monthly structure payments when an insurer exercises its right to a reversion. Statistical data confirms that reversions have produced a very favourable financial result for MVACF and other casualty insurers.

The Bottom Line

Structured settlements benefit injured claimants by providing them with the opportunity to receive the long-term care that they need. Catastrophically injured people who receive a lump sum of their SABS claim rarely maintain those funds to provide for their own care. The costs of lump sum cash settlements to government and the public are significant. If a claimant who receives a settlement cannot preserve it to meet his or her ongoing needs, those unmet needs may fall to OHIP, CCAC, or other government agencies to address. Potentially, the public may have to fund such settlements twice—first through their insurance premiums, then through taxes to fund overburdened medical and social support systems serving seriously injured people who have lost the settlement money intended to pay for their care.

MVACF recognized this very problem in developing its policy requiring structured settlements in nearly every case. The settlement of catastrophic SABS claims without a mandatory structured settlement has contributed to the current auto insurance environment in Ontario, where SABS settlements do not last long enough to meet the needs of the claimants who receive them and the cost of care for injured people has spilled over onto social assistance programs and the medical system.

Putting Drivers First Auto Insurance Reform

Catastrophic Limits

We agree with the government that the focus of the auto insurance reform should be on ensuring that catastrophically injured individuals receive the treatment that they need. We welcome the return to a default benefit limit of at least $2,000,000 for those who are catastrophically injured in an accident.

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We acknowledge that auto insurance is complex, and that it can be difficult for drivers to be fully aware of all the options available to them. Consumer choice is important, and consumers already have a wealth of options available to them in the current SABS framework to select coverage that meets their needs. Despite the level of choice available now, it is clearly difficult for drivers to know how much coverage they need to adequately protect themselves and their families in the event of a future accident, and most err on the side of reduced coverage in favour of decreased premium cost. Unfortunately, many Ontarians aren't fully aware of the implications of a "no fault" auto insurance regime, and the impact that decreasing one's own coverage has on one's own access to treatment after an accident—regardless of fault. Education in this regard is essential so that consumers can be informed about the consequences of the choices they are making when they buy auto insurance. We believe that consumer choice is important, but not if it jeopardizes access to necessary treatment.

After carefully reviewing the consultation papers, we are concerned with the following points:

> *"To ensure drivers have choice, consumers would be permitted to reduce their catastrophic coverage below the default limit to a minimum of $1 million. Drivers may have different reasons to obtain less coverage; for example, some may have benefits available through other insurance policies (e.g., extended health-care insurance through their workplace)."*

For unionized workers, some collective bargaining agreements stipulate that if an injury is the result of a motor vehicle accident, long term disability insurance is not payable. Additionally, many workplace extended health-care policies often have exclusions for automobile injuries, and most policies have limitations on coverage. This recommendation assumes that drivers, who don't fully understand their auto policy, must understand their extended health policy--and, in the case of a union employee, their collective bargaining--and understand where the gaps and overlaps between various policies exist. **McKellar recommends against allowing consumers to "buy down" their catastrophic coverage.** A "buy down" option puts consumers at risk of having inadequate coverage when they need it most: after a catastrophic injury. Individuals who suffer such an injury without adequate coverage to meet the needs they will have for the rest of their lives will inevitably put a burden on social assistance programs and the health care system. Industry stakeholders know that consumers buy auto insurance based on price because they don't think they will ever be injured in an accident. Without adequate catastrophic coverage, the cost of their treatment will fall to the government through increased use of social assistance and health care services.

Limiting Settlements

> *"Insurers would also be required to offer consumers the option of buying a benefit that would make them eligible to negotiate a cash settlement. …Under the default, insurers would not be permitted to negotiate a cash settlement with an insured person, except [in specific cases]."*

McKellar recommends against limiting the types of cases that can be settled. Consumers should not have to buy the right to settle their case—especially when the amount of any settlement is invariably discounted from the full value of the claim. Casualty insurers have never shown an appetite for becoming de facto disability insurers.

Recommendations

We recommend that in reforming the auto insurance regime in Ontario, the Ministry of Finance should adopt the model created and successfully implemented by its own Motor Vehicle Accident Claims Fund: a structured settlement shall be a mandatory part of the settlement of any catastrophic injury claim. The Ministry should identify the percentage or portion of a settlement that must be structured, in keeping with the MVACF model.

Specific language mandating structures will greatly simplify the settlement process for all parties involved and incentivize cost-effective behaviour. If a catastrophically injured claimant knows that the settlement of his or her claims will result in a stream of payments based on his or her needs, rather than a large lump sum that can be spent all at once, that claimant may be dissuaded from overstating injuries in hope of receiving a large lump sum. A lawyer who knows that a mandatory percentage of the settlement of his or her client's catastrophic claim will form a structure will tailor his or her fee to the funds available to pay it. That lawyer will be more likely to provide his or her client with realistic expectations regarding the value of the claim, with information about what SABS funds are intended to address, and how those funds would be paid upon settlement. Lawyers and casualty companies who know a structure will form a mandatory percentage of any catastrophic SABS settlement can spend less time negotiating those aspects of settlement and can more quickly reach a resolution.

McKellar also recommends against allowing consumers to "buy down" their catastrophic coverage and against limiting the types of cases that can be settled.

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Going Forward

We encourage the Ministry of Finance to look to MVACF's example in evaluating a structured settlement mandate and to be guided by the government's resounding endorsement of structured settlements (as evidenced by its previous inclusion of a mandate for structures in Section 267.10 of the Ontario Automobile Insurance Act).

McKellar is in the unique position of being a neutral entity serving the needs of all stakeholders who touch and concern the auto regime in Ontario. We know that clear legislative and regulatory language that instructs all parties on the form SABS settlements will take in the future will help to decrease the adversarial nature of claims negotiations and make the entire system more effective and cost-efficient.

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i Canada Revenue Agency IT-365R2 - Damages, settlements, and similar receipts

Structured Settlement
5. A "structured settlement" is a means of paying or settling a claim for damages, usually against a casualty insurer, in such a way that amounts paid to the claimant as a result of the settlement are free from tax in the claimant's hands. To create such a structured settlement the following conditions must be complied with:

(a) a claim for damages must have been made in respect of personal injury or death, (b) the claimant and the casualty insurer must have reached an agreement under which the latter is committed to make at least periodic payments to the claimant for either a fixed term or the life of the claimant,
(c) the casualty insurer must

(i) purchase a single premium annuity contract which must be non-assignable, non-commutable, non-transferable and designed to produce payments equal to the amounts, and at the time, specified in the agreement referred to in (b),
(ii) make an irrevocable direction to the issuer of the annuity contract to make all payments thereunder directly to the claimant, and

(iii) remain liable to make the payments as required by the settlement agreement

(i.e., the annuity contract payout).
As a consequence of compliance with the foregoing conditions, the casualty insurer is the owner of, and annuitant (beneficiary) under, the annuity contract and must report as income the interest element inherent in the annuity contract while the payments received by the claimant represent, in the Department's view, non-taxable payments for damages.

ii Canada Revenue Agency, Technical Interpretation, Document No. 2003-0043525, dated December 15, 2003. https://taxinterpretations.com/cra/severed-letters/2003-0043525.
iii Canada Revenue Agency IT-365R2 - Damages, settlements, and similar receipts – paragraph 3, Awards Not Considered to be Annuities

iv Ontario Courts of Justice Act – Sections 116, 116.1

Periodic payment and review of damages

116 (1) In a proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just. R.S.O. 1990, c. C.43, s. 116 (1); 1996, c. 25, s. 1 (20).

No order

(2) An order under clause (1) (b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interests of the plaintiff, having regard to all the circumstances of the case.

Best interests

(3) In considering the best interests of the plaintiff, the court shall take into account,

(a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;

(b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and

(c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

Future review

(4) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

Amount to offset liability for income tax

(5) If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award. R.S.O. 1990, c. C.43, s. 116 (2-5).

Section Amendments with date in force (d/m/y)

Periodic payment, medical malpractice actions

116.1 (1) Despite section 116, in a medical malpractice action where the court determines that the award for the future care costs of the plaintiff exceeds the prescribed amount, the court shall, on a motion by the plaintiff or a defendant that is liable to pay the plaintiff's future care costs, order that the damages for the future care costs of the plaintiff be satisfied by way of periodic payments. 2006, c. 21, Sched. A, s. 17.

The order

(2) If the court makes an order under subsection (1), the court shall determine the amount and frequency of the periodic payments without regard to inflation and shall order the defendant to provide security for those payments in the form of an annuity contract that satisfies the criteria set out in subsection (3). 2006, c. 21, Sched. A, s. 17.

Form of security

(3) The annuity contract shall satisfy the following criteria:

1. The annuity contract must be issued by a life insurer.

2. The annuity must be designed to generate payments in respect of which the beneficiary is not required to pay income taxes.

3. The annuity must include protection from inflation to a degree reasonably available in the market for such annuities. 2006, c. 21, Sched. A, s. 17.

Directions from the court

(4) If the parties are unable to agree on the terms of the annuity, either party may seek directions from the court about the terms. 2006, c. 21, Sched. A, s. 17.

Filing and approval of plan

(5) Unless the court orders otherwise, a proposed plan to provide security required by an order under subsection (2) shall be filed with the court within 30 days of the judgment or within another period that the court may specify, and the court may approve the proposed plan, with or without modifications. 2006, c. 21, Sched. A, s. 17.

Effect of providing security

(6) If security is provided in accordance with a plan approved by the court, the defendant by whom or on whose behalf the security is provided is discharged from all liability to the plaintiff in respect of damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid. 2006, c. 21, Sched. A, s. 17.

Effect of not providing security

(7) If a proposed plan is not filed in accordance with subsection (5) or is not approved by the court, the court shall, at the request of any party to the proceeding, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award. 2006, c. 21, Sched. A, s. 17.

Application for lump sum

(8) The court may order that the future care costs be paid in whole or in part by way of a lump sum payment to the extent that the plaintiff satisfies the court that a periodic payment award is unjust, having regard to the

capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to provide compensation. 2006, c. 21, Sched. A, s. 17.

Amount to offset liability for income tax

(9) If the court does not make an order for periodic payments under subsection (1) or makes an order for a lump sum payment under subsection (7) or (8), the court shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award except to the extent that the evidence shows that the plaintiff will not derive taxable income from investing the award. 2006, c. 21, Sched. A, s. 17.

Periodic payments exempt from garnishment, etc.

(10) Periodic payments of damages for future care costs are exempt from seizure or garnishment to the same extent that wages are exempt under section 7 of the *Wages Act*, unless the seizure or garnishment is made by a provider of care to the plaintiff and the seizure or garnishment is to pay for the costs of products, services or accommodations or any one of them with respect to the plaintiff. 2006, c. 21, Sched. A, s. 17.

Future review

(11) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just. 2006, c. 21, Sched. A, s. 17.

Regulations

(12) The Lieutenant Governor in Council may make regulations prescribing or calculating the amount of future care costs for the purpose of subsection (1). 2006, c. 21, Sched. A, s. 17.

Definitions

(13) In this section,

"future care costs" means the cost of medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations that is incurred at a time after judgment; ("coûts des soins futurs")

"medical malpractice action" means an action for personal injuries alleged to have arisen from negligence or malpractice in respect of professional services requested of, or rendered by, a health professional who is a member of a health profession as defined in the *Regulated Health Professions Act, 1991* or an employee of the health professional or for which a hospital as defined in the *Public Hospitals Act* is held liable; ("action pour faute professionnelle médicale")

"prescribed amount" means $250,000 or such greater amount as may be prescribed by regulation, calculated as a present value at the time of judgment in accordance with the Rules of Civil Procedure. ("montant prescrit") 2006, c. 21, Sched. A, s. 17.

Transition

(14) This section applies to all proceedings in which a final judgment at trial or final settlement has not been made on the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. A, s. 17.

[v] Structured Settlements across Canada

Alberta

Judicature Act, RSA 2000, c J-2, s. 19.1(1-9)

19.1(2) On application by any party to a proceeding, the Court may order that damages awarded be paid in whole or in part by periodic payments, and where no party to a proceeding has made an application for periodic payments, the Court nevertheless

(a) may, in the Court's discretion and on the terms that the Court thinks just, order that an award for damages be paid by periodic payments if the Court considers it to be in the best interests of the plaintiff, and

(b) shall order that an award for damages be paid by periodic payments if the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award.

British Columbia

Insurance (Vehicle) Act, RSBC 1996, c 231

Structured judgments

99 (1) The court must order that an award for pecuniary damages in a vehicle action be paid periodically, on the terms the court considers just,

(a) if the award for pecuniary damages is, after section 83 has been applied, at least $100 000 and the court considers it to be in the best interests of the plaintiff, or

(b) if

(i) the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, and

(ii) the court considers that the order, that the award be paid periodically, is not contrary to the best interests of the plaintiff.

(2) Despite subsection (1), the court must not make an order under this section

(a) if one or more of the parties in respect of whom the order would be made satisfies the court that those parties do not have sufficient means to fund the order, or

(b) if the court is satisfied that an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages arising out of the accident.

(3) If the court does not make an order for periodic payments under this section, it may make an award for damages that includes an amount to offset liability for income tax on income from investment of the award.

Manitoba

The Court of Queen's Bench Act, CCSM c C280 PART XIV.1 s. 88.1-88.9

Order for periodic payments

88.2 In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under *The Fatal Accidents Act*, the court may, on the application of any party, order that damages be paid in whole or in part by periodic payments.

S.M. 1993, c. 19, s. 6.

Nova Scotia

Judicature Act, RSNS 1989, c 240, Interpretation of Sections 35B to 35H

Periodic payments

35B In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under the Fatal Injuries Act, the court may, on the application of any party, order that the future pecuniary damages and such other damages as the parties may agree be paid in whole or in part by periodic payments. *2003 (2nd Sess.), c. 1, s. 26.*

Ontario

Insurance Act, RSO 1990, c I.8, s. 267.10

Structured judgments

267.10 In the circumstances prescribed by the regulations, the court shall order that an award for damages in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall be paid periodically on such terms as the court considers just. 1996, c. 21, s. 29.

Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996, O Reg 461/96

Structured Judgments

6. (1) The court shall order that an award for damages for pecuniary loss be paid periodically under section 267.10 of the Act if two or more of the following circumstances exist:

1. The award, including prejudgment interest but excluding costs, is for $100,000 or more.

2. On the date of the order, the plaintiff is less than 18 years of age.

3. The court is satisfied that the plaintiff has no other means to fund his or her future care.

4. The court is satisfied that the plaintiff is not likely to manage the award in a prudent manner. O. Reg. 461/96, s. 6 (1).

(2) Subsection (1) does not apply if the court is satisfied that,

(a) sufficient funds to pay the award periodically are not available under a motor vehicle liability policy; or

(b) an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery of a claim arising out of the incident. O. Reg. 461/96, s. 6 (2).

Courts of Justice Act, RSO 1990, c C.43, s. 116, 116.1(1-5)

Periodic payment and review of damages

116. (1) In a proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just. R.S.O. 1990, c. C.43, s. 116 (1); 1996, c. 25, s. 1 (20).

Quebec

Civil Code of Québec, LRQ, c C-1991

1616. Damages awarded for injury are eligible in the form of capital payable in cash, unless otherwise agreed by the parties.
Where the injury suffered is bodily injury and where the creditor is a minor, however, the court may order payment, in whole or in part, in the form of an annuity or by periodic instalments, on the terms and conditions it fixes and indexed according to a fixed rate. Within three months after the date on which the creditor attains full age, he may demand immediate and discounted payment of any amount still receivable. 1991, c. 64, a. 1616; I.N. 2014-05-01.

Saskatchewan

The Automobile Accident Insurance Act, RSS 1978, c A-35, s. 41.1 with Regulation 81(1), 216(1)

Rules respecting tort actions

41.1(1) The following rules apply to an action pursuant to this section and sections 41 and 51.1:
. . .
(4) In an action pursuant to this section, on the application of any party, the court may, in accordance with the regulations, direct that any compensation payable respecting all or any claimed categories of damages be provided for in the form of a structured compensation order.
(5) The court may make a direction pursuant to subsection (4) at any stage in the proceedings.
(6) In any action pursuant to this Part, the court shall, when awarding damages, set out under separate headings:
(a) the amounts that shall be awarded to any person for economic loss; and
(b) the amounts that shall be awarded to any person for non-economic loss.
2002, c.44, s.13.

[vi] https://www.alberta.ca/aish-eligibility.aspx#toc-1