STRUCTURED SETTLEMENTS

Avoidance of fees another advantage of structured settlements

By Robert Nigol

In Ontario, the Office of the Public Guardian and Trustee, particularly the Accountant of the Superior Court of Justice, is the depository for all money, mortgages and securities paid into or lodged with the Superior Court of Justice.

In the case of children, the accountant usually holds trust funds until the children reach the age of majority. Quite often, the monies so held were received as compensatory damages — for example, monies paid in settlement of accident injury claims.

One would naturally expect, then, that the funds held in trust in this manner would be returned with some modicum of interest accrual. It is a little-known fact, however, that, as of May 1, 2000, in Ontario, this prospect was severely diminished by changes to the *Public Guardian and Trustee Act*.

Robert Nigol

In accordance with s. 8 of the Act, the Public Guardian and Trustee is empowered to impose fees.

Specifically, as published in the April 29, 2000, edition of *The Ontario Gazette*, this means that, effective May 1, 2000, the transaction fee on trusts held for minors is "3% on capital and income receipts; and 3% on capital and income disbursements."

Furthermore, the Accountant of the Superior Court of Justice may levy a monthly "care and management fee" on trusts managed for a minor in the amount of "3/5 of 1% per annum on the average annual value of the trust under management."

In short, then, payments made into and out of court on behalf of an infant currently attract a transaction fee of three per cent, that is, three per cent in and three per cent out.

Beyond that, these payments attract an annual management fee of 0.6 per cent. Granted, these fees are levied only against what interest is earned on monies held in trust. However, given the current investment environment, it is quite conceivable that monies paid into court will be returned after an extended period of time with little or no growth.

Against this backdrop, the case for structured settlements, which, among many other positive features, are exempt from these sorts of fees, has never been better.

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Can commission fees be split?

By Robert Nigol

A question that we are frequently asked is how, as structure consultants, do we get paid?

A structure consultant receives commission(s) from the life insurer(s) with which a structure is placed. Our clients, who include lawyers from both sides of the bar and insurers, are never billed for our services, despite the countless hours that we may have invested in, for example, pre-settlement evaluative reporting, attendance at mediations and post-settlement meetings with injured parties, who ultimately opt not to structure.

We often work long and hard on files without recompense. This is how the system is set up and the risk of work without pay is something that all structure consultants assume.

Another question, somewhat related to the foregoing, has to do with whether the commission that might be earned by placing a structure can be split; for example, as a solution to the problem of two structure firms working on a file for opposing sides and one ultimately not being paid.

The short answer to this question is it depends. In Ontario, as in most other provinces, commission accruing from the placement of a structure can be split *only with a person or persons licensed to sell life insurance*.

In Ontario, s. 403 of the *Insurance Act* states that no agent or broker "shall directly or indirectly pay or allow, or agree to pay or allow, compensation or anything of value to any person for placing or negotiating insurance on lives, property or interests in Ontario, or negotiating the continuance or renewal thereof, or for attempting so to do, who, at the date thereof, is not an agent or broker and whoever contravenes this subsection is guilty of an offence."

On conviction of a first offence a person is liable to pay a fine of not more than $100,000, and on each subsequent conviction to pay a fine of not more than $200,000.

The offending life insurance agent or broker is also exposed to potential suspension or revocation of his or her licence.

The answer to the question, then, is that structure commission can be split, but only with someone licensed to sell life insurance.

In the example set out above, the splitting of commission would be permissible if both structure consultants were licensed life agents or brokers.

However, the splitting of commission with or the payment of referral fees to anyone other than a licensed life agent or broker is strictly prohibited in Ontario, as it is in most other jurisdictions in Canada.

Availability of Charter remedy evens the playing field for litigants

CIVIL REMEDY

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while an acquittal provides closure to a criminal prosecution, it does not remedy or provide redress for the enormous financial and emotional costs to those negligently prosecuted or wrongfully convicted. These costs can be substantial, particularly in cases where there is stigma attaching to the criminal conduct alleged.

By allowing persons subjected to negligent prosecutions and wrongful convictions to access civil remedies through the Charter, society allows aggrieved persons to recover on their losses and to restore their standing in the community.

While some might suggest that the advancement of Charter claims will serve to dissuade the state from pursuing criminal matters, it would seem that the availability of Charter remedies will serve to ensure that state actions are carried out in an appropriate fashion.

As caselaw will attest, awards for negligent investigations and malicious prosecutions have been few and far between.

The appropriateness of Charter remedies would seem self-evident — to provide for the assurance of fundamental rights and freedoms to citizens, and to provide a remedy to those whose rights and freedoms have been denied. By broadening the reach of Charter remedies, the access of litigants to justice will be enhanced.

As noted above, there are many areas of litigation where the Crown enjoys an immunity from suit simply because of the passage of a very narrow limitation period or the self-immunizing words of a statute that were drafted by the state itself.

For those whose access to a remedy would otherwise be constrained or denied outright, the availability of a Charter remedy would seem to allow such litigants the opportunity to pursue their claims on a much more even playing field.

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