

# U.S./CANADA CROSS-BORDER STRUCTURE CONSIDERATIONS

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Many Canadian residents are injured each year, while in the U.S. on business or pleasure, and pursue their personal injury claims in U.S. state courts. These claimants, when settling their claims, should give serious thought to seeking a Canadian structured settlement, denominated in Canadian dollars, which meets the structure requirements of Canada Revenue Agency (CRA), the Canadian equivalent of the Internal Revenue Service (IRS).

We can all agree that for personal injury claimants on both sides of the U.S.-Canada border, structured settlements make sense for a variety of reasons. Chief among those reasons are the certainty, security of payment, and tax advantages that structures provide.

To ensure that claimants will have the benefit of all of these advantages, it is almost always better for the structure to be established in the country where they live and denominated in the currency of that country. Were a Canadian resident claimant to receive a U.S. structure, the certainty and security that the structure is designed to provide would be compromised by the ongoing exchange rate risk to which the Canadian resident claimant would be exposed to over the term of their U.S. structure. Further, Canadian resident claimants have extremely limited access to the U.S. structure market, as most U.S. life insurers are not prepared to underwrite non-residents.

In deciding whether and where to structure, in addition to avoiding exchange rate risk and U.S. structure market restrictions, Canadian resident claimants should take into account the fact that the structure constituting requirements in Canada are significantly different from those in the U.S. While their personal injury claims are pursued in U.S. state courts, Canadian resident claimants are tax residents of Canada (and not of the U.S.) and, should they ever be audited and forced to demonstrate why their structure payments should receive tax-free treatment, would be audited by CRA, not the IRS.

Canadian residents would have a far easier time satisfying CRA that their structure payments should receive tax-free treatment if their structures were designed to meet the structure requirements of CRA, instead of the quite different structure requirements of the Internal Revenue Code. Among the important differences distinguishing Canadian from U.S. structures, are the following:

1. CRA requires (in Interpretation Bulletin 365R2) that the underwriting annuity funding the structure payments be “non-assignable, non-commutable and non-transferable,” all three of which attributes are customary in Canadian structured settlement annuities.
2. Additionally, CRA requires that the casualty company or assignee owing the structure payments be the “owner and annuitant (beneficiary)” of the underwriting annuity. All three of these capacities are provided for in Canadian structured settlement annuities.
3. Further, CRA requires that the underwriting annuity contain an “irrevocable direction” to pay the claimant, something which Canadian structured settlement annuities do. On account of this feature, Canadian structure payments cannot be factored, and the structured settlement factoring industry has not made any inroads into Canada.

For almost forty years, McKellar has worked with U.S. structure brokers and their personal injury attorney and insurer clients to make Canadian structured settlements a straightforward and achievable option for the settlement of the U.S.-based claims of Canadian resident claimants.

Canadian structured settlements are placed with one or more of four highly secure life insurers and are guaranteed by Assuris, the Canada-wide life insurance industry solvency fund. Structures involving U.S. defendants and casualty insurers are assigned, on an absolute and without recourse basis, leaving the assignors in the same position as if the case had settled on a lump-sum basis, with the U.S. defendant and casualty insurer having no ongoing liability or responsibility whatsoever.

McKellar maintains a legal staff that includes lawyers and structure specialists with both active Canadian and U.S. licenses. Please let us show you how we can help by contacting us today.

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