

# schjerner mediations

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## ERIC'S LTD UPDATE

### ISSUE 24 – Winter 2025

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**Eric Schjerner** is a mediator with 12 years of mediating LTD and other insurance disputes, a former litigator with over 3 decades of LTD trial work, and the author of 3 editions of the book **Disability Insurance Law in Canada**.

To look for available mediation dates or to book a mediation with Eric, visit [Schjerner Mediations](https://www.schjernermediations.com) or simply email Eric at: [eric@schjernermediations.com](mailto:eric@schjernermediations.com).

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Eric Schjerner

Schjerner Mediations Ltd.

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### What's New at Schjerner Mediations?

I had a nice holiday break and hope you did too. But I felt a good way to dust off the post-holiday cobwebs was to send out this LTD update. Who knows what 2025 will bring with a Canadian federal election, Donald Trump's tariff talk and with it a possible recession. Hopefully not, but looking back over my many years in the world of LTD insurance recessions often increase LTD claims volumes which could eventually mean more case law for future LTD updates.

This update contains two decisions of interest. While these two cases are not of course in *Disability Insurance Law In Canada, Third Edition*, this update will be posted on my Schjerner Mediations website. To access the 850 odd cases in *Disability Insurance Law In Canada, Third Edition*, click [here](#).

You may have noticed a change to my on-line booking calendar on my website. I have moved over to the booking calendar used by members of the Canadian Academy of Distinguished Neutrals. You may book a mediation via my website or simply email me at [eric@schjernermediations.com](mailto:eric@schjernermediations.com).

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### A. Limitations Act, Relief from Forfeiture

*Rahmouni v. Distinctive Wood Products Inc. and Desjardins Insurance*, 2024 ONSC 5738

Desjardins was successful on a summary judgment motion, on the basis that the plaintiff's claim for LTD benefits was out of time and that the doctrine of relief from forfeiture did not apply.

The plaintiff (whose first language was not English and claimed to be unclear about his LTD coverage) alleged that he became totally disabled sometime in early 2017. Desjardins first became aware of a possible claim when the Statement of Claim was served in 2021. No medical documentation was provided to Desjardins until the summary judgement motion was launched in 2023.

The motions judge noted in part:

*...as is well-summarized in the judgement of Petersen J. in Ferguson v. Halton, 2018 ONSC 5675:*

*In traditional insurance cases where no application for benefits has been submitted by the plaintiff, courts have found that the limitation period begins to run from the date the plaintiff became aware that they were totally disabled and had knowledge of the existence of their coverage: Thomson v. Sun Life Assurance Company of Canada, 2021 ONCA 849. If it were otherwise, a plaintiff could stall and control the triggering of the limitation period by holding back on filing an application indefinitely or until it suits them.*

*Accordingly, then, the claim is statute-barred by expiry of the limitation period.*

*...the claim is also out of time pursuant to the contractual limitation period set out in the policy...*

Turning to the issue of relief from forfeiture, the motions judge examined the cases of *Wiles v. Sun Life, Saskatchewan River Bungalows v. Maritime Life*, and *Williams Estate v. Paul Revere* and commented as follows:

*...in this case the plaintiff never filed a claim for benefits with DFS. Instead, he sued. As I have found, on both statutory and contractual terms, that action was out of time when it was launched and when it was launched it did not even advance a claim based on injuries sustained while the plaintiff was insured with DFS. On its face, this is a case of non-compliance, not imperfect compliance.*

The judge further found that the plaintiff's actions did not meet the reasonableness test required to grant relief from forfeiture since:

*...the plaintiff discovered his coverage in July 2017, launched his suit four years later in July 2021, did not identify the cause of his injuries until almost five years later...did not provide any medical information to DFS until almost six years later and never applied to DFS for benefits. Quite apart from the obvious lack of timeliness...none of these delays are explained. This conduct is not, in my view, reasonable.*

## **B. Pre-existing Condition Exclusion, Out of Country Exclusion**

*Nasab v. Sun Life Assurance Company of Canada*, 2024 ONSC 6921

Sun Life was successful on a motion for summary judgement on the basis that no further STD benefits were payable since the plaintiff was out of country contrary to an express policy exclusion, and that no LTD benefits were payable since a pre-existing condition exclusion applied.

The plaintiff received 11 weeks of STD benefits before leaving Canada for the following 15 weeks. The policy excluded benefits if the plaintiff was “absent from Canada longer than 4 weeks due to any reason” and the judge rejected the plaintiff’s contention that STD benefits should merely be suspended and the remaining 15 weeks paid out once she returned to Canada.

Regarding the claim for LTD benefits, the policy excluded benefits for “disability which results directly or indirectly from a condition which existed on or before the date coverage began.”

There was no issue that the plaintiff had seen her physician on numerous occasions for low back pain and chronic neck pain prior to her coverage taking effect. The judge rejected the opinion of the plaintiff’s medical expert who opined that while the plaintiff had suffered pre-existing back and neck pain problems, she was able to perform her job duties with such problems and thus the pre-existing condition exclusion should not apply since the plaintiff only made a claim when her problems worsened and she could no longer perform the duties of her work.

*“On the evidence before me the plaintiff’s chronic low back pain disability results directly or indirectly from a condition which existed on or before the date her coverage began and she is not entitled to LTD benefits.”*

## **C. Lump Sum Award of future LTD benefits**

*Pasap v. Saskatchewan Indian Gaming Authority and Bear Claw Casino*, 2022 SKQB 2000

As set out in [Eric's LTD Update Issue 17 Winter 2023](#), this trial decision generated a great deal of excitement given that the trial judge awarded a “discounted” lump out of future LTD benefits to age 65 totalling \$886,000 using the *Saskatchewan Courts of Justice Act* interest rate. The fact that the trial judge did so without either analyzing any of the case law from B.C., Alberta and Ontario rejecting such a lump out of future benefits, or appreciating the difference between LTD claims (with an available remedy of reinstating the plaintiff on claim) and tort claims (with no such available remedy) caused many in the defence bar to feel that this decision would be reversed by the Saskatchewan Court of Appeal.

The appeal was argued on January 10, 2024 and we are still awaiting a decision. While many defence counsel are hopeful that this long delay in issuing its decision must mean that the Court of Appeal is working on an opus that will overturn the trial judge’s reasoning versus a simple “appeal dismissed”, I learned long ago not to attempt to predict what a Court may or may not do. So stay tuned!

## **ACKNOWLEDGEMENTS:**

These LTD Updates are made possible through the many LTD counsel who regularly feed me case law. I am quite happy if I receive the same case from 2 or 3 different counsel as this tells me that my network is working. So thank you.

For this issue my thanks to Emily Caputo of Desjardins Financial, Michaela Diakiw of Diakiw Law, Steve Shantz of Sun Life, and Tracey Hamilton of Beneva. For any questions about LTD law, a new case you wish to share, or a mediation you wish to book, please email me at [eric@schjerningmediations.com](mailto:eric@schjerningmediations.com).

