

# schjerner mediations

P.O. Box 15343  
Queensway High P.O.  
Toronto, ON  
M8Y 0B4  
eric@schjernermediations.com  
416-236-9282

## ERIC'S LTD UPDATE

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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?

It is a few weeks early I know to officially call this a Spring LTD Update. However, with all of the shovelling those of us in Toronto have had to do in mid February, can you blame me for wanting to fast forward to Spring? More importantly, the decision by the Saskatchewan Court of Appeal in *Saskatchewan Indian Gaming Authority v. Pasap*, 2025 SKCA 15 has just been released and forms most of the subject matter for this update. And the Saskatchewan Court of Appeal must have gone on a bit of a blitz as a decision on whether a statement of claim is an appropriate forum for seeking LTD benefits is also contained in this update.

As usual, this LTD update will be posted on my [Schjerner Mediations](https://www.schjernermediations.com) website together with the 9 other updates I have done since the Third Edition of *Disability Insurance Law in Canada* was released in 2023. The total number of cases listed on my website now stands at 24. To access the 850 cases cited in the Third Edition of my book, you need the book itself, which you can order [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. Lump Out of Future LTD Benefits

*Saskatchewan Indian Gaming Authority v. Pasap*, 2025 SKCA 15

To recap, and as stated in my Winter 2023 LTD Update (found on my Schjerner Mediations Website), in 2022, the Saskatchewan Court of Queen's Bench in *Pasap v. Saskatchewan Indian Gaming Authority*, 2022 SKQB 200 found (among other remedies including damages for wrongful dismissal) that future LTD benefits should be lumped out to age 65 in the total amount of \$886,000 "discounted" at the Saskatchewan Rule 912 discount rate for future damages (2.5%).

The Saskatchewan Court of Appeal has just released its decision and in a 2-1 decision dismissed the appeal by Saskatchewan Indian Gaming Authority ("SIGA"). However, those hoping for a detailed analysis by the Court on whether lump outs of future LTD benefits are a proper remedy available to Courts will be sorely disappointed.

Before turning to the few comments on point in the Court of Appeal decision, I will set out what I believe seems to have occurred in the trial and Court of Appeal decisions concerning the lump out of future LTD benefits. My belief is based on a conversation I had with plaintiff counsel together with a reading of the decisions (defence/appellant counsel did not return my phone calls).

At trial, plaintiff counsel provided a valuation of damages chart for the judge. This valuation chart included wrongful dismissal notice period damages, damages for loss of employment benefits, past LTD benefits, and damages for future LTD benefits (since the plaintiff became disabled during the reasonable notice period) discounted at 2.5%. The trial judge simply accepted this damages valuation chart. There were not even any arguments made by either side over whether a lump out of future LTD benefits was within the power of the Court to grant.

Defence counsel did not raise any of the 5 decided cases across Canada which have held that a lump out of future LTD benefits is not a proper remedy for a Court to grant, and the only decision presented to the trial judge was *Brito v. Canac Kitchens* (see below).

This apparent oversight continued at the Saskatchewan Court of Appeal where appellant counsel did not even raise the lump out of future LTD benefits as a ground for appeal.

Let us turn now to the few paragraphs in the Court of Appeal majority decision which even brush on the issue of damages:

*(21) The Trial Judge valued Mr. Pasap's damages for wrongful dismissal and for loss of LTD benefits at \$1,216,764.25.*

*(44) Without deciding that the Disability Plan cannot be a standard form contract because it governs the relationship between SIGA and its employees, there is no evidence to suggest that the Disability Plan was a standard form group insurance policy used by employers other than SIGA. The insurer, Great West Life, is not a party to these proceedings. Great West Life was not called upon to give evidence at trial respecting how the Disability Plan was negotiated, constructed or used, or even to explain how it administered benefits under the Plan. That*

evidence might have provided some clarity in clarifying any damages that flowed from Mr. Pasap's loss of entitlement to benefits under the Disability Plan as a result of his wrongful dismissal. But, curiously, somehow that evidence was not tendered.

(110) The trial judge's reasons in respect of damages are scant...however, clear the bar for sufficiency.

(112) In his trial brief, Mr. Pasap provided his calculation of the value of lost LTD benefits and the basis for the valuation, as follows: Discounted LTD benefits during the any occ period and subject to a discounted rate pursuant to Rule 2-91 of the Queen's Bench Rules.

(113) The trial judge accepted Mr. Pasap's valuation....Given that Mr. Pasap provided a basis to support this valuation, it is implicit that, by accepting his valuation, the trial judge also accepted and adopted his reasons for valuation....On appeal SIGA has not identified which aspect of Mr. Pasap's valuation of lost benefits is in error, with the exception of contending that damages for LTD benefits should not be indexed for inflation.

The dissenting Court of Appeal opinion did not directly address the issue of damages for future LTD benefits although it did dissent on whether the plaintiff had proven total disability from any occupation (which of course would render future LTD benefits a moot point). Note that both the majority and dissenting opinions spend a great deal of time canvassing case law on the issue of total disability, including *Paul Revere v. Sucharov* and *Bacon v. Saskatchewan*. I do not intend to cover such analyses here but direct those interested in this discussion to the 230 paragraph decision by the Court of Appeal.

#### **WHERE ARE WE NOW REGARDING A LUMP OUT OF FUTURE BENEFITS?**

*Pasap* will no doubt rekindle the years long debate as to whether a plaintiff can receive a lump out of future LTD benefits at trial.

There are now conflicting decisions. On the one side, we have *Pasap* as well as *Brito v. Canac Kitchens*, 2011 ONSC 1011, where a court ordered a lump out of 2 years of future LTD benefits, albeit in a wrongful dismissal case where the employer had treated the dismissed employee as if he were "a serf." Neither *Pasap* nor *Brito* spent any time examining if a lump out of future LTD benefits was a proper remedy for a court to grant. Furthermore, in both cases the LTD Plan at issue was self-insured by the employer.

On the other side there are 5 cases: 1 in Ontario, 1 in Alberta, and 3 in British Columbia where Courts actually examined the issue and categorically rejected a future lump out of LTD benefits. The most important of these 5 decisions is *Gascoigne v. Desjardins Financial Security Life Assurance Company*, (2020) B.C.C.A. 316. The other 4 decisions holding that a lump out is not an available remedy can be found in Chapter 12 Part D of *Disability Insurance Law in Canada (Third Edition)*.

It looks like this debate will only be laid to rest once and for all if a case comes along where:

- the case involves only LTD benefits (i.e. not a case where the core of the lawsuit is a claim for wrongful dismissal damages),
- the LTD policy at issue is a regular insurance contract (not self-insured by the employer),
- the LTD insurer is a party to the action and testifies at trial,
- the Court is directed by counsel to examine all of the case law on this issue, and
- defence counsel points out to the Court the key difference between tort claims and claims for LTD benefits (which have as an available remedy a reinstatement under the terms of an existing insurance contract).

I will leave it to those who still litigate to decide if they would rather have in their Book of Authorities a British Columbia Court of Appeal decision which actually examined the issue as opposed to a Saskatchewan Court of Appeal decision which did not.

## **B. Proper Forum: Statement of Claim Versus Grievance**

*The Government of the Province of Saskatchewan v. Banarjee, 2025 SKCA 23*

The Public Employee Benefits Agency of Saskatchewan (“PEBA”) had in place a self-insured disability income plan funded by the Government of Saskatchewan and administered by Canada Life. Such benefits were made available to the plaintiff through a collective agreement.

The plaintiff received 20 months of own occ LTD benefits before such benefits were terminated.

Following two appeals the plaintiff sued for entitlement to continued benefits.

PEBA asserted that the plaintiff’s redress was not by commencing a civil action but rather through the grievance process. The Chambers judge denied PEBA’s Application, ruling that “neither judicial review nor arbitration is the appropriate forum for resolution of the plaintiff’s claim for LTD benefits and her claim was appropriately brought through a Statement of Claim.” This decision (2024 SKKB 19) can be found in my Spring 2024 LTD Update posted on my website.

**Held:** Appeal dismissed.

*“...the decisions of the Disability Income Plan Council regarding an employee’s entitlement to benefits do not have the characteristics of a government administrative or adjudicative decision that would be subject to judicial review.”*

NOTE: For those readers interested in the Court of Appeal’s analyses on topics such as whether a public body has acted in a private way when making a decision for the purposes of deciding whether judicial review of the decision is available, and on the suitability of public law remedies, I would direct you to the 84 paragraph decision itself.

## **ACKNOWLEDGEMENTS:**

Thank you to Tracey Hamilton of Beneva and to Michaela Diakiw of Diakiw Law for forwarding me the cases referenced in this Update.

If you have any case law to share, have a question about LTD or life insurance, or would like to book a mediation please email me at [eric@schjerningmediations.com](mailto:eric@schjerningmediations.com).

