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ERIC'S LTD UPDATE

ISSUE 26 – Fall 2025

Eric Schjerner is a mediator with over 13 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](#) or simply email Eric at: eric@schjernermediations.com.

Eric Schjerner

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What's New at Schjerner Mediations?

The biggest news in the world of LTD litigation has to be the massive changes to how litigation in Ontario will look once the proposed changes to the Ontario Rules of Civil Procedure are enacted. Read on for more details.

This update also contains a 1997 decision of interest which is an important decision on the topic of offsetting LTD benefits by CPP disability benefits. This decision, *Pogue v. Sun Life*, I somehow missed in the Third Edition of *Disability Insurance Law In Canada*. To access the 850 odd cases in *Disability Insurance Law In Canada, Third Edition*, click [here](#).

My mediation booking calendar is that 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.

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A. *Pogue v. Sun Life Assurance Company of Canada*, 1997 CanLII 3957 (B.C.S.C.)

The plaintiff applied for CPP disability benefits in 1986 but was denied same. The plaintiff appealed unsuccessfully. The plaintiff re-applied for CPP disability benefits in 1994 and was approved.

Sun Life submitted that the plaintiff should have re-applied at an earlier date. The judge noted that the plaintiff's lawsuit against Sun Life was commenced on June 30, 1992. As such, the judge concluded that the plaintiff must have received legal advice at that time to pursue her claim for LTD benefits and it was reasonable to assume that she could have also received legal advice to re-apply for CPP disability benefits, and had she done so, it was probable that she would have received such benefits as early as July 1, 1992. On this basis the court found that any LTD benefit payable since July 1, 1992 should be reduced by the CPP disability benefit.

B. Ontario Civil Rules Review: Proposed changes to the LTD litigation process

Every LTD lawyer and litigation consultant should be aware of massive proposed changes to the Ontario Rules of Civil Procedure which (assuming they are enacted) will fundamentally change the way litigation will be practiced in Ontario.

As a former litigator who has not conducted an examination for discovery in over a decade, I feel it is not my place to comment on whether the proposed changes are absolutely brilliant and will streamline the litigation process, or are completely, incomprehensibly crazy.

The Working Group (which includes a judge and a representative from the A.G.'s office) had initially set a three month consultation process with legislation to be enacted by the end of 2025. However, following pushback from a number of entities (including the CLHIA) the feedback timeline has been extended with the current aim that legislation be enacted in mid-2026.

The proposed changes include:

- *The abolition of oral examinations for discovery.*
- *The new test for Affidavits of Documents is no longer relevance but rather all documents a party is relying upon or a document the party feels is (in THEIR opinion) adverse to their case.*
- *Producing witness statements to put in a party's case (as opposed to examination in chief).*
- *Mediations would become mandatory in every jurisdiction in Ontario.*
- *Replacing substantive pre-trials with third party evaluative mediations where the mediator would be required to submit a post-mediation report setting out the mediator's views on*

the strengths of each side's position, a reasonable settlement number, and whether a party refused to move towards such number. Such report could be used by the trial judge to impose cost consequences.

- *Within one year of an action being commenced witness statements must be produced and there would be a case conference with a judge who would set a trial date within one year of such case conference. Case conferences would presumably be largely administrative with the usual judge providing their views of the case being replaced by the evaluative mediation.*

While these changes are not yet written in stone the Working Group has given every indication that they might as well be.

That said, it would seem that many questions remain unanswered, including:

- *How a party can be satisfied (without oral examinations for discovery) that the opposing party has produced all relevant documents in their affidavit of documents. For example, once in my litigation days a small LTD insurer with no previous litigation referred a new LTD lawsuit to me. I asked my claims department contact to send me their complete LTD file and prepared an Affidavit of Documents which was then sworn. At oral examinations for discovery plaintiff counsel asked if any internal claims notes had been created. "Oh yes" was the reply. Discovery was adjourned and I produced a revised Affidavit of Documents. In answer to my question my client advised that she had thought I wanted the complete medicals in the file, not the complete file including internal notes. It did not help that one such note included a claims adjudicator writing "This claimant is a big whiner. After dealing with her today I need to go home and have some wine."*
- *How a mediator can remain neutral when they will be required to submit an evaluative report for any mediation which fails to settle.*

FINAL COMMENT:

I have been around long enough to have seen many proposed changes to the Rules go nowhere.

Many readers will recall discovery plans. Some readers will recall judicial mediations, where every mediation in Ontario was proposed be conducted by a judge. Yes these same judges who are apparently driving these latest proposed Rule changes since they are being overwhelmed with motions concerning examination for discovery refusals. But as two prominent LTD counsel (one plaintiff, one defense) have said to me: "Why ban all oral examinations for discovery? Why not somehow limit motions arising from discoveries or have discovery disputes heard by an entity other than a judge?"

The Working Group is adamant however that these proposed Rule changes are coming.

Stay tuned.

ACKNOWLEDGEMENTS:

For this issue thanks to Rob Konduros of Hilborn Konduros for pointing out that the Pogue v. Sun Life decision does not appear in my text. Thank you also to the literally dozens of LTD counsel I have spoken with at recent mediations (both plaintiff and defence) who provided insight into the proposed Rule changes.

If you have any questions about LTD law, have a new case you wish to share, or have a mediation you wish to book, please email me at eric@schjernermediations.com.

