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on

ADMINISTRATION OF ONTARIO COURTS

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PART III

see Chp. 6 attached

MINISTRY OF THE ATTORNEY GENERAL

CHAPTER 6

THE PRE-TRIAL CONFERENCE IN CIVIL CASES

SUMMARY

A. INTRODUCTION

The procedures governing the conduct of civil proceedings in the Supreme Court and County and District Courts, subject to express statutory provisions, are set out in the *Rules of Practice*. These procedures are adopted where appropriate in other courts. The Rules provide for the institution of proceedings to be followed by a series of steps designed to narrow and define the issues and generally prepare the case for trial. They consist of the exchange of pleadings in which admissions of material allegations are to be made[1] and "discovery", a term used broadly to include examination for discovery (an oral examination of a party before trial, touching the matters in question by any party adverse in interest), production of documents, medical examination, inspection of property, cross-examination on an affidavit and examination of a witness on a pending motion. The Rules do not prescribe the holding of a "pre-trial conference" although there is nothing to preclude the informal convening of such a conference, as we shall discuss later.[1a] It is sometimes suggested that the pre-trial conference serves the same general purpose as examination for discovery and that its widespread employment in the United States may be attributed to the deficiency in American jurisdictions of procedures for a broad oral examination for discovery. Most, if not all jurisdictions in the United States, however, do have provision for oral

[1]See Rules 144, 146 and 678. The rule governing the admission of allegations is more honoured in its breach than its observance.

[1a]See generally Watson and Barber, *Annual Survey of Canadian Law: Civil Procedure*, 4 Ottawa L. Rev. 132, 167-72 (1970).

examination for discovery (usually termed "depositions upon oral examination") and its scope tends to be broader in the United States than in Ontario. In addition, discovery may extend to non-party witnesses.

The pre-trial conference was introduced into the United States Federal Rules of Civil Procedure in 1938 together with the introduction of broad oral examination for discovery.[2]

In Nova Scotia the pre-trial conference subsists with oral examination for discovery of both party and non-party witnesses.

B. Nature and Purpose of the Pre-trial Conference

The typical pre-trial conference is a conference attended by counsel in the case and a judge or other judicial officer several weeks before the trial date after all other pre-trial proceedings have been completed. The nature of the conference varies widely from jurisdiction to jurisdiction. It ranges from a statement of agreed facts to provision for repleading, a device for consolidating motions, and a settlement conference or any combination thereof. It may be little more than a series of detailed forms which are designed to ensure that counsel are fully prepared for trial. In some cases it amounts to a trial before an arbitrator whose decision is not binding. The objects of pre-trial are usually acknowledged to be the shortening of trial time by a clarification and reduction of issues, and by limiting the number of witnesses, *etc.*, and the improvement of the quality of the trial by increasing the preparedness of counsel, by facilitating the avoidance of surprise and by generally aiding the clear presentation of the case. It is not generally agreed whether the object of aiding the disposition of the case should include the active judicial encouraging of settlement. Although settlement may be the by-product of pre-trial, it is not necessarily prescribed or considered to be an objective.

1. *In the United States*

The use of the pre-trial conference became prevalent with its introduction into the Federal Rules of Civil Procedure in 1938.[3] It has since been adopted in one form or another in most state jurisdictions.[4] Generalizations about the American experience are difficult as the following passage illustrates:

> Our conference, however, has turned out to be so variable as to complicate assessment, comparative or otherwise. It appears in the Federal Rules as a device to be used in the court's discretion. In some courts it is used hardly at all; in others it is regularly used but in a perfunctory way; in still others it is cultivated intensively. The pre-trial conference figures importantly in the conduct of large, complex cases where it has been used under strong judicial initiative and impulsion to organize the conduct of discovery by the parties, to concentrate the parties' interlocutory motions, to frame issues of fact and law superseding the pleadings *pro tanto*, and to make other arrangements anticipating ultimate trial. Discussion of settlement comes in quite naturally, and is encouraged and even initiated by some judges.[5]

[2]See United States Federal Rules of Civil Procedure, Rules 16 and 30.

[3]Rule 16. See James, *Civil Procedure* 223 (1968).

[4]By 1955, 41 states authorized the pre-trial conference procedure: Barron and Holzoff, *Federal Practice and Procedure* 833 (1960).

The utility of pre-trial is a matter on which there is little agreement. The view that trials are shortened and settlement rates increased has been expressed by many judges in the United States based upon personal observations of the operation of pre-trial. The most extensive objective study of the subject casts doubt on these conclusions.[6] The results of that study, conducted by Professor Maurice Rosenberg in New Jersey in 1964, show that the length of trials is not statistically reduced and that there is no increase in the number of cases settled before trial. The study revealed, however, an improvement in the quality of trials following pre-trial. Counsel were found to be better prepared, a clear presentation of the opposed theories of the case was more common, gaps and repetition in the evidence was reduced and tactical surprise curbed.[7]

The general applicability of Professor Rosenberg's conclusions is frequently challenged[8] and the pre-trial conference continues to be widely employed in the United States, although there would appear to be a trend away from making it mandatory. Instead, a more flexible and selective device — pre-trial only at the request of counsel or at the direction of the court — is being fostered.

2. *In Canada*

Alberta,[9] British Columbia[10] and Nova Scotia[11] all have rules of

[5]Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure", 69 Mich. L. Rev. 821, 827 (1971).

[6]See Rosenberg, *The Pre-trial Conference and Effective Justice* (1964). Professor Rosenberg selected 1,500 personal injury cases to be tried by jury as a control group and 1,500 at random as an experimental group. The rule making pre-trial mandatory was suspended for the experimental group and no pre-trial was held in cases in that group unless requested. All cases in the control group were pretried as usual.

[7]Todd, "Pre-trial Revisited", 50 Judicature 153 (1967). See also Professor Rosenberg's summary in "Devising Procedures that are More Civil to Promote Justice that is Civilized", 69 Mich. L. Rev. 797, 804-07 (1971).

[8]See, for example, Becker, "Efficient Use of Judicial Resources" 43 F.R.D. 421 (1967) in which Chief Justice Becker of the United States District Court for the Western District of Missouri concludes from his experience in the use of the "accelerated docket" with mandatory pre-trial that it is effective in speeding up case disposition. He places reliance on an experiment which was conducted during one accelerated docket in which compulsory pre-trial was suspended and the results compared with the preceding one when pre-trial was mandatory as follows:

	With Systematic Pretrial	*Without Systematic Pretrial*
Cases Set	127	81
Cases Tried	20 (16%)	9 (11%)
Cases Terminated Without Trial	99 (78%)	37 (46%)
Cases Removed from Docket Unterminated	8 (6%)	35 (43%)
Total Terminated	119 (94%)	46 (57%)

[9]Alberta Rules of Court 1968, Rule 219.

[10]British Columbia Supreme Court Rules 1961, 0.34a.

[11]Civil Procedure Rules 1971, Rule 26.

general application authorizing the holding of pre-trial conferences. In British Columbia the procedure is optional with counsel and has rarely been invoked since its inception in 1961.[12] In Alberta, pre-trial was introduced in 1969 and, as in British Columbia, is invoked only at the instance of counsel. Although rarely used, it has been effective in a number of complex cases.[13]

The Nova Scotia rule, adopted in 1968, authorizes the holding of a pre-trial conference at the request of either party or at the direction of the court. The procedure is currently used in approximately 20% of cases, two-thirds at the request of counsel and the other third at the direction of the judge assigned to hear the case. Chief Justice Cowan, Chief Justice of the Trial Division, Supreme Court of Nova Scotia, in correspondence with the Commission provided the following memorandum concerning the use of pre-trial conferences in Nova Scotia:

MEMORANDUM

re use of pre-trial conferences
in Nova Scotia

R.1, Order XXXII of the Rules of the Supreme Court of Nova Scotia, as amended 1968, provide for a pre-trial conference. New Civil Procedure rules have been adopted, December 2, 1971, effective March 1, 1972, and r.26.01 deals with pre-conference procedure and has substantially the same effect as existing r.1 of Order XXXII. . . .

1. *How frequently is the procedure invoked?*

In approximately 20% of civil cases.

2. *By whom is it usually invoked?*

In two-thirds of the cases by the solicitors involved and one-third by the judge assigned to hear the case.

3. *In what type of case is the procedure invoked?*

In civil cases of all kinds, with or without a jury. If it appears that the case is likely to be long and more than one day has been set aside for trial, the judge will, in the absence of an application by counsel, suggest that a pre-trial conference take place. It is desirable that the pre-trial conference take place at least two weeks before the trial. Sometimes, one of the court officials who knows that the case is likely to take some considerable time, will suggest to the judge that a pre-trial conference be called. The judge will normally agree and suggest a date, which is then passed on to counsel by the court official.

[12]Correspondence between the Commission and Mr. Justice W. Kirke Smith, justice of the Supreme Court of British Columbia.

[13]Letter to the Commission from Chief Justice Milvain, Chief Justice of the Trial Division, Supreme Court of Alberta.

4. *Before whom does the conference take place?*

This is normally the judge who is assigned to hear the case but, if he should be absent on circuit, or otherwise occupied, one of the other judges of the Trial Division will, by arrangement, preside at the conference.

5. *How is the person, before whom the conference is conducted, chosen or appointed?*

The judge who is assigned to hear the case normally decides that he will preside at the pre-trial conference. If he should be absent, etc. a court official who is in touch with the docket will arrange for another judge to preside.

6. *In general, what matters are usually discussed or canvassed at the conference?*

It is usual to start with the statement of claim and to ascertain what matters are agreed upon and what are contested. It often develops that the defendant will not admit an allegation in the statement of claim in the form in which it is stated, but is prepared to admit it subject to certain qualifications and sometimes is prepared to admit it, provided that the plaintiff agrees to call certain witnesses or company officers and place them on the stand and make them available for cross-examination. Similarly, the defence is gone through to see what allegations, if any, in the defence can be admitted. In the course of this procedure, the main points at issue emerge and can be clarified and stated.

The second matter for consideration is the listing of documents and the admission of copies or of originals and the making of admissions as to sending and receipt of such documents, etc. Often, it can be agreed that the plaintiff will prepare a folder which can then be marked Exhibit 1, containing, say, 25 documents in chronological or some other order, numbered 1 to 25, with an index sheet identifying each document by number, date, content, etc. Arrangements are made for sufficient copies so that the presiding judge will have one, the witnesses will have one, the court reporter will have one and each counsel will have such a folder with copies of documents.

The next question discussed is as to whether or not there is any preliminary question of law which can, perhaps, be submitted in advance of the actual trial and decided. This may shorten the trial or may result in a settlement. See for example, *Bacon American Corporation* v. *Orion Insurance Company Limited* (1969), 67 D.L.R. (2d) 75. This was an application made to me shortly after the pre-trial conference rules were made effective February 1, 1968. The matter had been set down for trial on February 15, 1968, and the plaintiff had two witnesses living in Indiana, who were required to give evidence on the question of the amount of a fire loss. At the pre-trial conference, it was agreed that a preliminary question would be decided by me as to the applicability and effect of the one-year period of limita-

tion prescribed in the Insurance Act. Admissions of fact in the documents were made for the purpose of the submission of the preliminary question for decision. I decided the matter against the plaintiff and, as a result, the action did not go forward the plaintiff consented to an order dismissing the action. It was not necessary to bring the witnesses to Halifax and the time and expense involved in so doing was avoided. The defendant would have had to bring witnesses on the question of the extent of the loss, and this also was made unnecessary.

It may be urged by those who do not approve of pre-trial conference practice that such a question can be submitted by consent without any pre-trial conference rule. In fact, however, the existence of the rule tends to make it easier to have these questions raised and submitted in advance.

In certain cases, where technical evidence is necessary or evidence of medical practitioners is necessary, it may be possible to have the parties agree to have the question of liability decided in the first instance, deferring the hearing as to damages until after the question of liability has been decided. In many cases, once the question of liability is settled the damages can be agreed upon.

7. *Discussion of settlement*

It is not uncommon for the subject of settlement to be raised at the conference. Usually, if the subject is raised the presiding judge will suggest that the parties may wish him to leave, in order that they may have a free discussion in his absence and he will say that he will be in his chambers until he receives a call from them. Normally, after a few minutes, they know whether they are able to reach a settlement or not.

In some cases, the parties have never really got down to discussing a settlement and the pre-trial conference brings them together and one or the other will raise the question. In rare instances, disclosure will be made to the judge with regard to the negotiations for settlement and even as to the amounts and the difference between the parties as to amount. In certain cases also the parties will ask the judge to indicate generally the way in which he would go, assuming certain facts are established.

As to the role of the judge, this varies from judge to judge. Generally, judges of the Trial Division in Nova Scotia do not play an active role in canvassing the possibility of settlement. The judges leave it to the parties to raise the question and to pursue it in the absence of the judge if the question is raised. It is only if the parties ask the judge to remain and to listen to the discussion that he will do so.

I understand that the practice varies from province to province and place to place. In the United States of America in some jurisdictions, the presiding judge will take an active part in attempting to bring about a settlement. It is my own view that this is not a true function of the judge and that such action should be avoided. If no settlement is reached, one of the parties will probably feel that the judge has made up his mind.

When the introduction of pre-trial conferences was discussed in Nova Scotia with the Bar generally, some solicitors feared that the presiding judge might be led to make up his mind at the pre-trial conference and that the parties would be stuck with him. I gave an assurance to the Bar at that time that if, at any time, they wished to have a trial judge other than the judge who presided at the pre-trial conference, this would be arranged without any question and that this would apply even where I was the judge presiding at the pre-trial conference. In almost four years, I have never been asked to assign a different judge to the trial.

8. *Statistics as to impact of pre-trial conferences*

None have been kept, but the judges of the Trial Division in Nova Scotia are convinced that the pre-trial conference shortens trials and facilitates settlements. We all know of individual instances where, for example, a case was set down for three days and, after the holding of a pre-trial conference, it was heard and disposed of in one day.

9. *Personal assessment as to effectiveness or worth of a pre-trial conference*

Those judges of the Trial Division of the Supreme Court of Nova Scotia who use the pre-trial conference are convinced that it is very effective and worthwhile. A good deal depends on the individual judge. A judge who understands the system and wants to make it work will be able to narrow and define the issues and have the parties agree, with or without reservation, to most of the relevant facts, leaving certain facts in issue. If counsel on both sides are experienced, they can, on their own, get together and do much of the work which is done at a pre-trial conference. If, however, one is experienced and the other is inexperienced, the experienced counsel will often sit back and make the other counsel prove his case, hoping that there will be a slip-up in some material matter. I find that, in many cases, the counsel on one side or the other and often on both sides, are quite unprepared for trial and it is not until they sit down at a pre-trial conference and list the matters which are agreed upon and those which are contested, that they realize what has to be established. In some cases, it becomes apparent that the matter is not ready for trial and, in such cases, the trial date is postponed for a week or two, or even longer but always to a definite day so that the dilatory lawyer will not merely put away his file and forget it until just before the new date set for trial.

I believe that the existence of the rule governing pre-trial conferences is, in itself, worthwhile. If there were no such rule, one lawyer could refuse to deal with the lawyer on the other side prior to trial, knowing that there is no way in which they could be brought together.

If, however, he knows that a pre-trial conference can be ordered, he will readily consent to such a conference and may also discuss with the opposing lawyer, matters of proof, etc., without the necessity of having a conference. I have never known of an order for conference to be issued as it has never been required.

10. *Consensus among Bench and/or Bar as to effectiveness or worth of the pre-trial conference*

My impression is that the Bar generally is agreed that the pre-trial conference is worthwhile and effective. The experienced counsel use it regularly and the inexperienced counsel are coming to realize that it is an effective way of defining issues and of avoiding delay and expense in proof of preliminary matters. As indicated above, a consensus of the Trial Division judges of the Supreme Court and of those County Court judges who use the procedure is that it is effective and worthwhile.

3. *The English Summons for Directions*

English procedure makes provision for neither the pre-trial conference nor oral examination for discovery. The adoption of both was rejected by the Winn Committee in its Report on Personal Injuries Litigation.[14] The form of pre-trial conference considered by the Committee was directed at inducing settlement and was rejected largely out of an aversion for attempted coercion in the settlement of cases and because of the expense involved. It was proposed that counsel be briefed and both counsel and solicitor receive a fee. The introduction of the examination for discovery also failed to find support on the ground that it would "complicate, delay and increase the cost of litigation".

The procedure followed in England is the "summons for directions". It has been described as follows by one familiar with pre-trial in another jurisdiction:

> The masters deal with a variety of matters, but one of their better known performances occurs at "summons for directions". The plaintiff must bring on this summons within a month after the close of the pleadings. It is a theater for applications by both sides and also for settling the arrangements for trial. The master will handle the parties' demands concerning the pleadings — largely applications for particulars and amendments — and questions of interrogatories and perhaps documentary discovery. So, also, with the cooperation of the parties, the master runs over the possibilities of expediting and shortening the proof at trial; he fixes the mode and place of trial. With exceptions here and there, the masters' work is routinized. A summons for directions will usually be disposed of in one to three minutes. Barristers are not often in attendance; in fact, the parties are commonly represented not by the solicitors proper but by their unadmitted clerks. Masters' calendars are heavy and their decisions are made on the spot.

[14] *Report of the Committee on Personal Injuries Litigation*, Cmnd. 3691, para. 353 (1960).

On the view that in the vast majority of personal-injury actions the summons-for-directions procedure has become "a useless and wasteful step" in the sense of being standardized or perfunctory, it has been officially recommended that a "stock form draft order for main directions" be adopted that would go into effect automatically unless a party had meanwhile applied for further or special directions. The main directions would include commonplace items such as agreement on the expert evidence or limitation of the number of expert witnesses in default of agreement, arrangements for the use of plans and photographs, discovery, and date for setting the action down for trial.[15]

The major purpose of the summons for directions is to provide for the consolidation in one hearing of various interlocutory applications which are common or brought as a matter of course under English practice. A secondary objective is the obtaining of admissions and stipulations and generally readying the case for trial.

The Proper Role of the Judiciary

A controversial aspect of the pre-trial conference is the role of the judge with respect to settlement negotiations. Although most rules governing pre-trial do not specifically cite settlement as an object of the conference, the negotiations are a natural product of the conference and are frequently taken as a justification for its existence. Chief Judge Fox of the United States District Court for the Western District of Michigan strongly advocates the acceptance of settlement negotiations as a proper purpose for pre-trial:

> No one that I know of discourages settlement. Probably a majority of judges believe that settlements are only a by-product of pre-trial but that settlement itself should not become the focus of a pre-trial conference. Others frankly admit that a primary purpose of pre-trial is to dispose of cases without trial; to get them settled. The former assume that the case will be tried, and they use pre-trial solely to prepare for the forthcoming inevitable contest. The latter, myself included, accept this assumption. We agree that settlement is primarily a by-product of trial preparation, but we recognize, as did the Wayne County judges over forty years ago, that as a practical matter, the vast majority of cases — 85%-90% — settle before trial.
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> We accept settlement as a preferred means of disposition. We believe that encouragement of settlement is an important use of pre-trial and is consistent with the overriding goal "to further the disposition of cases according to right and justice on the merits".

Treatment of settlement and trial preparation as separate and distinct purposes of pre-trial results from too narrow a reading of Rule 16. Such a distinction is also rather meaningless for the administration of pre-trial practice.

[15] Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure", 69 Mich. L. Rev. 821, 827 (1971).

> The purpose of pre-trial encompasses *both* settlement and trial preparation. Pre-trial is an administrative tool designed to promote more just and expeditious *disposition* of cases. The values supporting pre-trial are thus satisfied if a disposition — whether by settlement or trial — has been more speedily and fairly accomplished than if Rule 16 had not been used. Under today's conditions of overbearing, time-consuming and expensive litigation beyond the reach of many, and to several a major catastrophe, any reasonable procedure accomplishing these ends is within the scope of modern pre-trial.[16]

These views are not universally shared by American authorities and in the Canadian provinces enjoying pre-trial a more restrictive approach is reflected. Chief Justice Cowan, Chief Justice of the Trial Division, Supreme Court of Nova Scotia, in his memorandum reproduced earlier indicates that in that Province the judge will be present at settlement discussions only at the request of counsel. The Chief Justice has given his assurance to members of the bar that if they wish to have a trial judge other than the judge who presided at the pre-trial conference, it will be arranged without question.

Chief Justice Milvain, Chief Justice of the Trial Division of the Supreme Court of Alberta, expressed to us these views:

> You will observe that in the . . . Alberta Rule it is expressly provided that the Judge who hears the pre-trial conference is neither deemed seized with the proceeding nor is he prohibited from hearing the trial.
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> In the pre-trial conferences that I have held personally, I did not feel that I should take the trial, because I would induce the parties to discuss matters that it would be better that they not disclose to the Trial Judge. I think that the Judge must exercise a sound discretion in determining whether he will or will not hear any trial subsequent to having taken part in the pre-trial conference. I may say in this connection that I see no reason why the question of settlement might not quite properly be discussed, again in the discretion of the Judge hearing the conference. If such discussions did take place and did not bear fruit, it would seem improper that that Judge should hear the trial, because he would have embedded in his mind matters discussed at the conference which did not become the objects of evidence during the trial.

Judicial involvement in settlement negotiations does take place in Ontario on occasion, quite apart from any formal rule governing the pre-trial conference. It is the practice of some judges to arrange a meeting with counsel in chambers prior to trial to discuss its conduct. Mr. Justice Haines, who favours this approach, has summarized the benefits to be derived:

> Maximum co-operation between the judge and counsel is essential to a successful jury trial. This can be assured by an informal pre-trial conference in the judge's chambers with both counsel in order to delineate the issues, to shorten and to expedite the trial and to arrange for an orderly presentation of the issues. Of course, if counsel prefers not to make disclosure on a particular point, he may do so without criticism. While each judge will have his own thoughts about how such a conference should be conducted, there are a few subjects that should be discussed. First, the pleadings should be checked to see whether there are any allegations which cannot be supported, whether there are any proposed amendments which can be agreed upon, or if not, adjourned to be argued in court. Next, if counsel can agree on the essential issues to be litigated and the amount of special damages, the case will start to streamline itself. Admissions are made and put in suitable form to be recorded at the start of the trial. Inexperienced counsel, not inclined to make any admissions, should not be pressed, for they will learn in time.
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> It should then be determined whether there is any medical evidence, when it will be called, what the convenience of the doctors is, and whether it is possible for the defence to present its medical evidence at the conclusion of that of the plaintiff, so that the jury will have the complete picture at one time. Moreover, it should be discovered whether there has been consultation between medical experts, whether the claimant has been examined recently and whether each party has had access to the doctors' reports and hospital records, if any, to be offered by the other . . . side. Further enquiries should be made as to proposed use of anatomical charts, X-rays and models, and as to their probative value as compared to their possible prejudicial effect. Basically the same considerations apply to any other type of expert witnesses to be called.
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> If witnesses are to be excluded, there should be a gentle reminder to counsel to warn other witnesses of the obligation not to talk to those who have testified concerning their evidence. If there are any infant witnesses, their capacity to take an oath should be checked. . . . The use of any photographs or sketches should be discussed. . . . The order of cross-examination should be considered. If previous evidence is to be used, transcripts should be available for the judge. In the case of a previous criminal record, the judge may want to know what the record is. (The judge can often re-examine with counsel the use of such a record, and where the witness has rehabilitated himself and will be embarrassed, counsel may decide he really does not want to use it if the judge suggests reconsideration.) If counsel plan to rely on previous statements, for instance those made to an insurance adjuster, precautions should be taken to prevent the disclosure of insurance.
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> Once the issues have been clearly delineated, it should next be determined whether all the issues can be tried by the jury and whether some of them should be tried separately. . . . If counsel expects to argue some important point of law during the trial, he might be invited to file a memorandum of law so that the court and opposing counsel may consider the matter beforehand. This applies to both

[16] Fox, "Settlement: Helping the Lawyers to Fulfill their Responsibility", 53 F.R.D. 129 (1971).

evidentiary and substantive matters and helps to avoid error through hasty rulings.

The judge can also be instrumental in encouraging settlements at this time. With many counsel all that is required to bring about a settlement is some indication of what the judge thinks of general damages. Quite frequently, counsel present me with a portfolio of all medical reports and ask me to think aloud as to the minimum and maximum values of the case, which often results in prompt settlement. Except in infant cases for personal injury, where the court has an obligation to the infant to see that the award is proper, I think care should be taken not to exert pressure on either party to settle. At all times counsel should be warned not to mention the payment in court because such knowledge disqualifies the judge, even in a jury case. (Rule 317, Ontario Rules of Practice.)

The foregoing discussion takes between 15 to 30 minutes. It helps the judge and counsel to get perspective and delineates the issues. It results in many admissions that will shorten the trial. In a substantial number of cases one or all of the issues are settled so that, if the trial is to proceed, it does so more efficiently. In my opinion, this pre-trial conference is the first step in a satisfactory jury trial.[17]

The Ontario Court of Appeal has considered the extent to which this type of conference may interfere with the fundamental concept of the proper role of the judiciary. In *Majcenic* v. *Natale*[18] the Court of Appeal ordered a new trial with a jury in the following circumstances:

In the case at bar, the learned trial judge before the commencement of the trial obtained the medical reports with the consent of counsel and then discussed the possibility of proceeding without a jury. Both counsel, for different reasons, preferred to retain the jury. At the end of the first day of trial, the trial Judge, in Chambers indicated to counsel his view as to the proper range of general damages. Counsel "A" disagreed while counsel "B" was hesitant. Again the trial Judge raised the question of dispensing with the jury and counsel were requested to obtain instructions concerning the suggested range of general damages. The following morning counsel "A" advised that he was not prepared to agree to the recommendation with respect to general damages and wished to retain the jury; counsel "B" was requested by the trial Judge to obtain instructions to dispense with the jury. Some further discussion took place but since counsel are not in agreement as to what transpired I do not propose to deal with it. It is sufficient to state that later that same day on application of counsel 'B" the jury was dispensed with on the ground that the medical evidence was so complex that the jury was incapable of appreciating its nature and the inferences to be drawn from it.

[17]Haines, "The Future of the Civil Jury", *Studies in Canadian Tort Law*, 10 at pp. 22-24. See also Haines, "Criminal and Civil Jury Charges" (1968), 46 Can. Bar Rev. 48, 81.

[18][1968] 1 O.R. 189.

I have outlined in some detail the circumstances preceding the motion since I am of the opinion that this background must be considered not only with respect to the motion but to the question as to whether or not the trial was generally unsatisfactory.

The Judge, presumably upon consideration of the medical reports, had already volunteered his estimate of the range within which he considered the general damages should fall. I am unable to perceive the necessity for or the desirability of such unsolicited comment, particularly when the case is to be tried by a jury. I have no doubt that counsel in a non-jury action may be assisted in arriving at a settlement by jointly requesting an expression of opinion as to quantum from the trial Judge. In doing so counsel assume the risk inherent in such procedure. When the opinion is expressed gratuitously counsel is forced to accept a risk which he did not invite and with which he should not be confronted and the risk is particularly onerous when counsel do not agree with the opinion expressed; it becomes oppressive in a jury trial when offers and counter-offers of settlement are made known to the Judge who expresses his own opinion and later withdraws the case from the jury.[19]

In *Tecchi* v. *Cirillo*[20] the Court of Appeal drew attention to the fact that the trial judge had read the examination for discovery of one of the parties before the evidence was adduced appropriate to the proper introduction into the trial of any part of the examination for discovery. In directing a new trial the Court said:

It is obvious from the record that the trial Judge was convinced that every effort should be explored to achieve a settlement in the case and that the case was of a nature warranting genuine efforts for settlement. Be that as it may, it is equally obvious to us upon the record that the Judge permitted himself, in his remarks, spread throughout the record, to go beyond judicial consideration of the appropriateness of settlement and permitted himself in the remarks he saw fit to make before even the first witness for the defence was called to pass into the area of prejudgment of the case or at least to give that appearance. The disposition of the case necessarily included in a most vital manner a determination of the respective credibility of the parties and their witnesses because there was sharp, if not total conflict between the version given by the plaintiff and that adduced on behalf of the defence.[21]

An appreciation may be gained from these cases of the role of the judge as impartial arbitrator in the administration of justice. He is not a conciliator and should not be put in the position of usurping the proper function of counsel whose duty it is to advise his client as to the most fitting disposition of his case. We think that this is basic to our system and that no procedures should be adopted which would have the effect of diluting it.

[19]*Ibid.* pp. 202-03.

[20][1968] 1 O.R. 536.

[21]*Ibid.* p. 537.

D. Conclusion

Although no formal rules for pre-trial exist in this jurisdiction informal chambers discussions before trial are conducted in some cases. In mechanics' liens actions such discussions have become standard, at least before the Master at Toronto.[22] This practice is particularly useful in that production and discovery are not available to the parties in this type of action without an order of the Court. The discussions take the following form:

> Pre-trial hearings take the form of a meeting of creditors at which informal production and discovery are had by all parties. All solicitors should bring their clients and all the relevant documents with them in order that their claims may be discussed intelligently. Where there are a large number of lien claimants, it is usually more satisfactory to have a committee (composed of the solicitors for three or four of the largest lien claimants) go over the individual claims for lien with the assistance of the solicitors for the owner and the contractor. The usual practice is for the judge or the Master to withdraw from the room while the claims for lien and other issues are discussed. He will re-attend at the end of the pre-trial to make a note on those things which have been agreed upon by all parties.
>
> Often all the claims for lien will be settled and the amount of the holdback will be agreed upon at the pre-trial. Even if this is not the case, the number of matters still in issue will usually be considerably reduced, so that several days will have been lopped off the period consumed by the trial. In my experience, a properly conducted pre-trial saves a good deal of time and expense for all parties.[23]

It should be observed that the new Act also makes provision for an "application for directions" as to pleadings, discovery, production, *etc.*[24]

The extensive acceptance of the pre-trial conference in other jurisdictions as an aid to settlement or as a tool in expediting case disposition, shortening trials and improving the quality of trials has led to speculation among both the bench and bar about the desirability of its introduction into Ontario practice. In 1969 the Advocates' Society which had become concerned about the average length of time required to get civil cases on for trial in the County of York, particularly cases on the civil jury list composed mostly of actions arising out of motor vehicle accidents, investigated the possibility of reducing the size of the list and expediting trials by introducing a form of pre-trial conference. Arrangements were made tentatively whereby counsel with cases on the jury list would be notified of a time to attend before a designated judge of the High Court in his chambers

[22] See Macklem, "Mechanics' Liens", [1967] Law Society Special Lectures 171, 213-15; Macklem, "The New Mechanics' Lien Act", [1970] Law Society Special Lectures 405, 433; Macklem and Bristow, *Mechanics' Liens in Canada* 159-60 1972); *B. A. Robinson Plumbing & Heating Ltd.* v. *Dunwoodco Ltd.*, [1968] 2 O.R. 826; *Kennedy Glass Ltd.* v. *Jeskay Construction Ltd.*, [1973] 3 O.R. 493.

[23] Macklem, "Mechanics Liens", [1967] Law Society Special Lectures 171, 214-15.

[24] R.S.O. 1970, c. 267, s. 38(10).

discuss the matters set out in the memorandum annexed as an Appendix this chapter. The possibility of settlement might be discussed, but the siding judge would not thereafter hear any subsequent trial. It was anticiled that the appointment would take up to 45 minutes.

No legislation or rules were adopted to give effect to the arrangements. he scheme was a voluntary one and some firms and counsel declined to rticipate, with the result that it failed to proceed beyond the planning age.

In the course of our review of pre-trial procedures a proposal was ade to us to test the usefulness of pre-trial in this jurisdiction by means a controlled experiment. The main features of the proposal may be mmarized as follows:

1. The pre-trial conference should be introduced selectively in order that its impact can be measured. This might be accomplished either by designating a test and control group of current cases for the period of the experiment or by comparing a group of pre-tried cases with a statistically reliable sample of cases tried prior to the introduction of the experiment.
2. The cases designated for pre-trial should be long and complex ones, since the greatest benefits have been discernible from pre-trial of this type of case. Cases in which counsel's estimate of trial time is longer than one or two days would meet this requirement.

We believe that an experiment of this nature is worthy of further consideration, although we are unable, on the basis of the information available to us, to give it our unqualified support. It seems clear that an experimental scheme would be doomed to failure without the full cooperation of the judiciary and legal profession. It is unlikely that either bench or bar could become sufficiently educated in the use of pre-trial to assess accurately its usefulness unless pre-trial is made mandatory for certain cases for the duration of the experimental period. If it is left to counsel or the court to invoke it, experience indicates it will be infrequently employed. Yet, paradoxically, mandatory pre-trial would appear to be ineffectual with respect to results which can be measured statistically, *i.e.* settlement rates and length of trials. The "quality of a trial" is not susceptible of objective quantitative analysis and conclusions about it must rely largely on subjective evaluations.

Any such experiment would probably involve affected litigants in additional legal expenses.

An alternative would be to introduce rules for pre-trial conferences applicable to civil cases at large, which could be invoked by counsel or by the court. If this were done without an initial experimental period in which pre-trial was mandatory, the likelihood is that it would never realize its potential. Insufficient use of the procedure would be made to establish its value.

We do not conceive of pre-trial as the type of reform that can be imposed on an unreceptive bench and bar. We have concluded that the

initiative to test its effectiveness in this Province must come from the judges and the profession. If our recommendation for the establishment of an educational and research facility devoted to court administration is implemented,[25] it might be of assistance in furthering any projects undertaken.

We think much could be accomplished to clarify the issues in civil cases by a stricter enforcement of the provisions of Rule 144, which requires each party to admit such of the material allegations contained in the pleading of the opposite party as are true. If parties failing to admit facts that are beyond dispute are penalized in costs, much could be accomplished to eliminate unnecessary proof at trial.

E. Summary of Recommendations

1. The adoption of rules governing pre-trial conferences is worthy of consideration. The initiative for conducting research to evaluate its effectiveness in Ontario should come from the judiciary and the profession.

2. If the pre-trial conference is introduced, it should not be conducted in any case by the judge who will preside at the trial. No procedures should be introduced into our system which would have the effect or appearance of interfering with the proper role of the judiciary.

[25] See Part I, chapter 2, pp. 34-35.

APPENDIX I

FORM A2

(Style of Cause)

CTS AGREED UPON —

Liability:

(1) Date of Accident
Time of Accident
Place of Accident

(2) a. Ownership of motor vehicle — Disputes, if any
b. Drivers of motor vehicles — Disputes, if any
c. Make, model and year of motor vehicles
d. Consent to use.

(3) Scene of accident
(a) Measurement of roads — (a) travelled; (b) shoulder
(b) Gradient — (a) direction; (b) slope
(c) Direction parties proceeding prior to collision
(d) Traffic signals
(e) Posted speed

(4) Weather Conditions

(5) Productions agreed upon — (a) survey; (b) photographs

(6) Admissions of liability, if any

II. Damages:
(1) Special damages — out-of-pocket expenses
(a) List agreed upon — Total $
(b) Items in dispute, i.e.
loss of income
housekeeping expenses
others

(2) General Damages

a. age and occupations of Plaintiffs

marital status

children and ages

b. Prior health

c. Injuries not in dispute

Plaintiffs

Plaintiffs by Counterclaim

(3) Fatal Accidents:

a. Vital Statistics

Ages of parents Years married

Names and ages of children

b. Occupation ..... Income for the past three years: Gross $..... net $.....

Income Tax returns for the past three years

Pension plans and pension benefits

Net amount of income received by or on behalf of dependants

c. Estate documents

d. Probate, Administration or Will

e. Accelerated value of insurance policies and joint interest in property

f. Prior health of deceased

g. Joint life expectancy of husband and wife

_____

Counsel for Plaintiff(s)

_____

Counsel for Defendant(s)

DATED at Toronto this day of A.D. 197 .

_____

Master, S.C.O.

Judicial Administration in Canada

Perry S. Millar
and
Carl Baar

The Institute of Public Administration of Canada
L'Institut d'administration publique du Canada

McGill–Queen's University Press
Kingston and Montreal
1981

If the use of standardized deadline rules in civil matters, discussed earlier, would prove too rigid in practice, or apply to some classes of cases rather than others, a more flexible approach is the trial scheduling conference. When the processing of a case is delayed, counsel for plaintiff and defendant are required to appear before a judge for a five-minute scheduling conference to fix a time when pleadings will be completed, discoveries held, and a trial date fixed. Without an enforcement procedure of this nature, monitoring is an academic exercise; with such procedure, time lapses from commencement of an action to disposition may be cut by half. The scheduling conference consumes more judge time than the deadline rules, which can be routinely enforced by administrative staff. Therefore, the scheduling conference may be best used in complex litigation, and deadline rules applied to other categories of civil litigation (for example, contested divorces or two-party personal injury suits under $25,000).

Another device for expediting civil cases is the pre-trial conference, a hearing scheduled before a judge in chambers, where two or more parties in a specific case search for agreement on issues of fact and/or of law. The purpose is to attempt either to eliminate trial, or to shorten the time it will take if settlement cannot be reached. The efficacy of this procedure is a matter of debate, and appears to depend on the manner in which the conference is conducted by the judge; conducting pre-trial conferences requires an expertise which comes more easily to some judges than to others. Some authorities assert that it does not reduce the number of trials, but that it does shorten trial time and firm up the trial list. Others deny that it reduces either trials or trial times, but that the requirement for a pre-trial conference causes cases to settle earlier. It is also said that a pre-trial conference only justifies fifteen minutes of a judge's time, not an hour or more. The preliminary report on the Ontario Supreme Court's pre-trial conference project of 1976–77 indicated an absolute reduction in trial time.[28]

Another frequent recommendation is the abolition of trial by jury in civil cases. Juries lengthen civil trials by an estimated 40 percent, and involve heavy expense and administrative load. Civil juries have been abolished in England save for actions involving defamation, fraud, malicious prosecution, or false imprisonment, unless otherwise ordered. Their use is on the decline in some provinces, and a U.S. advisory commission has recommended the abolition of civil juries—an astonishing development in view of the widespread use of juries in that country where, in some jurisdictions, juries may be invoked with respect to issues involving quanta as low as $200.

Caseflow management has also been made more effective when changes in rules and procedures have facilitated the movement of litigation. Thus,

16. The individual cited is Robert G. Hann; see his *Decision Making in the Canadian Criminal Court System: A Systems Analysis* (Toronto: University of Toronto Centre of Criminology, 2 vols., 1973).

17. Note that this is a percentage of cases set down for trial, not a percentage of all cases brought before the court on first appearance. Note also that these percentages are suspect for certain reporting reasons; however, other sources have confirmed instances of lower trial rates, and the admitted average is well under 50 percent.

18. Responses to 1977 provincial chief court administrator questionnaires.

19. Alberta questionnaire response.

20. Ontario questionnaire response.

21. Harold R. Poultney, "The Criminal Courts of the Province of Ontario and their Process," 9 *Law Society of Upper Canada Gazette* 192 (September 1975), at 211–12.

22. Ibid., pp. 201, 202, and 229.

23. Thomas Church, Jr., et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, p. 14.

24. Based on responses to 1977 provincial chief court administrator questionnaires. Ontario reports that "in some places trial coordinators are not permitted by the judiciary."

25. Sarah Cox, "Court Scheduling Made Easy?" 59 *Judicature* 353–55 (February 1976).

26. In some provinces, for example, the writ and appearance have been eliminated.

27. An analysis of the supreme and county courts in Vancouver for the years 1970 and 1973 revealed that, on the average, appearances were never filed in 37 percent of all writs issued, and that at some stage between issuance of the writ and final disposition, 56 percent of all case became dormant. Data on county court civil actions (1970) disclosed that appearances were never filed in 50 percent of cases of actions brought, while 41 percent of all actions became dormant at some stage between issuance of the summons and disposition.

28. Michael Stevenson, Garry D. Watson, and Edward J. Weissman, "The Impact of Pre-Trial Conferences: An Interim Report on the Ontario Pre-Trial Conference Experiment," 15 *Osgoode Hall Law Journal* 591 (December 1977).

29. Exceptions occur in small claims matters. The Alberta small claims court uses a summons procedure which has a returnable date of approximately sixty days; Manitoba reports thirty days; and Ontario's small claims court has no set time limit.

30. Data in this paragraph were obtained from the 1977 provincial chief court administrator questionnaires.

31. See Law Reform Commission of Canada, Working Paper no. 4, *Criminal Procedure: Discovery* (Ottawa: June 1974).

32. The preliminary hearing originated for a different reason, namely to inquire into the granting of bail in cases involving custody awaiting trial, and possibly even as an inquisitorial proceeding providing for the arrest and

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time. Secondly, at present in Canada, many Courts have serious backlogs and are just not in a position to offer trial dates which would significantly reduce the overall delay to which litigants are subjected. Moreover, it is questionable (largely because of inadequate management information systems) whether many Courts are presently in a position to meaningfully estimate trial dates which they could themselves meet. A Court cannot realistically expect counsel to meet a deadline which counsel quite rightly suspects the Court will be unable to meet itself. (In the Unified Family Court in Hamilton-Wentworth, Ontario, hearing dates are assigned at the outset of proceedings).

A second approach is to provide for a Court appearance in all cases which are not certified ready for trial within a specified period of time from the commencement of the proceeding, *e.g.*, six months or nine months. At the hearing, to be attended by counsel and by the parties themselves, the Court would require an explanation for the delay and give specific directions as to the future conduct of the action. Such an approach would give lawyers a real deadline to work to — one that could not be negotiated away — while leaving to them some discretion as to how they organize their time with regard to particular steps. Requiring the attendance of the parties at the hearing would undoubtedly have a salutory effect. Such a scheme may produce a not insignificant workload for the Court and counsel, but if a realistic time limit is adopted, a reasonable level of compliance may be expected and this could keep the number of hearings within manageable proportions. A major advantage of this approach is that it would permit the Court to concentrate its attention only on those cases which are really a problem in terms of delay. (A variation of this approach is already in use in Nova Scotia.)

Reducing Trials Through Increasing Settlements: Conciliation as an Alternative to Adjudication

By increasing the percentage of cases disposed of by settlement, justice can be expedited in two ways. First, for those cases which, as a result of an increased settlement rate, settle rather than go to trial, the time to disposition will be shortened. Secondly, with fewer cases going to trial, those still requiring trial will be reached more quickly by the Court. What strategies are available for increasing the settlement rate of cases?

Measured quantitatively, the litigation process is already essentially a settlement process rather than an adjudicative process. Of all proceedings commenced, only five to ten per cent survive to the point of

adjudication, the vast majority being resolved short of trial by out-of-Court settlement. Despite this quantitative reality, our Court rules are primarily adjudication oriented. While we undoubtedly value settlement as a method of disposing of litigation, Court rules typically contain few procedures directed to achieving this goal.

As already noted, until recently almost the only procedural device directly related to achieving settlement has been our cost indemnity rules (including payment into Court in satisfaction).

We could perhaps add to this our discovery rules, particularly examination for discovery, since it is generally felt that the extensive mutual disclosure resulting from examination for discovery is an important catalyst to settlement. Indeed it is often said that our discovery rules have two objectives: to bring about a fairer trial and, more importantly, to facilitate settlement. However, there is a question whether discovery does, in fact, increase settlements. In the United Kingdom, where the extent of pre-trial disclosure is much less than in Canada, and examination for discovery is unknown, settlement rates are no lower and, indeed, appear to be higher, and they may well occur earlier than under our own system. Perhaps examination for discovery appears to lead to settlements simply because we tend to settle after discovery. It may be that we just tend to postpone settlement until after discovery.

Until recently in Canada, it seems fair to say that we have viewed adjudication as the sole function of Courts and that settlement although quantitatively enormously important, is essentially a by-product of the adjudicative process. However, with the recent advent of the pretrial conference (which in one of its forms emphasizes settlement), we may be seeing the beginnings of a different, less monolithic conception of the litigation process: one in which settlement is not a mere by-product but a mode of dispute resolution to be actively pursued by the Court. We may be witnessing the emergence of Court centered conciliation services: the development of the concept of the Court as a conciliator as well as an adjudicator.

Though its origins are more complex, so far as the Canadian procedure is concerned, the pretrial conference is an American import. In the U.S., the use of pretrial conferences became prevalent with the introduction of the procedure into the Federal Rules or Civil Procedure in 1938. Subsequently, it has been adopted in most state jurisdictions, and it is now widely used throughout the country, although the intensity of its use varies from Court to Court. By way of contrast, in Canada the pretrial conference was little used until the 1970's, but

today there is widespread interest in the procedure, and it is now being used in various parts of the country.

The pretrial conference is a conference between the counsel in a case and a Judge, typically held shortly before the trial and after the other pretrial proceedings have been completed. In Canada, to date, essentially two forms of pretrial have emerged. The first has as its principal goal the readying of the case for an orderly trial (*trial-oriented conference*). The second has as its major goal pre-trial settlement of the case (*settlement-oriented conference*).

In either form, the conference consists of a discussion between the Judge and counsel concerning the case. In the trial-oriented conferences the major emphasis is placed upon clarification and reduction of the issues in the case, the limitation of the number of expert witnesses, the obtaining of admissions of fact and agreements to dispense with formal proof of documents. The aim of such conferences is to reduce trial time and to improve the overall quality of the trial by increasing the preparedness of counsel. Typically, the trial-oriented pretrial conference will be conducted by the Judge assigned to try the case. The possibility of settlement may or may not be discussed, but it is not the focus of the conference, although it may be a by-product.

At the settlement-oriented conferences, the presiding Judge seeks, through discussions with counsel, to assist them in arriving at an out-of-Court settlement. Here, essentially, the role of the Judge is that of a conciliator or third-party mediator, pointing out the strengths and weaknesses of each side's case and giving his opinion as to the likely outcome of the trial, both as to liability and damages. Typically, at such a conference, the Judge will make it clear that, under no circumstances will he be the trial Judge in the case (in Ontario, the rules specifically disqualify him), nor will he disclose anything said at the conference tc any of his fellow Judges. At such a conference, if it becomes clear tha settlement is not possible, some time may be spent on limiting anc clarifying the issues to be tried.

The utility and effectiveness of pretrial conference is a matter or which there is disagreement. Based on personal experience, many (perhaps the majority) of Judges and lawyers in the U.S. feel that trial are shortened and settlement rates increased by the use of pretria conferences. However, the only objective study of the operation of pre trial conferences in the U.S., conducted in the early 60's in the Ne Jersey Courts by Professor Maurice Rosenberg (Rosenberg, *The Pre Trial Conference and Effective Justice,* Columbia University Pres 1964) casts severe doubts upon these conclusions. Using a "partially

controlled experiment involving personal injury cases, Rosenberg concluded that a mandatory pretrial conference system did not lead to any increase in the number of cases settled, nor reduce the length of the trial. Indeed, the use of such conferences had an adverse effect upon the Courts' efficiency, since additional Judge time was expended on pretrial conferences without any improvement in the disposition rate. (However, the study did conclude that pretrial conferences led to improvement in the quality of trials in that, in pre-tried cases, counsel were found to be better prepared, a clearer presentation of the opposing theories of counsel was more common, gaps or repetition of the evidence were reduced and tactical surprise curbed.) The general applicability of Rosenberg's conclusions have been frequently challenged in the U.S. and pretrial conferences have continued to be widely employed in that country.

The effectiveness of the pretrial conference is a crucial consideration. If it does not produce the benefits claimed for it, little can be said for its introduction, and much can be said against it, for the procedure clearly involves added expense for the parties (in terms of the preparation and attendance of counsel), and it is costly for the Court, since Judge time has to be diverted from the trial of cases and other essential duties to the conducting of pretrial conferences. If the procedure does not increase settlement rates, shorten trials or accelerate the time of settlement the increased cost involved may be quite unjustified, merely representing added expense for litigants and actually decreasing the efficiency of the Courts' operations (as was Rosenberg's conclusion). If all a pretrial conference can do is "increase the quality of the trial" a question remains as to whether this result justifies the increased cost involved.

With the emergence of interest in pretrial conferences in Canada in the 70's came a concern with this question of the efficacy of the procedure, particularly on the part of the Supreme Court of Ontario. That Court was attracted to the procedure as a means of increasing the settlement rate and thus increasing the Court's productivity, reducing the cost to litigants and speeding up the resolution of disputes. The Court decided that, rather than simply introducing the procedure and hoping for the best, it would introduce the procedure on an experimental basis and in a form that permitted close monitoring. In conjunction with the Canadian Institute for the Administration of Justice, a controlled experiment was undertaken in the use of settlement-oriented pretrial conferences in a mixed group of cases (including both personal injury and other types of civil litigation, but excluding divorce cases) listed on the

non-jury list in Toronto. The experimental design employed involved strict random sampling of all cases on this list into test and control groups, all such cases being paired. The test cases were put through a settlement-oriented pretrial conference several weeks before trial, while their paired, control cases proceeded without a pretrial conference. A mass of data was collected in respect of all test and control cases, including the time and manner of ultimate disposition, and the length of trial (if any). The principle objectives of the experiment were to measure the impact of the pretrial conferences on settlement rates, length of trial, the timing of settlement and on the overall productivity of the Court. The experiment involved something in excess of 900 cases — all of the cases that were on the Toronto non-jury list in April 1976, the date on which the experiment commenced.

Initially, it had been anticipated that at least the data collection phase of the experiment would be completed by December 1977. As events have turned out, and basically because it took longer for the last cases to reach trial than was anticipated, the data collection phase did not finish until September, 1978. At the time of writing, the final data is in the process of being analyzed, but this has been disrupted due to labour relation difficulties at York University. Earlier, it had been hoped that we might be able to "unveil" the analysis of the final data in this paper.

In June, 1977, an Interim Report on the experiment was prepared analyzing the first batch of preliminary data (see Stevenson, Watson and Weissman, "The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment", 15 Osgoode Hall Law Journal 591). The preliminary results contained in that Interim Report can be briefly summarized here. It must be stressed that these preliminary results are based on the relatively small number of cases (approximately 160), that any conclusions suggested by these data are preliminary and tentative only and that the picture may change when all of the data from the 900 cases is analyzed. (In some instances the significance levels of the preliminary data is not high by accepted statistical standards.) There is also a real possibility that the preliminary data may have measured the impact of a newly introduced procedure, and what may be apparent is the effect of the newness of the procedure: over time, the effect may wear off.

What did the preliminary data indicate?

First, it indicated that the use of pretrial conferences would appear to substantially increase the rate at which cases are disposed of by settlement, as opposed to proceeding to judgment after trial. The dif-

ference in the settlement rate between test and control cases was 17%, representing a 25% increase in the rate of disposition by settlement when the pretrial conference is employed. But this marked difference in the proportion of cases which were disposed of by settlement rather than by judgment, does not tell the full story. It is necessary to distinguish cases settled without trial from cases going to trial, since many settlements are "in-trial" settlements.

Distinguishing among (a) cases settled without trial, (b) those settled during trial and (c) cases going all the way to judgment, the preliminary data suggested that the settlement-oriented pretrial conferences were having a dramatic effect in reducing the incidence of trials through increasing the rate of pretrial settlements. While only 50% of the control (non-pretried) cases settled without a trial, 73% of the test (pretried) cases settled without a trial. (The incidence of in-trial settlements was higher for control cases (19%) than for test cases (14%).) In terms of cases surviving all the way to judgment, the data indicated that 31% of the non-pretried cases required a completed trial and judgment for a disposition, whereas only 14% of the pretried cases survived to judgment.

What was the impact of pretrial conferences measured by their effect on time spent in trial? The non-pretried cases consumed considerably more trial time than did pretried cases, but this was almost totally attributable to the fact that many more non-pretried cases proceeded to trial than did pretried cases. Insofar as the average in-trial time was concerned, there was no significant difference between pretried and non-pretried cases.

Where the preliminary data was most interesting was in respect to the overall impact of the pretrial conference on Court efficiency. This is the crucial question as to the impact of pretrial conferences on the amount of judicial time which must be spent in disposing of a given number of cases. (And, it will be recalled, this is the area in which Rosenberg found the pretrial conference to be lacking). The extent of this impact can be calculated by off-setting against any savings in trial time, resulting from the use of pretrial conferences, the judicial time expended in conducting the conferences. The preliminary data indicated that (aggregating both in-trial time and time spent on conducting pretrial conferences) the 81 pretried cases consumed 200 judicial man hours, whereas the 81 non-pretried cases consumed about 300 judicial man hours. Expressing this in terms of "average Judge time spent per disposition" each pretried case consumed 2.48 hours while each non-pretried case consumed 3.73 hours.

This indicates a saving in Judge time resulting from the use of pretrial conferences. How would this translate into increased Court productivity; *i.e.*, how would the reduction in Judge time using pretrial conferences affect the absolute number of cases disposed of in a given number of Judge hours? The suggested increase in judicial productivity can be expressed in the following way. If all of the 161 cases analyzed had proceeded without a pretrial conference, they would have consumed approximately 600 Judge hours, all "in-trial" time. Had all been pretried, only 400 Judge hours would have been consumed, in trials and pretrials, and with the 200 hours thus saved, the Court could dispose of a further 80 cases, employing pretrial conferences, thereby indicating an increase in the number of cases that could be disposed of employing pretrial conferences in the order of 50%.

The key to all of this, of course, is that the preliminary data upon which the Interim Report was based indicated a significant disparity in the settlement rate as between test and control cases of 17% in favour of the pretried cases.

How closely the final results mirror those of the preliminary results will depend largely upon whether or not a similar disparity between the settlement rates is maintained over the much larger number of cases to be analyzed in the final report. While it is too early yet, because of data analysis difficulties, to show any firm conclusions, there is some indication that the disparity between the settlement rate of pretried and non-pretried cases may be less dramatic. If this is confirmed by further analysis, the overall impact of these settlement-oriented pretrial conferences or Court productivity will likely be less.

The research described above is specifically concerned with the impact of pretrial conferences which are settlement-oriented. It would appear that such conferences, where the Judge plays an active role as conciliator-mediator, have a positive impact on delay in Court through increasing settlements, leaving fewer cases to be tried with a consequent increase in judicial productivity and the speed with which the Court can reach the reduced number of cases requiring trial. Whether pretrial conferences that are primarily trial-preparation oriented can have a similar quantitative effect is debatable and, I feel, unlikely. In utilizing the procedural device of the pretrial conference to expedite justice, we need also to expand our concept of the role of the Court itself, beyond that

of adjudication to embrace active participation in achieving negotiated settlements.

CONCLUSION

This paper has been primarily concerned with the ways in which reform of our pretrial procedures can contribute to reducing the delay which presently characterizes two phases of the civil litigation process in Canada: the period during which a case is being prepared for trial by the lawyers (non-Court delay) and the period during which prepared cases must wait to be reached for trial by the Court (Court delay). To this end, three strategies have been suggested — simplification of our procedure, increased Court control over the pretrial progress of cases, and the introduction of conciliation as an additional role (to adjudication) for our Courts.

My concluding observation is rather a bleak one. It is that the task of reducing delay in litigation may be much more difficult than is often realized. The reason is that our litigation process maintains its present level of operations, dilatory as it may be, largely through a dependance on high rates of out of Court settlement and default judgments. Yet, it is generally recognized that one of the factors leading to out of Court settlements is the delay involved in getting a case adjudicated. If delay can be overcome, and litigants can obtain a speedy trial, it is all too likely that more of them (or even some of them) will opt for adjudication and reject the alternative of settlement. If this happens, settlement rates could drop and the Courts would then be faced with an increased volume of cases to try, resulting once more in a situation of Court backlog and delay. (This effect is also a likely result of any reforms which will significantly reduce the expense of litigation, since the present high cost of taking cases to adjudication is generally considered to be a factor contributing to many settlements today.) This is a very real danger because, given the present high rate of settlements, relatively small shifts downwards in the settlement rate of cases can have an enormous impact on a Court's trial workload. A drop in the settlement rate of cases from 95%-90% may not seem a very large or important shift; however, it would result in a 100% increase in the Courts' trial workload, even if the number of actions commenced remained constant.

Efficient Criminal Procedure

*Judge Stephen Borins**

This paper is concerned primarily with the trial of indictable offences by a Court comprised of a Judge and jury or by a Judge alone. With due deference to the organizers of the conference, it is not possible in the time made available for me to cover the entire gamut of the criminal process from arrest to final disposition, nor is it possible to consider the trial of summary conviction offences and the trial of indictable offences by a magistrate. I have elected, as well, to abandon any discussion of the trial of civil cases. This topic has already been dealt with by Professor Garry Watson and would result in unnecessary duplication. However, in discussing the trial of criminal cases I fear that I may, of necessity, be transgressing upon what was discussed by Judge Lessard, namely, "Pre-Trial Measures in Criminal Cases". In my view, one cannot divorce what comes before the trial from what takes place during the trial.

I have, however, taken seriously the admonition of the conference organizers in my approach to this paper. It is non-technical and devoid of footnotes. Indeed, some may find it too general and somewhat anecdotal. In my own defence, I wish to make it clear that my views are based, essentially, on my own experience, which means that my reflections are based upon what I perceive to be occurring in the province of Ontario. I should also add that the views expressed in this paper are personal and are not meant to be, nor should they be interpreted as,

* His Honour Judge Stephen Borins is a County Court Judge in Ontario and a Director of the Canadian Institute for the Administration of Justice.

reflecting the views of other members of the Court of which I am a member.

I normally preside in a county which has no shortage of criminal litigation. I would estimate that about three-quarters of my time has been devoted to criminal trials. We have in our county five judges together with a sixth judge who elected supernumerary status about two years ago. I believe it is fair to say that since my arrival more than three years ago we have always had a list of criminal cases waiting to be tried. I believe that we have efficient assignment Court procedure designed to promote an ordered docket and to give the bench, the bar, the accused and the witnesses a reasonable idea of when a particular case might be reached for trial. From the beginning of September to the end of June there are at least two, and often three, Judges assigned each week to conduct criminal trials. However, the backlog continues and in many cases trials are held months or years after the event. To assign any single cause for this would be both impossible and unrealistic. It is, in my view, an over-simplification of the problem of delay to suggest that the creation of "efficient procedure", whatever that means, will somehow itself work the magic necessary to ensure that an accused person will come to trial within a reasonably short period after his or her arrest. From the many factors which I have experienced I am convinced that the causes of delay are complex and that procedural change alone will not likely cure the problem. In what follows, an attempt will be made to emphasize procedural inadequacies but not, I hope, in the abstract. The dynamics of a criminal trial render this impossible.

I begin with the premise that basic changes in the adversary system and the philosophy of the criminal justice system which proceeds on the concept that an accused person is presumed innocent until the prosecution has proved his guilt beyond a reasonable doubt are beyond the scope of this paper. I proceed on the basis that the adversary system within the system of criminal justice is not likely to experience any radical change in the foreseeable future and leave to some other time to debate the premise that adversariness is ultimately and invariably the best system for resolving disputes in criminal cases. Rather, I will accept, not with total agreement, what was recently said by the Supreme Court of the United States: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free" (*Herring v. New York*, 422 U.S. 852, 862 (1975)). The adversary system, therefore, leaves it to the parties, through their lawyers, to present each side of the case. Implicit within this proposition, of course, is that the parties are able to seek to employ every legal rule procedural, evidentiary, or otherwise, to *prevent* the opposite from presenting his case. The result often becomes what we are fond of calling a "fair trial", the reality of which often is a trial so tortured and obstacle-strewn as to be barely tolerable.

What I am saying is not to be understood as suggesting that procedural and evidentiary safeguards are to be abandoned in the interest of avoiding delay. In that regard I would respectfully adopt what was said recently by Chief Justice Burger of the United States Supreme Court: "I would suppose that a system of criminal justice ought to be judged by these three questions: Is it fair? Is it humane? Is it efficient? I put efficiency last." I would agree, as well, that the objects of a code of criminal procedure be those contained in Rule 2 of the Rules of Criminal Procedure for the United States District Courts (hereinafter referred to as "the U.S. Rules") which states:

"These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

What I am saying is this: One of the reasons why there is delay is that trials are becoming very long and protracted. One of the major causes of long trials is the legitimate exercise of the rights of a party to insist that procedural and evidentiary standards be met — a significant by-product of the adversary system. The goal of the advocate, one assumes, is that the trial be fair and just. In most instances the time of the trial Court is taken up with frequent pre-trial and mid-trial applications or objections all of which usually require the trial Judge to rule upon questions of law. While this is going on jurors and witnesses sit by and wait — as do those involved in the next case and the case after that. The object of procedural change should not result in the diminution of basic rights but in the retention of the rights together with more expeditious means of exercising them.

About two years ago I presided over a conspiracy case which took almost eight months to complete. In the course of the proceedings I was required to rule upon almost 100 pre-trial and mid-trial motions. In addition, almost three months were required to conduct a *voir dire* with respect to the admissibility of wire-tap evidence. Because I was occupied with one case for such a long period the trials of many other matters were delayed. However, the reason I refer to this case is to point out that our criminal procedure rules do not at present allow many of the

matters with which I had to deal to be dealt with in other than a trial setting. In this regard, I had occasion to make the following observations at the conclusion of my ruling following the *voir dire*:

"The trial does not begin until the accused person places himself in the hands of the jury. The . . . *voir dire* is properly part of the trial and it seems, therefore, for it to have any legal validity it cannot take place before arraignment. . . . It may be that Parliament should consider procedural changes to permit certain preliminary matters to be determined before a jury is selected, or, perhaps, before the accused is required to plead."

R. v. Rowbotham (No. 4) (1977), 2 C.R. (3d) 244 at 276 (Ont. G.S.P.).

Bill C-51, which [at the time of writing] is presently before Parliament, has partially recognized the problem with respect to matters that cannot be dealt with until a jury has been empanelled. Section 110 provides an amendment to section 574 of the Criminal Code which, in the words of the explanatory note, "would enable a judge, prior to the empanelling of the jury, to deal with matters from which a jury would normally be excluded, thus expediting the trial". Thus, for example, a *voir dire* held to determine the admissibility of a confession could be conducted before a jury is selected. With respect, the proposed amendment does not go far enough. If there is to be an effective saving of trial Court time I would submit two essential reforms should be considered.

First, there are many procedural and other issues that can and should be determined in advance of the trial of the general issue. In February of this year the Law Reform Commission of Canada in its "Report on Criminal Procedure — Part I" recommended that the following issues, *inter alia,* should be dealt with at a pre-trial hearing: special pleas, *res judicata* and issue estoppel, severance of trial, venue, joinder of counts, alternative charges, amending of defective indictments, particulars, fitness to stand trial, admissibility of evidence, statutory *vires*, and the jurisdiction of the trial Court. Although the recommendation is admirable, it, too, does not go far enough in the sense that it fails to make mandatory the determination of these issues prior to trial. In that respect, Rule 12 of the U.S. Rules provides a useful precedent where it requires that certain motions "must be raised prior to trial" but with discretion in the Judge hearing the motion for "good cause" to order that it be deferred for determination at the trial of the general issue. Of course, such motions cannot be made until a person is committed for trial.

Second, I would recommend that introduction of a provision for a pre-trial conference. Once again, a precedent is found in Rule 17.1 of the U.S. Rules which reads, in part:

". . . the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. . . ."

Many judges in Ontario have adopted such a procedure without, of course, statutory authority when faced with a lengthy and/or complex criminal trial. Commencing with the *Rowbotham* case I have found pre-trial conferences of great assistance in the management of the trial. Indeed, my perception of the conference is that of a management orientated conference as contrasted with a settlement orientated conference which I view as improper in the criminal justice system. The main purpose of the conference, therefore, is to discuss issues relating to the trial and the possible disposition of the case, including the identification and clarification of issues, evidence and procedure for trial purposes. Counsel are assured that unless agreement is reached on an issue, the discussion is both privileged and without prejudice. I feel that it is essential that the Court be able to require a pre-trial conference on its own initiative for I fear that if left to their own devices the parties will not always seek to have one. In general, I favour a more active role by the Court in controlling its own docket.

The following are some of the matters which can be usefully explored at a pre-trial conference:

(1) Does defence counsel require particulars?

(2) If there are multiple accused and/or counts in the indictment, will there be an application for severance of counts or accused?

(3) Determine if all notices which must be given by the Crown or the defence (including section 30(7) of the Canada Evidence Act) have been given and determine whether the transcripts from the preliminary hearing have been prepared. With respect to notices, determine whether there is any issue that has to be litigated at trial. If not, obtain the agreement of counsel that the appropriate admission (pursuant to section 582 of the Criminal Code) will be entered on the record at the commencement of the trial.

(4) Where there are multiple counts, determine the counts upon which the Crown intends to proceed and upon which the accused will be arraigned.

(5) Determine whether the defence intends to apply to quash the indictment.

(6) Determine if defence counsel intends to apply for the release of exhibits for the purpose of conducting scientific tests or examinations.

(7) Determine whether either party will wish an order to take commission evidence.

(8) Determine whether there are substantial evidentiary issues, *e.g.*, wire-tap evidence, confessions, business records. If so, see what agreement, if any, can be obtained, particularly with respect to wire-tap evidence. If it is necessary for the Court to determine issues of admissibility ascertain what matters are in issue.

(9) Urge upon counsel for all parties to make as complete a disclosure as possible to one another before the trial begins. Possibly there will emerge facts which really are not in dispute and with respect to which a formal admission can be obtained and entered pursuant to section 582.

(10) Urge upon counsel to exchange a list of their witnesses and the order in which they will be called. As far as defence counsel is concerned, of course, this is not something which the defence can be expected to do until the end of the Crown's case.

(11) Without requiring defence counsel to commit himself or herself, attempt to determine the nature of the defence, particularly if it is a defence such as drunkenness, insanity, diminished responsibility. Presumably defence counsel will previously have informed the Crown if the defence is to be alibi.

(12) Where there are multiple accused, determine the order in which defence counsel will be called upon to present a defence which will, in turn, govern the order with respect to the cross-examination of witnesses.

(13) Where there are various Crown exhibits upon which there are admissions as to proof they can be tentatively marked at this stage for presentation at the commencement of the trial.

(14) Seating arrangements for the accused and counsel should be made.

(15) If the trial is to be lengthy, temporary absence of defence counsel during the trial should be discussed and suitable arrangements should be made.

(16) Procedure on evidentiary objections where there are multiple counsel should be determined.

(17) The excision from admissible statements of material prejudicial to an accused or co-accused should be discussed and settled if possible.

(18) Arrangements for the safe keeping of bulky exhibits should be made. Where inadequate facilities exist in the Court House for the safe keeping of such exhibits obtain agreement that they be returned to the custody of the party producing them after they have been introduced and identified as exhibits, subject to being returned to the Court Room at any time when required by counsel. Often photographs of bulky exhibits will provide an adequate substitute for the actual article.

(19) Jury selection and, in particular, whether counsel are considering challenge for cause should be discussed and the order of selection should be determined. Where there are multiple accused the order in which the accused are to exercise their challenges will be the same as the order of presentation of evidence, submissions and cross-examination.

(20) Determine whether there will be any applications for amendment of the indictment.

(21) Determine whether there will be an application for change of venue.

(22) Advise counsel that there will be a pre-charge conference after the conclusion of the evidence and before counsel make their submissions to the jury at which they will be expected to make submissions as to matters which they feel should be included in the trial Judge's instructions to the jury and to assist the trial Judge with respect to any issues upon which he might ask for submissions. A corollary purpose of the conference is to obtain the Judge's ruling on the legal validity or availability of certain defences and accordingly, whether they should properly be the subject of comment by counsel in their jury addresses. The conference takes place in Court in the absence of the jury.

If agreement cannot be obtained on any of the above matters or if they cannot be resolved by the pre-trial Judge (who I suggest should be the Judge who is to preside at the trial) an early date should be set for the return of the formal motion or motions.

Perhaps the most costly undertaking in any trial, civil or criminal, is that of transforming facts into judicially acceptable forms of proof. Judges and juries are unable to view the enactment of the crime *in situ*. The parties must arrange to place their evidence before the Court through witnesses, authenticated documents, scale models and plans, photographs, and so on. Too often evidence is presented where none is required as the issues to which it is directed are not in dispute. Often there is no dispute with regard to the *actus reus* of the crime. The single

issue in most criminal cases is whether the accused acted knowingly or with the required intent. Although section 582 of the Criminal Code, which permits an accused on trial for an indictable offence to admit any fact against him for the purpose of dispensing with its proof, already exists as an expense and time saving provision, far too few lawyers ever make use of it.

I have presided over a disturbingly large number of trials where at least 50% of the time of the trial was literally wasted by the prosecution being put to the proof of facts which defence counsel either ultimately conceded or with which no issue was taken. A lawyer who takes proper advantage of a preliminary hearing should know the strengths and weaknesses of the case for the prosecution. Why, after a preliminary hearing some defence counsel still do not admit facts that are not in dispute is difficult to understand. One reason, I am sure, must be either lack of experience, or lack of knowledge, or lack of confidence. In any event, there is no sanction in criminal cases as there is in civil cases to penalize a party in costs who ought to have admitted facts which could have been admitted without prejudice to his case but who failed to do so. However, those provinces which have legal aid plans might consider deducting from legal aid fees the amount equivalent to the time wasted by defence counsel who fail to make use of section 582 when they should have done so.

Over the years provisions have been introduced to save trial time and lessen the inconvenience of prospective witnesses by enabling the party making proof to file reports or certificates, *e.g.*, medical reports, certificates of analysis of various substances. Also, "business record" provisions have facilitated the proof of records kept in the ordinary course of business. It would seem that this principle could be usefully extended by permitting the proof of certain routine facts — which are not admitted — by affidavit evidence. As the Law Reform Commission has observed, "ordinarily proof of ownership, or of an owner's lack of consent to the moving of a chattel, or the entering of any premises or other place is not a matter in dispute, no matter how essential such proof may be".

There has been debate in recent years with respect to whether an accused should be under any obligation to make full or limited discovery to the prosecution. In civil cases compulsory discovery is mandatory. The traditional argument against requiring the accused to make disclosure is the privilege against self-incrimination. However, it seems that there is room for compromise — at least with respect to certain types of

evidence. U.S. Rule 16(a)(1)(C)(D) and (b)(1)(A)(B) providing for mutual discovery of documents and tangible objects and reports of examinations and tests does not really compromise the right of the accused to remain silent and provides a sensible mechanism for the exchange of certain types of evidence.

Another factor that tends to promote delay is the right of an accused to re-elect his mode of trial. Whether the re-election be from trial by Judge and jury to Judge alone, which is the most frequent re-election, or from trial by Judge alone to Judge and jury, the Criminal Code virtually encourages the re-election to take place on the day of trial — usually when the accused learns who will be the presiding Judge: see sections 490(5), 492(1)(5). At this stage in the proceedings the jury panel is present, the Crown's witnesses are present and it would not make sense for the Crown to refuse his consent to the re-election when the re-election will mean either a plea of guilty or a non-jury trial. However, the use by an accused of his right to re-elect has two effects on the system. First there is the administrative dislocation caused when a case which was expected to proceed on a certain date as a jury trial becomes a non-jury trial. In those jurisdictions where the presiding Judge will proceed to hear the case without the jury, the jury panel will be sent home "unused". In those jurisdictions where the presiding Judge will not hear the case following re-election it will be remanded to a later date when there will be criminal non-jury sittings. In this example the accused uses his right to re-election to delay his trial. But the re-election has a serious effect on the system — Crown witnesses are sent away and so is the jury panel until another case can be put in place. In some jurisdictions there will be a stand-by case and so the jury panel will not be seriously inconvenienced. However, in other jurisdictions which work on an assigned date basis the Court may be idle for the period of time allocated to the case which has "disappeared" because of re-election. Finally, to be realistic, last minute re-election is used to get the case away from a certain Judge and before another Judge.

I agree with the Law Reform Commission that the right of re-election should be retained. However, there must be something added to the procedure to prevent its abuse. In that regard, the proposal of the Law Reform Commission that re-election of mode of trial be available as of right only within seven days after committal for trial is sound, as is the second part of the Commission's recommendation which would permit a re-election after seven days if the accused can show valid cause, and if the Crown and Court to which he was committed for trial both

agree. The agreement of the Crown and the Court is to avoid administrative dislocation and to ensure judicial control over the case and over the Court's own docket.

Bill C-51, referred to earlier, in the words of the explanatory note accompanying section 80, "would clarify and rationalize the provisions of the Code on re-election and would, in the proposed subsection 491(1), provide certain limitations on the accused's right to re-elect the mode of trial". To say that the proposed section 491(1) would "provide certain limitations" on the right of the accused to re-elect is something of an under-statement. Under the proposed legislation, once he has been committed for trial the accused will *not* have any absolute *right* to re-elect — a right available both under the present Code and the new procedure advocated by the Law Reform Commission provided the right is exercised within the time provided. However, Bill C-51 permits the accused to re-elect his mode of trial *only* with the written consent of the prosecutor. That, in my view, leaves too much in the hands of the prosecution. As long as Parliament still recognizes the basic right of re-election, it is wrong in principle to vest the prosecution with an apparently absolute power to control how the accused is to be tried. If Parliament wishes to place some control as to how and when the right of re-election is to be exercised — as I have submitted it should do — the better approach would be to give an accused an absolute right to do so within a stipulated time *from* the date of his committal for trial, as proposed by the Law Reform Commission, and not within a stipulated time from the date fixed for the opening of the Court sittings, as the Code presently provides.

As I attempted to indicate at the outset, many of the devices and rules of the adversary system of litigation as we conduct it are not geared for, but are often aptly suited to defeat, the speedy resolution of the issue central to the prosecution. In suggesting a few reforms which can roughly be characterized as procedural, it should be apparent that I have not attempted to try to reconcile all of the factors which play a role in the criminal justice system *per se* or, in the narrower sense, the dynamics of the trial itself. Rather, these modest proposals are designed to fit into an already complex system without altering it in any inherent way and without changing the basic precepts of criminal law and the obligations which it places on the prosecution and the rights which it accords the accused. However, I would be remiss if I failed to mention other factors which play a role — at times difficult to quantify — in causing delay.

One must, of course, recognize the role of two figures central to the

adversary system — counsel and the trial Judge. As for counsel, the inherent flaw in the adversary system is the mismatching of the contestants. Whether through the inexperience, ignorance or sheer perversity of counsel — none of which are the exclusive preserve of defence counsel — trials are often needlessly protracted. Earlier, in referring to the reluctance of counsel to admit obvious facts, I referred to one of the problems. However, too many accused persons are represented by counsel who lack either the ability or the experience to handle what is in many ways the most difficult and specialized problem in law — the defence of a criminal charge. Apart from the failure of some lawyers to observe the rules of professional etiquette essential for effective trial advocacy, I would identify the following problem areas:

(1) Insufficient skill in formulating questions;

(2) Failure to learn and understand the art of cross-examination, including when not to examine;

(3) Inadequate knowledge of the rules of evidence, resulting in the making of wooden objections to simple, acceptable questions on uncontested factual matters — and the failure to object to really questionable evidence;

(4) Wasteful development of immaterial facts; and

(5) Endless arguments on points devoid of merit.

Sometimes, however, to be brutally frank, some lawyers knowingly commit some of these "errors". This is what one eminent jurist has recently characterized as the "nastier aspect" of the conflict between self-interest and public justice when he said "the interests of the individualistic lawyer and of his client are not inevitably harmonious". Again, as suggested earlier, in an era when most people are legally aided, perhaps the only sanction — short of involving the provincial Law Societies — is for legal aid directors to seek the assistance of the bench in identifying what has become known as "abuse of legal aid". One also hopes that some minimal qualification requirements to the trial bar will evolve in the coming years to ensure that the outcome of a lawsuit is always determined by the merits of the cause and not solely by the competence or incompetence of its pleader.

Another brief word with respect to counsel relates to their availability. Because counsel practising in or close to large metropolitan areas must inevitably have commitments in various Courts occasions will arise where they are required, through no real fault of their own, to be in two Courts at one time. I sympathize with their problems and suggest the only way to cope with them is to maintain a flexible docketing system. However, I am less sympathetic to those occasions where

trials cannot proceed because of the inability of already under-staffed prosecutors' offices to grow at the same pace as the demand for their services. Similarly, one must also identify as a cause for delay what occurs — or does not occur — at the provincial Court level from which must come all of our cases after committal for trial. I refer, of course, to delay occasioned by the time required to complete a preliminary hearing — which is frequently spread over many non-consecutive days spanning several weeks or months — and the resultant delay in providing a transcript of the hearing.

What of the trial Judge in terms of delay? This is a subject to which an entire paper could be devoted. However, in my view the Judge in Canada is one of the most seriously neglected people in the administration of justice. From the psychological effect of having to relocate oneself and his family, and all that this entails, to the provision of adequate assistance in terms of libraries and other essential information, Canadian Judges are not treated as well as they could be. I believe that there is something to be learned from the civil law countries' tradition of judicial selection: Judges are, in large part, trained and not born. While much progress has been made in the past 10 years by the Canadian Judicial Council in terms of judicial education, considerably more is required. I realize that in terms of available assistance, local conditions vary. However, there is nothing in this country which is the equivalent of the Federal Judicial Center in Washington, D.C., the administrative and educative adjunct to the federally appointed judiciary. Well-staffed and well-funded, the Center provides a highly sophisticated source of information to the bench — from general and specialized seminars to videotapes on specific subjects, from information readily available on computer to library research, from studies designed to measure the efficiency of a particular Court to studies designed to determine whether a proposed procedural change should be implemented. Many Judges in this country are expected to work with sub-standard libraries and little, or no, research aid. (My bench has two law clerks for over 125 Judges.) Also, more help is required, perhaps in the form of parajudges who may conduct pre-trial hearings, assist with motions, calendars and other preliminary matters and can free Judges to turn their skills and training to trying more cases. The removal from the responsibility of the Judge of a variety of useless and mindless tasks would not only mean that the Judge has more time to devote to trials, but would go a long way to enhancing his or her self-respect and self-image. I wonder how many Court hours have been thrown away doing this type of demeaning work?

The Judge who has neither the resources nor the help to decide an issue may do one of two things. Either the issue will be decided quickly and, perhaps, incorrectly thereby risking delay and expense through a successful appeal and maybe even a new trial. Or the Judge may adjourn the case to enable him to research the point — which may require him to seek out the books he needs in someplace other than his own courthouse. What I am saying is that a decision may be useless to the litigant if it comes too late or too early. Obviously "few litigants would be satisfied with a court that renders decisions instantaneously, inexpensively and incorrectly. A judicial system whose decisions are intellectually or morally purblind cannot long engender the respect and underlying public support so vital to that system's survival".

One cause of delay is uniquely in the hands of our lawmakers who must recognize that no effort to expedite the hearing of cases can succeed if legislatures continue to enact laws without providing resources to cope with the increase in litigation that results from these statutes. To name only a few examples, in recent years the following provincial and federal statutes have had a tremendous impact upon the efficiency of the courts: the Ontario Family Law Reform Act, the Divorce Act (Canada), the Ontario Landlord and Tenant Act, the Invasion of Privacy part of the Criminal Code, the bail provisions of the Criminal Code, the amendment of the summary conviction appeals provisions of the Criminal Code. In their zeal to make the judiciary the arbiters of all possible problems that befall society, the lawmakers are literally smothering the judicial branch without proper or adequate consideration of the impact which such legislation has on the machinery of justice. The Americans are just now, after many years of effort, reaching the stage where it will be a legal requirement that each significant piece of new legislation affecting the Courts must be accompanied by a judicial impact statement assessing its potential impact on the judicial branch. With respect to each piece of legislation should be required analyses of the likely effects of the legislation on such factors as the volume of litigation, possible delays and costs, jury needs, and the consequent need for more federal Judges. No less is the need for judicial impact statements in Canada.

Finally, I would refer briefly to three other factors which contribute to delay. The absence of a unified trial Court in several provinces contributes not only to delay, but also to confusion among litigants as to the proper Court in which proceedings are to be commenced. I recognize that in some provinces, my own included, the subject of the possible unification of the County and Supreme Court is a sensitive subject and I do not raise it here to debate it. Suffice for now to say that studies in

the United States and Canada suggest that a unified trial Court is a more efficient way of trying cases.

On another occasion I have been required to address the subject of mandatory minimum sentences from the viewpoint of whether they constitute cruel and unusual punishment: *R. v. Shand* (1976), 11 O.R. (2d) 28, 33 C.R.N.S. 82, 29 C.C.C. (2d) 199, 64 D.L.R. (3d) 626. However, there is another aspect to the mandatory minimum sentence that contributes to delay. Those charged with an offence that attracts such a penalty, particularly if it is seven years or 25 years, are unlikely to plead guilty for what I submit are obvious reasons.

Finally, the complete abolition of Long Vacation in those provinces which still retain it will undoubtedly have a positive effect upon the lessening of delay.

Also, I would recommend the removal of all procedural provisions from the Criminal Code, which really was meant to deal with substantive law, and the creation of a simplified, easy to understand code of criminal procedure. Undoubtedly not an insignificant cause of delay is trying to locate the appropriate section in the Criminal Code and then trying to determine its meaning!

Although my instructions were to be non-technical and to omit footnotes I could not, in good conscience, depart from this paper without acknowledging my debt to three papers by Judge Marvin E. Frankel, District Judge, United States District Court for the Southern District of New York and one by Judge Irving R. Kaufman, Chief Judge, United States Court of Appeals, Second Circuit, which are, respectively, "The Search for Truth: An Umpireal View", (1975) 123 U. of Pa. L. Rev. 1031; "The Adversary Judge", (1976) 54 Tex. L. Rev. 465; "From Private Fights Toward Public Justice", (1976) 51 N.Y.U.L. Rev. 516; "Judicial Reform in the Next Century", (1976) 29 Stan. L. Rev. 1.

(1984) 18 U.B.C. Law Rev. 163

"TIME, GENTLEMEN, TIME . . .": PRE-TRIAL CONFERENCE PROCEDURES IN THE SUPREME COURT OF BRITISH COLUMBIA

The Supreme Court of British Columbia, in common with the courts of most other jurisdictions in Canada and the United States, is experiencing problems with the efficient operation of its civil litigation process. Many American state courts, all American federal courts, and the Supreme Court of Ontario employ a procedure known as pre-trial conference in an effort to increase the efficiency of the trial process. This note will first briefly consider the problems the procedure addresses, which are much the same throughout North America, and then will look at the origins and development of pre-trial conferences. The findings of empirical studies of pre-trial conferences in particular states and in Ontario will be discussed, and the more formal American and Ontario procedures will be contrasted with the highly flexible system in British Columbia. Finally, the system in British Columbia will be examined in detail, and some suggestions made as to possible improvements.

Inherent in such a discussion is a consideration of several jurisprudential issues; while these will be identified, they will only be considered tangentially. Thus, the following is an analysis of what various courts, particularly the Supreme Court of British Columbia, are doing with respect to pre-trial conferences, and why.[1]

The Problem

Simply put, there is an ever-increasing number of cases that must be processed through the court system. That system is finite in size, capacity, and efficiency. On the other hand, the potential number of litigants is so great as to be close to infinite. It is both physically and economically impossible to resolve the matter entirely by building more courtrooms and appointing more judges. In any event, those are long-term solutions available only to government. It is for the various courts to regulate the problem in the short term.

A court only becomes directly involved with an action once the matter is set down for trial.[2] From that moment the court must

[1] Hereafter the Supreme Court of British Columbia will be referred to as the "Court".

[2] In British Columbia the Chief Justice of the Court, the Honourable Mr. Justice Allan E. McEachern, has said that the Court's jurisdiction over the

The Trial Process

by the Honourable Mr. Justice A. E. McEachern,
Chief Justice of the Supreme Court of British Columbia

I am grateful to the Publisher of The Advocate for this opportunity to share some thoughts I have about the trial process. I shall first state my concerns and I shall then describe some proposals (intended to be remedial) which I have made to the judges and to the Attorney General for possible changes to the Rules of Court. Some of these items are presently being considered by the Rules Committee, on which the Bar has representation (Messrs. Rodney Taylor, John Horn and R. H. Guile). Also, I have already mentioned some of these matters to local Bar associations and to the Civil Litigation Section of the Canadian Bar Association.

We are inundated by litigation which must be measured not only in a quantitative sense. Besides a substantial increase in volume, the time taken for most trials has increased by at least 50% in the past few years. Some of these cases are complex and oppressively lengthy.

It is not my intention to attempt an analysis of the underlying causes for these phenomena, but they include: increasing population; increasing complexity of society; rapidly escalating numbers of lawyers (probably a primary cause); increased intensity of counsel's exploration of issues; and possibly photocopyology;

These are all likely to continue, possibly at an exponential rate. In addition, we now have a new Charter of Rights and Freedoms, the impact of which cannot be predicted.

The consequences are obvious. Trials are getting longer. Trial dates in short cases are not available for upwards of a year, and beyond that in longer cases. Further, litigation is becoming increasingly expensive. The cost must be almost prohibitive for most private citizens.

I regret to say that some judges and lawyers have the view that some cases are not properly prepared, and many of the cases which come to trial should be settled. I expect the former is often the cause of the latter, although I do not suggest that all cases are ill prepared. There is as much good (or better) counsel work being done as ever: but, unfortunately, the visibility of good work compared with unsatisfactory work decreases as the number of cases (and lawyers) escalates.

In short, we have failed to meet the ideals expressed in Rule 1(5), which states:

"The object of these rules is to secure the just, speedy, and inexpensive determination of every proceeding on its merits."

The case load, like the mountain, is there and it must be challenged.

I suggest changes in our trial and pre-trial procedure which will have as their object one or more of the following: decrease the cost of litigation; advance the state of trial preparation so that unworthy cases will be identified before there is an irreversible financial or emotional commitment to trial; encourage and maximize the use of out of court procedures so as to save time at trial; furnish an expeditious procedure for the "summary trial" of appropriate cases.

I suggest the following for discussion and comment.

1. **Pre-trial Conferences**

Our present pre-trial procedures are not as effective as they should be because —

a) Lawyers delay their preparation — sometimes alarmingly. When that happens they cannot usefully discuss the case on a pre-trial conference until just before the trial, by which time it is often too late to wind down a case that should be settled.

b) With our present case load judges do not always have sufficient time to spend with counsel. In this connection it should be obvious that the judges are required full-time on trials. Early morning or late afternoon appointments, when counsel are distracted, and judges and lawyers are tired, is not the best way to conduct pre-trial conferences.

In future, therefore, I plan to advance further the date of the first pre-trial conference, and to encourage increased judicial participation in the pre-trial ritual.

Judges will encourage counsel to advance their preparation so as to avoid some of the difficulties just described. Counsel must understand that setting a case for trial is really a reservation of a judge, a court room, and all the other apparatus of the court. As I have said before, the court acquires a proprietory interest in a case once it is set for trial. If counsel do not respond appropriately, I expect the kindly trial judge, by a pre-trial conference order, may impose a schedule of proceedings upon the parties which will include dates for adding parties, amendments of pleadings, third party proceedings, discovery of documents, interrogatories and admission of facts (if any), examination for discovery, and the date for a further pre-trial conference. Failure to comply with a schedule may result in the case being taken off the list if that can be done without unfairness, or an appropriate order for costs.

2. **Agreements regarding facts**

Too often we hear much evidence at trial about matters of history or other non-contentious matters which are not really in dispute. The furnishing of a narrative of facts as part of the pre-trial procedure may be a way of reaching agreement on many facts which are not in dispute. The Rules do not presently require the parties to furnish a statement of facts and a rule change or a Practice Direction may be required if counsel continue to fail to agree on matters which are not really in dispute and which use up valuable time at trial.

3. **Expert Evidence**

I propose to seek a further amendment to the *Evidence Act* to permit the early exchange of the opinions of experts, probably verified under Oath; the early pre-trial cross-examination of experts on their reports; and the use of the expert's report or other statement of evidence as his evidence-in-chief at trial. In this way the often laborious evidence-in-chief can be avoided, and cross-examination may be shortened. Such a procedure, of course, will require earlier and better preparation which is much to be desired.

4. **Mini Trials**

Neither the mini trial nor the quantum mini trial are often used. These, of course, are available only by consent. As some counsel seem to be uncertain about these procedures I attach formats for typical mini trials and quantum mini trials. I invite counsel to make use of these procedures, which can be arranged through the Trial Scheduling Division (Mr. Drews) of the Vancouver Registry.

5. **Summary Trial Procedure**

Some straightforward cases are particularly appropriate for what I propose to call the Summary Trial Procedure (S.T.P.) These cases include personal injuries, some contract and commercial matters, Family Relations Act cases and other cases where the parties seek an expeditious and inexpensive trial. I suggest the following be established by a new Rule:

— an party may elect to have the proceeding conducted pursuant to the S.T.P., with the right of any objecting party to apply for "an order otherwise". In addition, the court may order a S.T.P.

— pleadings may be amended without order up to but not after 30 days before trial.

— there will be no costs in interlocutory proceedings unless the Court thinks a party is being unreasonable.
— examination for discovery shall be limited to one-half day for the examination of any witness.
— notice of the names of all witnesses must be given 30 days before the trial.
— 14 days before trial the Plaintiff must furnish a written sworn statement of the evidence-in-chief of all parties, experts and principal witnesses (i.e. any witness whose evidence-in-chief will take more than 15 minutes).
— 7 days before trial the Defendant must furnish written sworn statements of evidence for parties, experts and principal witnesses.
— These statements of evidence shall be the evidence-in-chief of such witnesses at trial. There shall be no change in the present cross-examination or re-examination.
— each party at trial shall be limited to one day for the presentation of his evidence-in-chief and argument. Time used in cross-examination will not be included in this computation of time.
— all costs will be in the discretion of the court, which shall have power to penalize any party who fails unreasonably to conduct his case in accordance with the objects of the S.T.P. (as stated in Rule 1(5)).
— all the foregoing are subject to the usual "unless the Court otherwise orders".
— except as otherwise stated, the Rules of Court will apply to the S.T.P.

I recognize that, for a time, some of the foregoing may cost more than the present procedure, particularly in cases where there is now little or no preparation. I believe, however, that for whatever they are paying, the clients would prefer to see proper preparation.

I also believe that it is in the interests of the Profession to improve the quality of its services and to preserve the integrity of the trial process by making it reasonably available to the public. The challenge to both the Profession and the judges is to make our system function effectively. To do so may require us to change some of our comfortable ways. Lawyers may have to use some new techniques such as the employment of legal assistants to prepare statements of evidence, and judges may have to do more preparation before trial by reading the evidence, etc. We are all capable of doing a better job than is now the case. We are not entitled to "eke" out our professional life expectations refusing to do anything for the first time.

I invite the Bar to make its views known through its various organizations such as the Law Society, the Canadian Bar Association, and local Bar associations. All comments and suggestions will be considered.

Appendix A

Format For Typical Mini Trial

1. The purpose of a mini trial is to explain the case to a judge and to opposing counsel and his client in the expectation that better understanding (and the recommendation of the judge), may assist in arranging a settlement.
2. As there are no Rules of Court governing mini trials, they may be arranged only with the consent of participating parties.
3. The mini trial judge shall not be the trial judge, and he shall to disclose the terms of his recommendation to anyone except the parties until after the trial.
4. Mini trials are conducted on the basis of statements by counsel (no evidence is taken), but counsel may refer to documents, transcripts and authorities.
5. Clients, claims managers, etc. are welcome at mini trials which are conducted in a court room.
6. The Plaintiff (or party carrying the onus) begins and counsel outlines his case within a prescribed time, e.g. 1 hour, ½ day, 1 or more days, depending upon the nature of the case.
7. The opposing party then outlines his case within the prescribed time, and there is a brief right of reply.
8. Some counsel prepare written outlines of their case, books of documents and briefs of authorities. These are helpful, but not essential.
9. After the hearing the judge either orally or in writing makes a recommendation for the settlement of the case, or he may make a Pre-Trial Conference Order (which, of course, is not confidential), regarding the future conduct of the case, e.g. severing issues, ordering amendments, etc.
10. A mini trial recommendation, of course, is not binding on the parties, and should not be mentioned at the trial.

Appendix B

Format For Typical Quantum Mini Trial

1. The purpose of a quantum mini trial is to obtain a non-binding opinion from a judge about the likely result of an assessment of damages.
2. The procedure is essentially the same for other mini trials, except, of course, only the question of damages is discussed.
3. Counsel are expected to present their medical reports. Calculations of cost of care, and income losses are useful.
4. Copies of relevant cases are helpful but not essential.
5. Most judges ask counsel to state the range of damages which they think is appropriate.
6. The judge's recommendation is, essentially, an opinion on quantum. It will not be disclosed to the trial judge, and should not be mentioned at the trial.

The Pre-Trial Conference

by the Honourable Mr. Justice Allan McEachern
Chief Justice of the Supreme Court
of British Columbia

(Text of a speech prepared for the Continuing Legal Education Society Seminar, May 30, 1980, titled "Practice and Procedure in the Supreme Court of British Columbia")

Before I discuss pre-trial conferences, I think it might be worthwhile if I outline the problems which we have in the management of the case load because one of the important reasons for pre-trial conferences, is to assist in the management of the trial list.

It also appears to me that if one is going to be practising in Court for many years, that one should know how the work of the Court is organized. I can assure you that we could not manage our very substantial work load without a fairly extensive structure, and that many of the requests we get for special consideration often cannot be acommodated, not because we are unwilling, but because the quantity of cases makes it absolutely impossible for us to accede to many of the special requests we receive.

Having said that I wish to say something which may appear partly contradictory. It is essential, in my view, that the Court respond to the requirements of society, and in cases of urgency, especially custody, and commercial cases, counsel must feel free to apply for an early trial date. I am proud to be able to point to the **Afton Mine** case where commercial reality required an early decision. In that case, if I recollect correctly, a decision was delivered after a lengthy trial, within, I think, 5 months from the time the cause of action arose. We must always be able to serve the urgent requirements of all segments of society, but special circumstances must be shown before anyone can expect to get special treatment.

Let me return to consider the management of important, but non-urgent cases.

In the beginning there is the Rota. As you may know, there are 27 Justices of the Supreme Court, and 4 Supernumeraries; the 4 Supernumeraries each sit about ⅓ of the time, so collectively, they amount to 1⅓ Judges. This does not mean however, that at any particular time we have a pool of 28⅓ Judges to draw upon. It is now accepted in almost all jurisdictions that Judges need time off the Rota to write their judgments. The days of writing judgments before Court, after Court, in the evenings, and on weekends, are gone forever. It was never a good system, and I don't know of anyone who would contend that Judges should not have time off Rota to write judgments. Our rotation is 1 week in 4 to write judgments. Thus in any given week, about 25% of the Judges, from 6 to 9 Judges, are on reserved judgments. This leaves an average of 19 Judges for trials and other judicial duties.

Each week we require 2 Judges for First and Second Division Chambers in Vancouver. We get help from the County Court but on the average we need ar least 1 Judge for Vancouver Chambers. We also need 2 or 3 Judges for Vancouver Criminal Assize, 1 or 2 Judges for Victoria, 1 or 2 Judges for New Westminster, and an average of 4 more Judges for civil and criminal Assize work in other judicial centres throughout the province. This leaves 10 or 11 Judges for the Vancouver Trial List. In addition, of

course, the Vancouver Trial List is the pool from which we draw to send Judges to other centres on special civil assignment when they have cases which are expected to take 5 days or more. Such cases, of course, cannot be accommodated in the Civil Assize system.

I should say that at the present time I am reviewing the Civil Assize system throughout the Province, and it is unlikely that it will be continued in its present form. What seems to be happening is that, as cases get longer, 3 and 4 day cases on a Civil Assize make it impossible for most of the 1 and 2 day cases to be heard. I suspect that what we will have to do is to pre-trial all cases of 3 days or more in the up-country centres, and make those cases the subject of special assignments, so that the regular Civil Assizes can be devoted to the 1 and 2 day cases which at the present time, I am sorry to say, are not getting sufficient attention. This, of course, will create further demands on the Rota, and I estimate that we should set aside at least one further Judge each week for dispatch to other judicial centres for the trial of cases which cannot conveniently be tried at a Civil Assize.

But that is in the future—the near future I hope—and that will not change the basic pattern which presently exists which, you will understand, requires us to prepare a Rota, on a yearly basis, which governs the allocation of judicial time throughout the Province.

Once the Rota is set, Merle Drews in Vancouver, and the other trial Co-ordinators or Registrars throughout the Province, know how much judicial time they can expect in their particular centres, and they start loading their list accordingly.

In Vancouver, Merle Drews sets cases for trial on the basis that he is going to have the Judges shown on the Rota for Vancouver civil trials, and he is often disappointed because, as I have said, Vancouver is the pool from which other judicial requirements are to be serviced, and every case which takes longer than is estimated removes another Judge from the Rota.

In Vancouver the Profession is fortunate that we have a fixed date system. This is a luxury that is not enjoyed in very many places. Many major Canadian centres do not have a fixed date system. In those centres, as in all other British Columbia centres except Vancouver, cases under 4 days are assigned in some sequence—perhaps in weekly segments, or on a "ready" list—and the commencement date of the trial is often as uncertain as the outcome of the litigation. In order to make a fixed date system work, however, it is necessary to overload the list. This is a calculated gamble which in Vancouver we entrust to Merle Drews. Within certain limits,he overloads the list by approximately 300% in the expectation that settlements and adjournments will reduce the list to a manageable size. The risk factor we build into our trial list assumes settlements and adjournments, but we are not able to include a factor for cases which run longer than expected. The reason for this is that the Rota assigns Judges for maximum periods of 3 weeks before they go on reserve judgments and it is only in Vancouver that Judges are available for 3 consecutive weeks. It is a rare occcasion when more than ⅓ of the Judges on the Vancouver Trial List are on the Vancouver Trial List for 3 consecutive weeks. More often, they come on to the Vancouver Trial List for 1 week after having been elsewhere for 2 weeks, or they will be on the Vancouver Trial List for 1 week, then to Chambers for a week, and then back to Vancouver Trials for the third week before they go back to reserve judgments. There are of course many other combinations. It is principally for this reason that cases which run longer than expected cause us so much difficulty.

Let me mention an example. Suppose a case is estimated by counsel to require 5 days. A great majority of the cases on the long trial list are estimated to take 5 days. Wherever possible I will assign such a case to a Judge who is going to be on the Rota for 10 days in case it takes longer, but that is not usually possible, and a great majority of 5 day cases must be assigned to Judges who have only 5 days on the Rota before

they move on. If the case runs over 5 days there must be either a split trial, which is much to be avoided, or a Rota change. Often that means dominoes, because a Judge who takes the place of the overholding Judge the following week, say in Prince Rupert, may himself be due for reserve judgments, in which case his lost time on reserve judgments must be made up later when he is expected somewhere else, and someone must then take his place. We simply do not have the flexibility with our present case load and Rota, to accommodate very many of these changes.

To continue with the management of our Vancouver List, Merle Drews takes one further step. He divides the cases which he sets for trial into 2 groups which are: Long Trials; that is trials of 4 days or more, which is our Long Trial List; and cases under 4 days which are on our weekly list.

The Long Trial List, that is cases estimated to be over 4 days, are set to commence on Mondays only. We set about 14 each Monday, and Merle tries to set not more than two 15 or more day cases, a couple of 10 day cases, and the rest are 4 to 9 day cases. All these long cases are collected on Monthly Lists grouped into weekly segments. You will be surprised to learn that of the 14 or so cases on the Long Trial List for each Monday, it is rare when more than 2 or 3 of them actually proceed on the day set for trial. The rest are settled or adjourned, many of them, usually, in the 2 previous weeks, and most of them in the last few days.

Our Weekly List of cases—4 days and under—start on every day of the week, but, naturally, we only set 5 day cases to start on Mondays; 4 day cases on Tuesdays; 3 day cases on Wednesdays, and so on. A typical Weekly List, which will also include long trials set for Monday, will usually have about 20 cases on it for Monday, with a decreasing number for each subsequent day of that week.

What happens is that about a month in advance, I assign the long trials to the Judges who are on the Rota for that week. This often uses up all of the Judges that I have on the Vancouver Trial Rota, and if one was a worrier, one would always think that there were not going to be any Judges available for the rest of the weekly list. The settlements and adjournments I mentioned a moment ago, however, free up some Judges and there are usually enough Judges whose long trials have been settled or adjourned to accommodate the rest of the weekly list. Any Judges who are still free after the weekly list cases are assigned to hear Chamber Referrals in the morning, and Uncontested Divorces in the afternoon. On most days, when Merle comes in to set the next day's list, about 4:00 each afternoon, it is touch and go whether we have enough Judges to meet the next day's requirements. Often we do not, and many factors can put our calculations out of balance. This last little while we have been particularly hard-pressed because Berger, J. is continuing on a trial which is taking several weeks longer than expected, and 2 Judges have been ill. When this sort of thing happens we simply do not have the resources to staff the trial list, and a few cases have to be stood over. We try to avoid this, but sometimes it is unavoidable. On one day in May we were short 5 Judges because nothing finished on time and these cases did not get on until the next day. On two other days in May one case did not get on, but I repeat, we have practically no flexibility for special requests.

From the foregoing you will understand that if we are to maintain the fixed date system in Vancouver we must overbook, and if we overbook we take the risk that some cases will not proceed. It is therefore important that we do everything possible to ensure that the cases which are set for trial are indeed ready for trial, and that all possible means for making the case ready for trial are explored.

Let me turn now to the purpose of the pre-trial conference.

In some jurisdictions, particularly the United States,cases are assigned to Judges as soon as the Writ or equivalent document is issued, and that Judge actively participates in the pre-trial preparation. He wrestles the case along at various stages; he calls the parties in at various times; he makes Orders directing that certain pre-trial procedures be conducted within certain dates whether the parties wish to proceed or not; he fixes the date for trial when he thinks the case is ready; and he generally involves himself in every aspect of the management of the trial.

I think I speak for all the Judges of this Court when I say that we do not believe that system is appropriate to this jurisdiction. It may be all right elsewhere, but we know from experience that a great many Writs are issued which are never going to go very far, and we do not think we should meddle with them. In addition, we do not have the staff, and we do not want to have the staff, to perform that management function.

We think lawyers, acting in the best interests of their clients, should be free to use the process of the Court, in accordance with the Rules of Court, and their own professional responsibility, as they think best, unharassed by an over-officious judiciary.

I have the view, however, that when a case is set for trial, counsel thereby asks the Court to reserve a Judge, a Courtroom, a Court Reporter, a Clerk, and all the other apparatus of the Court; and the parties, through their lawyer, impliedly warrant that the case will be ready on the trial date. From the moment the case is set for trial, therefore, I consider that the Court has an interest in the litigation, and has a right, indeed an obligation, to become involved in the process.

In the case of the Weekly List, our practice has been to pre-trial as many of these cases as possible, but we cannot pre-trial them all. What we have been doing is to assign one Judge every Friday to pre-trial as many cases as he can, at half-hour intervals. These pre-trial conferences are not intended to be exhaustive. They are designed, first, to satisfy the Judge that the case is ready for trial; secondly, to make sure that it is not going to take much longer than the estimated time; and thirdly, to be of whatever assistance we can in ensuring that the trial is properly managed. I do not propose to take much time talking about these cases but I do wish to make this statement, which is intended to be a statement *in terrorem* . I propose to instruct the Judges that when they come upon cases either in pre-trial conferences or in their Chambers which are obviously going to take considerably longer than the estimated time, they are to be taken off the trial list. As I have already mentioned, we cannot manage our trial list if too many cases take substantially longer than the estimated time, keeping in mind that a case is only set for trial on the basis that the estimated time set forth in counsel's statement is reasonably accurate. Other cases have been placed on the list after the one in question on the basis that the case in question will not take substantially more than the estimated time. I am not talking about an overrun of a day, or possibly even a day and a half or two days, although such an overrun on a 2-day case set for a Thursday can cause sufficient difficulty that it may well be taken off the list. But if we pre-trial a 2-day case, and it appears it is going to take 5 days, then it will be taken off the list.

In these short cases it is unlikely that the pre-trial conference Judge will be the trial Judge, and the Judges therefore should not hesitate to get involved in the question of settlement if counsel agree, or give frank advice about the likely outcome of the trial. I do not think it improper for a pre-trial conference Judge, who will be the trial Judge, to state an opinion on the likely outcome of an obviously bad case.

Counsel are, of course, not bound in any way by the advice they get from the pre-trial conference Judge. They are free to ignore that advice as they think best. The advice is given for the purpose of being helpful, and for no other reason.

I turn next to the pre-trial conferences in the long cases. As I mentioned, our Rota is usually very tight, and we live in a Province of expanding population where legal activity seems also to be expanding at an exponential rate. We have already experienced a very substantial increase in the size of our Court. When I started practising 30 years ago there were 7 Supreme Court Judges. Today there are 31. We have only 2 alterna-

tives. First, we can just keep expanding the size of our Court. This may happen anyway, but I do not think we can expect to expand the size of the Court in the same proportion as legal activity increases. If we do that we will have a huge Court in the near future. The alternative is better management of the case load. This requires the co-operation and assistance of the Judges and of counsel, and while there may be other devices which will bear upon this question, the pre-trial conference at the present time is the best device we have to assist us in better management of our Trial List.

With regard to what I am about to say, I am eliminating from consideration the exceptional, complicated, very long case such as the **Portage Mountain Dam** case, **Keen v. B.C. Railway** and **Cominco.** These are special cases which fall outside the scope of what I am about to say, as in these cases, on request, a Judge will be assigned early to assist in the management of the case.

With regard to the other long cases, however, it is my intention to advance the date for pre-trial conferences so that the first pre-trial conference will be held not less than 90 days before the date set for trial. When I assign such a case to a Judge for a pre-trial conference I will usually assign it to a judge who is not likely to be the Trial Judge. The reason for this is mainly defensive. If it is a 3-week trial, I try to assign it to a pre-trial Judge who is on the Rota at the time of the trial, but who is going to be there for a week. The reason for this is that I will only have 1 or 2 Judges with 3 consecutive weeks on the Rota at that time, and if I assign it to one of them, and if he becomes involved in settlement discussions, or if he learns things at the pre-trial conference which might disqualify him from taking the trial, then I may not have another Judge who will be on the Rota for 3 consecutive weeks to whom the case can be re-assigned. Thus , if someone is going to get disqualified, I want it to be a Judge who cannot take the case anyway, and I will assign 1-week trials to the Judges who are going to be on the Rota for 2 or 3 weeks for the same reason. It is my view, although the Court has no fixed policy on this question, that the pre-trial conference Judge should NOT be the trial Judge.

I anticipate that the first pre-trial conference on a long case may be a relatively brief, perhaps less than half an hour. What I like to see happen at these pre-trial conferences is for the pre-trial conference Judge to size up the case, and find out what can best be done to assist in the management of this long trial. The first thing he has to determine is whether the case is going to be ready for trial. As a rule of thumb I find that if examinations for discovery are not completed within 90 days of the trial date, then the case may not go on; the second rule is that if examinations for discovery have not been completed, *and* pleadings have to be amended, it is even less likely that the case will be ready for trial; and the third rule is that if, in addition to all this, parties have to be deleted or added, then it is highly unlikely that the case will be ready for trial, and, in my view, the pre-trial conference Judge should probably take the case off the list then and there. This may seem drastic, and we have not been doing this up to now, but in the next little while, as counsel become familiar with this procedure, it may become far more common.

If the pre-trial conference Judge decides that the case will likely be ready for trial, the next thing he has to do is make sure that it is going to be ready for trial in a way which will be efficient. He may make interim orders for amendment of pleadings, further examination for discovery, direct questions to be answered on discovery, and that sort of thing; bur more importantly, he will look for a way to streamline the proceedings without doing violence to the adversarial right of each party to conduct his case as he thinks best. It will become more common for cases to be divided on liability and quantum, and for some issues to be tried separately because we are not going to have the luxury of leisurely litigation in the future.

What I try to do, and which I hope the other Judges will also try to do, is to make

suggestions as to how the case can best be handled. One suggestion I often make is to offer what I call a mini-trial. This was inspired by the **Century City** project in the United States. In that case, which was a large patent action (similar to the **I.B.M.** anti-trust case), the pre-trial conference Judge learned that both parties thought they had an unanswerable case, and both believed the other side would fold if he learned what the case of his opponent was. The Judge directed, and in our jurisdiction this requires the consent of the parties, that a future appointment be set where each side was given a limited period of time to present a summary of his case to the pre-trial conference Judge and to his opponent. This included a summary of the case, some reading from discoveries or depositions, possibly some reference to authorities, and an abbreviated argument about what the case is all about. I usually suggest that the plaintiff's counsel take the morning to make his summary of his case, and the defendant have the afternoon for his statement.

The pre-trial conference Judge then makes a non-binding recommendation to the parties about what the likely outcome is going to be, or what he thinks would be an appropriate settlement. This is done on an assurance from the Court that the pre-trial conference Judge will not be the trial Judge, and the pre-trial conference Judge will not disclose to the trial Judge what his recommendation or conclusion was. I have only done this on a very few occasions with mixed results, but I am impressed that it is, in most cases, a useful procedure because, if it doesn't do anything else, it requires the parties to do some early preparation, and that is often very useful.

Mr. Justice Wallace has experimented with this concept. In a personal injury case he conducted a slightly different variation of a mini-trial. He heard submissions from both counsel, read the medical reports, and then made a general recommendation on what he thought the damages would be. No one was bound by the result, and the recommendation was not to be disclosed to the trial Judge. The case was settled.

I expect we will have a good many mini-trials in the future.

I often find in my pre-trial conferences that it is necessary to have 2 or 3 pre-trial conferences. On the first one counsel are usually completely unprepared either for a pre-trial conference or for a trial. Sometimes opposing counsel has never spoken to each other. That is understandable because it has not been the practice to do much preparation for pre-trials. When I get them back again, for what I call an in-depth pre-trial, or a mini-trial, I find they are much better prepared; they have a better awareness of what the case is about, and what their own case is. We are sometimes able to do something fairly useful.

Thus, I think it safe to say that in the future counsel should expect that they are going to be called back for more pre-trial conferences, and the conferences are going to be more intensive and time consuming than has heretofore been the case. I recognize that this is an imposition on counsel's time, and an expense to the client. But I am satisfied that, if the parties are prepared to bear the expense of a long trial, they are probably prepared to bear the expense of one additional day in the hope that something worthwhile can be achieved, and perhaps the case will be settled. At the very least, they will have the benefit of some genuine pre-trial preparation.

From the Court's point of view, we are prepared, notwithstanding our case load, to invest additional judicial time in these intensive pre-trial conferences because we believe it is usually time well spent. Either we are able to contribute towards a settlement, or we expect the case, when it proceeds, will be better prepared, irrelevant issues will be identified and discarded, and the time we spend on the pre-trial conference should not exceed the time saved at trial.

I am anxious for the profession to understand that the whole question of pre-trial conferences is being reviewed by the Judges, and we may be seeking some fairly major amendments to our rules which will permit us much greater jurisdiction on pre-trial

conferences. At the present time most of what we do requires the consent of the parties. I think you will understand from what I have said, however, that in my respectful view, the Court has an active interest in the conduct of litigation after a trial date has been reserved, and, in order to assist us in managing our case load better, we are going to require the assistance of counsel.

I would not want any of you to think that I have the view that pre-trial conferences are the answer to all our problems. There are many cases where a pre-trial conference doesn't accomplish anything except to assist in the preparation of a case. If there is a serious question of credibility then there is no way I know of to determine credibility short of a full trial, and it is not my intention to deprive any party of the right to his day in Court. All we ask is that if your clients want to have a week in Court, you must be able to satisfy us well in advance of the trial date that the case is indeed going to go to trial, and that it is going to be properly prepared, and that the judicial time devoted to the trial is usefully spent.

(1961) 1 U.B.C. Law Rev. 432.

THE PRE-TRIAL CONFERENCE IN BRITISH COLUMBIA

THE HON. MR. JUSTICE J. G. RUTTAN†

Order 34A of the new British Columbia Supreme Court Rules (1961) entitled "Pre-Trial Conference" provides an additional stage in trial procedure with the objects of clarifying the issues and shortening the trial. It reads:

> 1. In any action, cause, or matter, the Court may, *in its discretion*,[1] direct the solititors for the parties or the parties themselves to appear before it for a conference to consider:
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to pleadings;
>
> (3) The possibility of obtaining such admissions as will facilitate the trial;
>
> (4) Such other matters as may aid in the disposition of the action, cause, or matter.
>
> 2. Following such conference the Court may make an order reciting the results of the conference and giving such directions as the Court may consider advisable; and such order when entered, shall control the subsequent course of the action, cause, or matter, unless modified at the trial or hearing to prevent manifest injustice.
>
> 3. The Judge who conducts a pre-trial conference in any action, cause, or matter shall not be deemed to be seized of that action, cause, or matter which may thereafter be tried by him or by any other Judge of the Court.

To the layman, the whole process of litigation is expensive, time-wasting and mysterious. He goes to the courts to seek protection for his private rights or to oppose what he considers to be an unjustifiable claim by another member of the community. But he cannot learn with any certainty how long it will take to decide the claim or indeed just what may

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[1] My italics.

be the full extent of the dispute. So often he merely reflects the confusion that is present in the mind of his own counsel who cannot gauge from his opponent's pleadings the main issues involved or what evidence must really be established.

It was to meet these same complaints in the United States that pre-trial procedure was devised and used first in one or two states, then adopted by the federal courts in Rule 16 of the Federal Code which has largely been reproduced in Order 34A.

The story of the development and modern operation of pre-trial in the United States is well told by Harry D. Nims in his book, *Pre-Trial*.[2] According to Nims, the procedure was introduced to meet the growing complaint that the existing forms of pleadings do not perform the service for which they were originally designed, i.e., the simplification and crystalization on some factual basis of the issues raised. There were no restrictions in the rules of pleading to asserting or denying whatever the party might choose. In the words of Professor Sunderland, of the University of Michigan Law School, quoted in Nims:[3]

> Whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do. That was a matter to be dealt with at the trial not at a preliminary stage. . . . . False issues may not be due to bad faith. They may result from ignorance or bad judgment, or merely from the desire to profit from the turns of fortune which have always been inherent in litigation under our traditional system of procedure. But whatever their cause, the burden which such issues place on the parties, the witnesses, the Court and the public, is a serious one . . .

The solution proposed contemplated informal meetings in a judge's private chambers, some days or weeks before the date fixed for the trial, the proceedings not necessarily to be reported but with senior counsel in attendance having full authority to give undertakings or make admissions to bind their clients. Not being seized of the action, the judge would not have to sit on the later trial and the opinions quoted in Nims favour the practice of never having the pre-trial judge preside at the trial.

[2] New York, Baker Voorhis & Co. Inc., 1950.
At p. 10.

The development of pre-trial has varied from state to state. In some the rules have been elaborately developed and extended to cover every conceivable point that might arise in the course of trial proceedings and the pre-trial conference is mandatory in every case. In other states the system operates on a purely voluntary basis. As an example of the possible scope of pre-trial enquiries, here is a partial check list devised by Judge Chillingworth in the 15th Judicial District of Florida covering seventeen possible subjects for discussion:

Statement of case.
Amendments to pleadings.
Simplification of issues.
Possibility of jury.
Is defendant protected by insurance?
Admissions to avoid unnecessary proof.
Maps, photographs, sketches, diagrams, etc.
Estimate of repairs.
Bills and statements.
Correspondence.
View of scene.
Other exhibits.
Physical examination.
Use of medical testimony.
Elements of surprise.
Other expert witnesses.
Settlement possibilities.

It will be noted that at the bottom of his list the Judge puts "possibilities of settlement". Some American judges attach much importance to this issue, as being a fundamental aim of the pre-trial judge. But the majority view seems to be that the judge should have nothing to do with settlement though such a result might well be inevitable after the conclusion of the conference. To go into pre-trial with the thought that the judge is going to try to bring the parties together, may impair the entire voluntary nature of counsels' participation. With this view, I am in complete agreement.

I am advised that pre-trial has been introduced in Ontario and Saskatchewan but with indifferent success. There is no counterpart contained in the English Rules and the immediate reaction is to question the need for it in this Province. It has been suggested that we have within the framework of

our existing rules or within the inherent jurisdiction of the Court all the necessary machinery for solving the very problems for which pre-trial procedure was devised. Thus, in the Supreme Court Rules there exist no less than six methods for clearing up and clarifying issues and pleadings:

1. Applications for amendments which a party desires to make in his opponent's pleadings or proceedings against the will of that opponent. Such "hostile amendments" are comprised in the rules allowing for adding or subtracting parties,[4] amending or striking out embarrassing, frivilous or unnecessary pleadings,[5] or applying to strike out any pleading which discloses no reasonable cause of action or answer.[6]

2. Either party may, by his own desire, amend his endorsement or pleadings or other proceedings at any time up to the commencement of the trial, provided there has been no undue delay and that such amendment will not injure or affect any vested rights of his opponent.[7]

3. Every Judge also has the power to amend the proceedings before him whether he is asked to do so by the parties or not, though it is not his duty to force amendments upon them, for which they do not ask.[8]

4. Under O. 70, R. 1, the Court or Judge may amend or otherwise deal with such proceedings which are not in strict compliance with the rules of practice in such manner or upon such terms as the Judge shall think fit.

5. Moreover, there is existing procedure for pre-trial examination, both of the pleadings and evidence on both sides, through the use of the rules for discovery, including medical examination of injured parties, and the requirement of the furnishing of particulars.[9]

6. Finally, there is the existing inherent jurisdiction of

[4] O. 16, R. 11.
[5] O. 19, R. 27.
[6] O. 25, R. 2, 4.
[7] O. 28.
[8] O. 28, R. 12.
[9] O. 31, 31A, 31B; O. 19, M.R. 202 to 204.

the Court to stay all proceedings which are obviously frivolous or vexatious or in abuse of its process.

But if the present rules are sufficient to improve our trial procedure, then from the every-day experience in our courts, it is apparent that many counsel are not using them. Whether it be from ignorance, inexperience, or the fear of revealing too much of one's own case, counsel too often leave it to the opening day of the trial before cleaning up their pleadings, agreeing on issues to be narrowed or abandoned, or making admissions of fact. At that time too, the presiding judge, from his first perusal of the record may offer suggestions designed to expedite the trial. Contrary to the opinion of some lawyers, the Court is reluctant to interfere in this manner in the opening stages of a trial, particularly where the result is to force counsel to make immediately in the presence of their own clients as well as opposing counsel decisions that would be better for further study and consideration. But if this form of pre-trial conducted on the opening day is desirable and even essential, how much better to have it performed some days or weeks earlier, in the interests not only of the lawyer but also of the economy of his client's time and money.

Those who object to the pre-trial conference as unnecessary, complain that we are not attacking the real problem, which is not inadequacy of the existing rules, but the attitude of the lawyer. Some counsel, both senior and junior, still practise what an eminent jurist has called "the sporting theory of justice, a theory that stresses the law suit as a game with a Judge as an umpire awarding the prize to the more skillful". The same learned jurist goes on to say: "This principle is outmoded. We all now see in a law suit a means to achieve justice under the law". And someone else has said: "There is now no room for trial by ambush".

There are some who assert that the matter goes deeper still and involves the attitude of the lawyer to his own profession. They say that the modern trend is to engage in law not as a profession, but as a commercial enterprise, with each case to be developed in that way which will return the greatest possible remuneration. Such lawyers, who must be in a minority group, would probably never agree on any issue that might reduce their fee, unless forced to do so. For these

people the need is not new procedures but new sanctions which might be achieved by granting to the judge the same unrestricted discretion of costs that exists under the modern English Rules. It is suggested that exercise of this discretion at the opening of the trial would do away with the need of any other pre-trial procedure.

One criticism of the new procedure is put forward by senior counsel of two firms in the City of Vancouver who conduct a great deal of litigation. Both firms are strongly in support of the scheme but state that it is too voluntary in nature. They agree that Order 34A is unnecessary where both parties are represented by counsel anxious to simplify the issues at the trial. In such cases they conduct their own informal pre-trial and by this means have simplified and shortened trials from an estimated period of weeks to that of days. But when they are faced with counsel who follow the "sporting" or "commercial" theories of justice, or lack the experience or knowledge that will enable them to agree on any matters, then resort must be had to the Chamber Judge for an order for a pre-trial conference, unless the court, moving on its own initiative, on perusal of the record before trial, will make the desired order. Since the record is not normally received by the presiding judge until the night before the trial, he will seldom be in a position to direct a pre-trial conference.

To proceed by way of chamber application is to further complicate our existing procedure and provide just one more dispute between the parties. Moreover, the whole matter must be canvassed in chambers and then be re-stated before the pre-trial judge. It is submitted, therefore, that we should follow the practice of some of the American states, where every record is screened by some judge or other competent court official, and if so directed, then placed on a pre-trial calendar for consideration by the duty pre-trial judge.

The only case in which Order 34A has been invoked to the date of this writing was in fact commenced by chamber motion. The application was to direct a pre-trial conference to consider the separation of issues, and was contested. The submission was that the issue as to liability in a complicated accounting case should be tried first and that the quantum be left for later determination. In this way much time and ex-

pense might be saved if it should be determined that there was no liability *ab initio*. An order for pre-trial was made by my brother Verchere and the conference was held before me. It was not successful as such because defence counsel did not come prepared to make any admissions. Neither he nor his clients possessed the necessary information to agree to statements of facts proposed by the plaintiff. He was not averse to the separation of the issues if he were not required to agree on anything which might later operate against his client. The matter was solved when I made the desired order under M.R. 431, sitting as a Chamber Judge and acting without the formal consent of either counsel.

This may illustrate the objection taken by those lawyers who suggest that the voluntary system falls down where counsel are not in a position to be able to agree on certain statements of fact. It is interesting to note, however, in this case that the fear of defence counsel to making any agreement at all was dissipated after a full and frank discussion held before me. In the end he agreed that it would appear that one issue should be tried before the other in the interests of economy and expense and that his failure to agree was only based on lack of sufficient information. He did not oppose the application under M.R. 431.

One advantage that could result from a compulsory review of all cases for pre-trial purpose is the greater certainty given to the commencement date and the duration of trials in the various registries, with a consequent shortening of the trial lists and protecting each judge's timetable from the disruption caused when trials do not go on at all, or conversely, when the trials commence on date but last several days or weeks longer than estimated.

Over the past few years, much progress has been made in reducing the backlog of cases that formerly cluttered the registries in Vancouver, New Westminster and Victoria. Where at one time the lists were over a year behind, nowadays the delay is no more than a few months. At the time of writing, July 14, there are still some dates available in the Vancouver list for September or October. A similar improvement has been made in the Interior of British Columbia by employment of the Itinerant Judge travelling throughout the province when the Spring and Fall Criminal Assizes are

not being held, and sitting solely to clear up the civil list. But we are still faced with the "court house step settlement" and, conversely, with the two-day estimate for a trial that lasts four weeks. In the one case, the judge and court room are suddenly free—too late for assignment of the next case on the list. In the other, the judge is detained so long that his programme is seriously disrupted. If he stays to continue the trial, he may have to cancel a circuit trip to some Interior point. On the other hand, if he must leave for a criminal assize, he will have to adjourn the present case, perhaps to some indefinite date in the future. In the meantime actions waiting on the trial list and ready to go on, often with witnesses from distant points in attendance, must be delayed or adjourned.

The use of pre-trial procedure may result in these things:

1. By simplifying and crystallizing the issues, counsel can with greater accuracy estimate the duration of their trial.
2. If there is a prospect of settlement, pre-trial can assist counsel to make their decision in time so as not to interfere with the court calendar.

To give the new procedure a fair chance to prove its worth will necessitate the co-operation of both Bench and Bar. In many cases, the discretion both for the invoking of the procedure and the carrying out of the conference will depend solely on a particular judge. American experience has shown that some judges who are not sympathetic to the system have turned the hearing into a purely formal one settling points that could be done in the registry. On the other hand, some judges have become so enthusiastic that they have endeavoured to use the pre-trial to force settlement upon the parties. I suggest that the only risk here is that the judge might take too enthusiastic an interest. He must resist the temptation to insist on disclosures, admissions, or amendments which counsel may sincerely believe to be against his client's interest, and as I have said before, pre-trial is not the place for insisting on settlements.

In the final analysis, of course, pre-trial will succeed or fail on the attitude of the Bar. Criticism and support have been indicated above and perhaps the most helpful sign of

success is that the procedure as inserted in these new rules was enthusiastically endorsed at least by the Bar Association of Vancouver.

Time and volume of work alone can decide the success or failure of pre-trial procedure. Some problems can be foreseen and I will conclude by summarizing them, together with comments, not doing so to indicate the opinions of myself or any of my brothers of this Court, but to stimulate thought and discussion among those members of the profession who seek to give pre-trial procedure a chance to show its value:

1. Is pre-trial procedure too voluntary in concept? I suggest that under the present organization whereby the trial judge reads a record only the night before the trial date, there will not be sufficient time for the court to order a conference in a reasonable space of time before trial. If there is to be a screening of all trial records, then it should be done by an official, if not a judge, who is qualified to decide whether the procedure should be invoked. The Master in Chambers should be able to fill this task but no Master has yet been appointed in British Columbia. There are Masters in the Provinces of Ontario and Saskatchewan and it might be interesting to enquire how they handled pre-trial applications when the procedure was used in their respective provinces.

2. If a pre-trial order is made after compulsory screening, then possibly one member of the Court would handle all pre-trial conferences for a week at a time, much as each judge takes his place on the Chamber List. In effect, we would be setting up a second Court of Chambers. A judge cannot be spared for this additional duty, unless the time so employed is more than offset by the saving in the length of trials.

3. The rule provides that the pre-trial judge should not be seized with the case and it is suggested that he should not hear the case either. But this is impossible in our present court arrangement and with the number of judges sitting in this Court. One judge by sitting in pre-trial might disqualify himself from the next twenty cases that are coming up and he would have nothing to do when he went back on the trial rota. In any event, I can see no harm in the pre-trial judge later sitting on the trial. Any opinion formed in the conference room will be erased by time or further argument and evidence, just as now happens every day in our courts where judges are asked to review their own previous decisions in such matters as injunctions or custody hearings.

4. I am advised that costs are to be allowed on pre-trial conference. This may be a further barrier to the agreement of counsel to come before a pre-trial judge. Counsel may not be willing to make admissions which have the automatic effect of penalizing his client before they ever get to trial. Costs, of course, may be reserved for consideration by the trial judge but it may be that the whole question of costs of pre-trial conference should be re-considered.

5. Should there be any rules of practice to govern pre-trial conferences? No procedure is laid down in Order 34A and experience may show the need for some formal rules as to evidence, keeping of records, scope of the enquiry, form of orders, etc. For the time being, so as not to hinder the flexibility of the procedure, perhaps the form and content of the conferences should well be left to the discretion of the presiding judge.

6. Pre-trial can only operate in the Interior of the Province if the visiting Itinerant or Assize Court Judge can hold conferences for cases that will not be heard until a following sitting of the Court which may not come for another three to six months. If this means that the conference is being set too soon, and not close enough to the actual trial date, then possibly some thought should be given to empowering the Local Judge to sit on pre-trial. This is impossible under the present phrasing of Order 34A which refers throughout to the discretion and direction of "the Court".

ensure that a judge, a courtroom, and the full panoply of support staff are reserved for that action. To do this the court must maintain a Trial List, a sort of waiting room outside the bottleneck in the civil litigation process, the courts.

In British Columbia there is ample proof that this bottleneck exists. The Trial List at the Vancouver Registry is consciously and consistently overbooked by five hundred to six hundred percent.[2] Waiting periods of over a year are not uncommon for trials set for ten or more court days. However, days where there are more trials ready to proceed than judges to hear them are extremely rare.[4] Clearly, something is awry with the present system. Even allowing for natural attrition due to pre-trial settlement, it would seem that counsel are overestimating the time that some cases will require, and underestimating others. Some possible reasons for this are an excess of caution, a lack of understanding of the nature of the case, a desire either to force a settlement or to "smoke out" the other side, or simply inexperience as barristers. To be fair to counsel, the above reasons stem in part from the length of the Trial List itself. When the earliest trial date available is several months hence, it is small wonder that not all counsel are completely conversant with all aspects of their case when they are setting a date. This is particularly so in personal injury actions, where medical evidence must often be contemporaneous with the time of trial.

The Origin and Development of Pre-Trial Conferences

A lawsuit has four major phases: (1) cause of action to setting a trial date; (2) setting a date to trial; (3) trial to judgment; (4) judgment to satisfaction of judgment. Traditionally a court is

preparation of an action arises once a date is set. "The Pre-Trial Conference", Complex Civil Litigation, a course given by the Continuing Legal Education Society of British Columbia [C.L.E.], February 1982.

[2] The writer gratefully acknowledges the courtesy of the Honourable Chief Justice Mr. Allan E. McEachern, the Honourable Mr. Justice Hugh P. Legg, the Honourable Mr. Justice Charles C. Locke, and the District Registrar for Vancouver, Mr. Gordon N. Turriff, in providing her with extensive information concerning court scheduling and pre-trial conferences.

[4] The intricacies of this scheduling deserve mention, as they highlight a further cause of case back-log in British Columbia, namely lack of judicial manpower. The Trial Co-ordinator, in conjunction with the Chief Justice, daily juggles twenty-seven Supreme Court judges, four Supernumerary judges, and, generally, two County Court judges sitting as Local Judges of the Supreme Court. This pool services the province's eight judicial districts, with the result that ten or eleven judges per day are left to handle the Vancouver Trial List and the two Chambers Divisions.

only directly involved in the trial-to-judgment phase; the organization and management of the other three phases remain the domain of counsel. The Rules of Court ensure a procedural uniformity commencing with the filing of the initial Writ, but historically the courts have not used them to manage an action or to direct counsel in their preparation prior to trial. However, as the length of time spent in phase (2) increased, courts began to suspect that this was affecting the efficiency of their domain, and thus counsels' trial preparation began to receive judicial scrutiny.[5] One way of doing this involved pre-trial conferences.

The pre-trial conference, in essence an informal dialogue or series of dialogues between counsel and a judge prior to trial, is a procedure indigenous to North America. In the 1920's a judge in Wayne County, Michigan, began "bringing counsel together before trial to state their claims and defences and to exhibit their evidence".[6] This technique was formalized in 1938 as Rule 16 of the Federal Rules of Civil Procedure, and similar rules were added to many state Rules of Court. In March 1978 the Supreme Court of Ontario, after a two-year study of the procedure, formally implemented pre-trial conferences. British Columbia has had a pre-trial conference rule since 1961,[7] but the rule received little attention until the late 1970s, when the Trial List began to burgeon.

While the use of pre-trial conferences in civil litigation has become almost universal in the United States and is definitely a developing trend in Canada, it is inaccurate to assume that procedural uniformity exists. Common to all jurisdictions is a desire to increase the efficiency of the administration of justice. Pre-trial conferences provide a court with a "window" through which to observe trial preparation; the interaction between judge and counsel through that window varies greatly between courts. Guidelines for a pre-trial conference are found primarily, but not exclusively, in the Rule of Court that authorizes the procedure. The following is a brief four-

[5] The mere fact that a court is interested in the preparation of counsel raises few eyebrows. However, any overt effort to manage or to oversee that preparation gives rise to diverse reactions from both counsel and judges. On the one hand, the common law has always espoused the position that justice will most readily be attained when counsel are free to present their client's case as they see fit to a neutral and somewhat detached judge. On the other hand, the common law has also traditionally sought to be efficient in the administration of justice, for "Justice delayed is Justice denied".

[6] J. A. Jolowicz, *Some Twentieth Century Developments in Anglo-American Civil Procedure* (1978) 7 ANGLO-AMERICAN LAW REVIEW 163.

[7] British Columbia Supreme Court Rules, Rule 35. (Prior to 1976, Order XXXIV A.)

point analysis with which to determine which jurisprudential value, the traditional autonomy of counsel, or speedy dispute resolution, is favoured by a particular pre-trial conference rule.

Firstly, is the procedure mandatory? Is there room for either counsel or the judge to suggest that a specific case does or does not require one or more pre-trial conferences? Secondly, what, if any, is the formal agenda of the pre-trial conference? Again, can this vary? Thirdly, what orders can result from the pre-trial conference? Most importantly, what emphasis is placed on settlement prior to trial? Fourthly, is the pre-trial judge seized with the matter? As the inflexibility of the procedure increases, particularly where this is accompanied by an emphasis on settlement rather than on improved trial preparation, the bias of the court shifts towards reducing the number of cases to be heard, and away from improving the efficiency of the administration of justice.

Pre-Trial Conference Procedures Elsewhere

As noted earlier, the progenitor of all pre-trial conference rules is Federal Rule of Civil Procedure 16,[8] which has remained unchanged since its inception. Under it, pre-trial conferences are discretionary, occurring at the court's request. The agenda of a conference as outlined in the Rule includes: (1) the simplification of the issues; (2) amendments to the pleadings; (3) admissions of fact and evidence; (4) the number of expert witnesses; (5) preliminary references to a master; and (6) "[s]uch other matters as may aid in the disposition of the action".[9] The resulting order recites the actions taken at the conference, the agreements, the admissions, and/or the amendments made or allowed. Further, it limits the trial to those matters not disposed of at the conference. No mention is made of whether the pre-trial judge may or may not be the trial judge. This varies from court to court. In those where settlement is stressed the pre-trial judge is generally the trial judge.

Many American courts have long been of the opinion that the phrase "[s]uch other matters as may aid in the disposition of the action" sanctions a conference with a strong bias towards settlement. There are, however, states where this emphasis is not so apparent even though identical or similar words are used. One such state is New Jersey, where the seminal study of pre-trial conference

[8] Federal Rules of Civil Procedure, Rule 16 (U.S.A.).

[9] *Id.*, Rule 16(6).

procedure was conducted. This research analyzed the impact of mandatory pre-trial conferences on two thousand nine hundred and fifty-four personal injury cases during 1960-62 in the Supreme Court of New Jersey.[10] These conferences stressed trial preparation, although settlement was considered a valuable by-product.

The agenda under New Jersey Rule of Civil Practice 4:29 is much the same as that under Federal Rule 16, except that all damage claims must be specified at the date of the conference. The order must contain all those items mentioned in Federal Rule 16 and a description of the nature of the action, as well as a summary of the factual contentions and the legal issues raised. In addition, the estimated length of trial is discussed. A significant difference from Federal Rule 16 is that here the court is empowered to set schedules for the completion of further discovery proceedings. The Rule anticipates, but does not require, that the pre-trial judge will also be the trial judge.

The basic findings of the Rosenberg study are of interest, particularly when one remembers that pre-trial conferences are presumably designed to improve the administration of justice. The researchers report that mandatory pre-trial conferences are an inefficient use of judicial time. The study does note an improvement in the quality of the trial process with respect to cases that were pre-tried and later went to trial. Specifically, "lawyer preparedness was promoted, there was a clear presentation of opposing theories of the case, improper gaps and repetitions in the evidence were eliminated, and tactical surprise curbed".[11]

There is a third point (which is also raised by the Toronto study discussed later[12]): Pre-trial conferences may occasion an increase in the rate of plaintiff recovery. This is not as startling when one considers that the plaintiff's case must be reasonably well prepared prior to commencing an action. At a pre-trial conference, defence counsel may well assess the situation and decide that it is more economical to settle than to prepare an elaborate defence. Without the exchange of information that occurs at a pre-trial conference, such settlements might not otherwise occur.

In Toronto, prior to the introduction of a pre-trial conference rule, Messrs. Stevenson, Watson, and Weissman conducted a two year pilot program during which the effects of pre-trial conferences on one hundred and sixty-one civil non-jury cases in the Supreme

[10] M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

[11] *Id.*, at 34 (Table 1), at 35 (Table 2), at 40 (Tables 6 and 7).

Court of Ontario were analyzed. The authors explained the focus of the project as follows:

> It has been generally assumed that the introduction of the pretrial conference procedure has the effect of increasing the rate and speed of settlements and of reducing the length of trial in those cases that go to trial. This project is addressing itself, *inter alia*, to the following questions: whether or not these effects *do result* from the holding of pretrial conferences; whether such effects are common to all or only some types of litigation; whether such benefits are of a magnitude sufficient to produce a *net* benefit to the court, taking into account the judicial manpower required to conduct the pretrial conferences.[13]

Further, it was stated that "the pretrial conferences . . . were intended to be primarily *settlement-oriented* rather than *trial-oriented*".[14]

This bias towards settlement does not accurately reflect current Ontario pre-trial conference practice in that Rule 244, enacted in March 1978,[15] makes no reference to a settlement as one of the objectives of the pre-trial conference. Thus the findings of the study are of limited use.

In the Toronto project pre-trial conferences were mandatory. The agenda was very fluid, but clearly aimed towards settlement. With this emphasis, little attention was paid to an analysis of what orders could be made, or to the effects of having the pre-trial judge hear the trial. Given these limited parameters and the extremely small size of the sample, only two findings are of interest with regard to practice in British Columbia: settlement pre-trial conferences result in a net saving of judicial time and an apparent increase in plaintiff recovery rates. The first finding is almost circular. A pre-trial conference is invariably shorter than a trial. If a judge presides over four pre-trial conferences, three of which settle, he or she will be able to try the remaining one fully, completing the four in less time than it would take to hear four full trials. The second finding merely reinforces the comments made in the Rosenberg study. If the pre-trial conference makes the parties more aware of the true

[12] Below, at 592.

[13] M. Stevenson, G. Watson, and E. Weissman, *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment* (1977) 15 Osgoode Hall L.J. 591, at 592.

[14] *Id.*, at 594.

[15] Rules of Practice of the Supreme Court of Ontario, Rule 244.

state of affairs, there is an incentive to settle rather than to drag the matter on through the lengthy and costly trial process.

A recent article in the Canadian Bar Review does much to put the Toronto study in its proper perspective *vis-à-vis* Rule 244.[16] The Rule, as it stands, is discretionary: a conference is available upon the application of a party or upon a motion of the court. The agenda is similar to that of Federal Rule 16, and incorporates additions similar to those found in New Jersey Rule of Civil Practice 4:29. In Rule 244, Paragraph (6) of Federal Rule 16 has been modified, and the pre-trial conference is to consider, *inter alia*, "any other matters that may aid in the disposition of the action, cause or matter or the attainment of justice".[17]

In September 1980 the state of Maine enacted Maine Rule of Civil Procedure 16 in order to improve existing pre-trial conference procedures. Although pre-trial conferences are mandatory, a court may dispense with the conference after the filing of pre-trial memoranda with a satisfactory proposed pre-trial order. Such an order must indicate that the case is in a "trial posture"; in other words, that the counsel have already held their own conference or conferences and "fine-tuned" the issues and the evidence. In practice it is rare for counsel to meet this standard and thus avoid a pre-trial conference supervised by a judge.[18] However, the technique would appear to be a way of forcing counsel to prepare for trial with a minimum of judicial intervention.

Apparently picking up on the Toronto findings that settlement-oriented pre-trial conferences increase judicial efficiency, the Maine Rule is clearly biased towards settlement, should counsel be unable to avoid the pre-trial conference as outlined above. The major settlement provision states: "at pretrial the court shall explore the settlement negotiations had to date between the parties and shall encourage a fair disposition of the case by settlement".[19] Further, where counsel are not prepared to comply with this or other sections of the Rule, absent good cause, sanctions are to be imposed. These may include dismissal of the action or any part thereof, the default of a party, the exclusion of evidence at trial, and/or the imposition of

[16] R. M. J. Werbicki, *The Pretrial Conference in the Supreme Court of Ontario* (1981) 59 Can. Bar Rev. 485.

[17] *Supra*, note 15, Rule 244(6).

[18] R. J. Plourde, *Pretrial in Maine under New Rule 16: Settlement, Sanctions, and Sayonara* (1982) 34 Maine L. Rev. 111.

[19] Maine Rule of Civil Procedure 16(c)(5).

costs, including all fees and travel expenses. The latter may be imposed directly on counsel, to the exclusion of the client.

In keeping with this pronounced bias towards settlement, the Rule also requires that, unless excused for good cause, those counsel who intend to act at trial must attend the pre-trial conference. Although this provision is found in some other states, such as New York, South Carolina, and Wisconsin, Maine has the severest sanctions for non-compliance.

The foregoing survey of the evolution of pre-trial conferences in other jurisdictions illustrates several positions on the continuum of jurisprudential values, each coming somewhere between the traditional *laissez-faire* approach, where the court is imperator between parties in an adversarial system, and the "speed-above-all" approach, where the matter is settled before the merits are heard in open court. Where does the present pre-trial process in British Columbia fall on this spectrum?

Pre-Trial Conferences and Similar Procedures in British Columbia

The pre-trial conference procedure in British Columbia is quite unlike the formalized systems already discussed, despite the fact that British Columbia's Rule 35[20] is very similar to Federal Rule 16,[21] and thus in part to New Jersey's Rule 4:29[22] and Ontario's Rule 244.[23] There are at least four general factors that cause this difference. Firstly, the Trial List has been a cause for concern in British Columbia since the late 1970's. Pre-trial conferences have thus only been in use for about five years, unlike other jurisdictions where the procedure is of long standing. Secondly, even if there was empirical evidence showing that pre-trial conferences are of use in expediting all cases, the Court does not have the judicial manpower to pre-try all cases. Thirdly, the Court has a clear preference for trial preparation over settlement as the *raison d'être* for pre-trial conferences. This is apparent not only from discussions with various judges, but also from Rule 1(5), which would appear to be incompatible with a procedure that precludes the possibility of a trial: "The object of these rules is to secure the just, speedy, and inexpensive determination of every proceeding on its merits."[24] Fourthly, although Rule 35 permits the Court to order a conference at any stage of a proceeding, the Court will not do so unless a trial date has been set.[25]

[20] *Supra*, note 7.

[21] *Supra*, note 8.

[22] Rules Governing the Courts of the State of New Jersey (1960), N.J.R. Civ. Prac. 4:29-1.

[23] *Supra*, note 15.

In British Columbia the nature of the pre-trial conference depends on the estimated length of trial given by counsel when a trial date is set. A trial is considered either short (scheduled for three or fewer days), medium (scheduled for four to nine days), or long (scheduled for ten or more days). The Court has found that without pre-trial conferences short cases are more likely to settle and long trials are the more likely to "overhold", that is, to carry on beyond their allotted time. Medium and long civil jury trials are also prone to overholding. The Court has therefore developed a pre-trial conference system that emphasizes both trial preparation and settlement for short trials, and trial preparation for long matters. Medium trials are not yet dealt with in a consistent manner, although every effort is made to pre-try a medium civil jury matter .

It is difficult to apply the four-point analysis used earlier to pre-trial conferences in British Columbia. While pre-trial conferences are not mandatory, they generally occur. The agenda and formality of the procedure vary greatly. Where settlement is stressed the pre-trial judge will often not hear the trial. Where the emphasis is on trial preparation the pre-trial judge will most likely be the trial judge. Individual judges disagree as to what may properly be the subject of an order resulting from a pre-trial conference, but those that will not order usually find that counsel agree with their pointed suggestions.

All short trials are set down for an abbreviated pre-trial conference known informally as a "Friday Special", and one judge a week is assigned to hear all of them. The conferences are scheduled two to three weeks prior to trial and address limited matters: is the action ready to proceed to trial; is the estimated length of trial still reasonable; has settlement occurred or is it imminent?

Judges assigned to hear long trials are allocated time in which to pre-try those cases. This form of pre-trial conference is much less perfunctory than the "Friday Special" and may involve a series of conferences, with the first one generally taking place four to six months before trial. The Chief Justice has indicated that ideally the result of such a pre-trial conference — or more realistically, the re-

[24] *Supra*, note 7, Rule 1(5).

[25] *Supra*, note 2.

sult of a series of pre-trial conferences — should be "an in-depth discussion with a judge . . . having as its object the identification of issues, reaching agreement on facts which ought not to be in dispute, and generally preparing the case for the trial of the real issues".[26]

The Court maintains an internal record of all pre-trial conferences called a Pre-Trial Conference Report. The degree to which it is completed depends on the judge and the type of conference. Some of the items considered are: the nature of the case; specific issues; exhibits; expert witnesses; the length of trial as set and the pre-trial judge's estimate of length required; the completeness of Examination of Documents and Examination for Discovery; the possibility of settlement; admissions; amendments; adjournments; whether the pre-trial judge is able to hear the trial. Thus, among other things, the Report helps the Trial Co-ordinator assess the accuracy of the length of time for which the trial is set, and provides a mechanism through which a pre-trial judge may disqualify himself or herself from sitting as the trial judge.

At present there is a certain amount of disagreement among judges as to whether or not a judge may order that specific trial preparation, such as Discovery of Documents and Examination for Discovery, be done by a given time or in a prescribed manner. The Rule is ambiguous so that some judges order schedules, while others only make suggestions.

In addition to the procedures sanctioned by Rule 35 there are two further procedures available upon consent of the parties: the Mini Trial and the Quantum Mini Trial. These are quite new and neither counsel nor the Court are as yet very experienced in their use.

Mini Trials originated in California in complex corporate litigation. Each party nominates one of its corporate officers as its representative, and they mutually choose a neutral party, usually a lawyer or perhaps a retired judge, to act as arbiter. In British Columbia the format is slightly abridged but the underlying idea remains the same. The clients must be present while a summary form of argument is presented by counsel. A judge hears the "case" completely off the record and then gives an oral or written opinion very soon after the hearing. The judge will not be the trial judge and will not discuss the matter with the trial judge. The recommendations resulting from a mini trial are not binding on the parties and are not to be mentioned at the trial.

[26] *Id.*

The Quantum Mini Trial involves much the same format. The purpose is to obtain a non-binding opinion from a judge about the likely result of an assessment of damages. Counsel are expected to present their medical and/or damage reports; calculations of cost of care and of income losses are considered useful but not necessary. As with the Mini Trial, the recommendation is confidential and should not be disclosed at trial.

The value of these two procedures is in the objective appraisal of the matter by the person in the position of judge. However, there is potential for abuse of the procedures should one or both sides treat the conference as a dress rehearsal for the actual trial, with the intention of obtaining a better insight into the opponent's case.

The Honourable Chief Justice A. E. McEachern recently proposed a new procedure, the "Summary Trial Procedure".[27] This would have been available upon the request of either party, or by order of the court, subject to an "order otherwise" at the instance of any objecting party. In essence the procedure would have regulated amendments to the pleadings, costs in interlocutory proceedings, limited the length of Examination for Discovery, and set very precise schedules for the completion of each stage of trial preparation and for the exchange of information along the way. Unlike either form of Mini Trial, the results of a "Summary Trial" would have been binding on the parties.

This suggestion did not receive very favourable comment from members of the Bar or from the Permanent Rules Committee. On 12 May 1983 an Order in Council was passed enacting certain amendments to the Rules, to become effective 1 September 1983.[28] The package included a brand-new Summary Trial procedure, Rule 18A, which differs from the Chief Justice's proposal in several ways.

The salient features of Rule 18A are as follows. A party may apply for judgment where an appearance has been entered and there are no facts which constitute a defence or where there is no merit in the whole or part of the claim. There is no provision for such an order to be made on the Court's own motion. Evidence must be adduced by way of affidavit, which may be cross-examined. If, on the whole of the evidence before him or her the judge is unable to decide the issue of fact or law or is of the opinion that it would be unjust to decide the issues on the application, the trial may nevertheless be expedited by giving directions. These may di-

[27] Hon. A. E. McEachern, C.J., *The Trial Process* (1982) 40 ADVOCATE 217.

[28] B.C. Reg. 178/83.

rect, schedule or limit the following: amendments to pleadings; interlocutory applications; discovery procedures, including pre-trial examination of a witness; written summaries of proposed evidence of a witness; evidence in chief of a witness; the production of a written statement to take all or part of the place of the evidence in chief of a witness. The judge making such orders is not seized of the matter unless he or she orders otherwise. A Court may, before or at trial, vary or set aside an order made under the Rule.

Suggestions

The present use of pre-trial conferences in British Columbia is evidence of two things. First, like other North American courts, the Court is trying to use judicial management of a matter prior to trial to improve the administration of justice. Second, unlike many courts, the Court has not opted for a procedure designed to encourage settlement to the exclusion of trial preparation. The Court has attempted instead to further both objectives, with an emphasis on trial preparation.

With these points in mind it is highly probable that the various studies done elsewhere are of limited applicability to British Columbia. The Court is considering the use of a computer system to analyze the daily activity of the Court. Annual, monthly, and possibly weekly reports would assess the manner in which the Court functions and the progress of each case. Should this system be implemented, it will also provide the data necessary to evaluate whether the current pre-trial procedures are improving the efficiency of the litigation process in British Columbia.

In contrast to the extreme situation in Maine, there are no sanctions accompanying Rule 35. This may in part give rise to one difficulty that the Court is currently having: trial counsel do not always attend pre-trial conferences. Rule 35 only speaks of "solicitors" and in practice this may mean a junior or even an articled student. The possibility of meaningful discussion is often considerably reduced in such instances. Redrafting the Rule to require the presence of trial counsel would be one answer. It might also be useful to permit some pre-trial conferences, particularly the "Friday Specials", to take place through the medium of a conference telephone call, with sanctions imposed if trial counsel were unavailable for a pre-arranged call.

With respect to sanctions, it is important to keep in mind that the imposition of costs requires an assessment of such costs. This would merely add another layer to the trial process, not streamline it. If the sanction is to be financial, a fine payable directly and solely by counsel might be in order. Striking all or part of the matter would seem to be a somewhat Draconian measure for a court that has the "just . . . determination of every proceeding on its merits"[29] as its object. Further, such action affects the client more than the counsel.

Sanctions aimed at counsel do not and cannot resolve what may be an underlying source of difficulty in the litigation process: many counsel lack experience as barristers. The efficacy of a pre-trial conference is in many ways directly related to the degree of trust and respect which the participants feel towards each other. The unified nature of the Canadian Bar means that counsel may not be in court all that often and thus may not have the opportunity to develop a familiarity with and a trust in the Court, its procedures, and their fellow barristers. It is premature to predict what will transpire as the Court urges counsel into better and earlier trial preparation. Perhaps some form of barrister-solicitor division in the Bar will be necessary, if not officially, at least in practice.

Some form of amendment to Rule 35 is necessary in order to clarify those aspects of trial preparation which may properly be made the subject of an order following a pre-trial conference. Rule 18A goes a long way towards indicating what is permissible in a procedure requested by a party. Should these limits necessarily be the same for a procedure that can be imposed by the Court? The proposed Summary Trial Procedure would have moved the Court away from its present position near the middle of the *laissez-faire* "speed-above-all" continuum, towards the latter end. Rule 18A does not give the Court the sweeping powers of the proposal. Counsel must apply for judgment under the new Rule; the Court cannot impose the procedure. Nevertheless, Rule 18A does mandate a far greater degree of judicial management than was previously the case.

It would seem reasonable to predict that, whatever the changes in the Rules are, the pressure on the litigation system will not vanish. One possible outcome is the emergence of arbitration as an alternate means of dispute resolution. The Court has already shown some interest in this by developing the various Mini Trials. While these procedures accommodate matters in which delay is particularly vexatious, that is, commercial and matrimonial concerns, it is important

[29] *Supra*, note 7, Rule 1(5).

to realize that they are significant departures from the traditional adversarial system.

As stated at the outset, this note does not comment on the advisability of any such departure, be it a pre-trial conference, a Mini Trial, or a Summary Trial. That evaluation must be made by the reader.

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THE PRETRIAL CONFERENCE IN THE SUPREME COURT OF ONTARIO

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On March 1st, 1978 the pretrial conference became a formal part of civil practice and procedure in the Supreme Court of Ontario.[1] It was not a quiet introduction. The conference had been and continued to be the subject of controlled observation and statistical analysis since April, 1976.[2] Effectively, its implementation involved the active participation of both bench and bar in a procedure without tradition or analogy in the historical common law practice of the Supreme Court. In its workings the pretrial conference is not to be taken lightly. It is available in any civil case. The court may compel it. Its subject matter is simply that of the tribunal, the nature and breadth of which is as would be expected in Ontario's court of highest original jurisdiction. It is not only a forum for pretrial applications but more importantly a forum at which evidence is prepared for trial and cases are settled. As a single item of procedure the pretrial conference promises to exert a significant influence on cases both individually and generally.

This article attempts to examine this important and somewhat novel form of civil procedure not only in terms of its practice but also according to principle, with a view towards considering the very general but important question, "Does the pretrial conference improve Ontario's system of civil dispute resolution by suitable and effective means?"

I. *Origins.*

The phrase "pretrial conference" is of very general meaning. The procedure which it describes need not take any particular form.

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[1] O. Reg. 32/78, s. 2, Rule 244, proclaimed into force March 1st, 1978. Subsections (2) and (5) of the original Rule were later amended, O. Reg. 933/79, s. 4.

[2] See Stevenson, Watson and Weissman, The Impact of Pretrial Conferences (1977), 15 Osgoode Hall L.J. 591.

Indeed, variations are to be found in most systems of civil procedure. The type of pretrial conference now in Ontario is generally thought to have originated in the United States of America.[3] In 1930 judges of the Wayne County Circuit Court were concerned with problems of calendar congestion. In an attempt to improve the state of the lists they introduced what was then called a "conciliation docket". The purpose was to institute a system whereby more cases could be settled by means of voluntary informal conferences between trial judge and counsel, which would take place in chambers shortly before trial. Once in use, the new system was thought to be a success, not only from the point of view of the number of cases which did in fact settle, but also because of the conference's potential to narrow issues and generally improve the quality of preparation in cases which could not be settled without a trial. Within two years the conference had been made compulsory in all cases. The docket was renamed "Pretrial and Conciliation". The experiment attracted widespread attention, and the new procedure was soon adopted by several courts in various states. In 1938 the following Federal Rule of Civil Procedure came into existence:

> Rule 16. Pretrial Procedure: Formulating Issues.
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
>
> 1) The simplification of the issues;
>
> 2) The necessity or desirability of amendments to pleadings;
>
> 3) The possibility of obtaining admission of facts and of documents which will avoid unnecessary proof;
>
> 4) The limitation of the number of expert witnesses;
>
> 5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> 6) Such other matters as may aid in the disposition of the action.

But in 1930 the concept of such a conference was not strictly speaking original, even in adversarial systems of civil procedure. In England the practice of the court providing general directions on a single application towards narrowing of the issues, conduct of the action and preparation for trial by way of a "Summons for Directions"[4] dates back to 1883,[5] and in Scotland to 1868.[6] Indeed this procedure has even earlier roots in the English and Scottish

[3] See H.D. Nims, Pretrial in the United States (1947), 25 Can. Bar Rev. 697.

[4] R.S.C., Ord. 25, Rule 1.

[5] See R.S.C., Ord. 30 (1935).

[6] 1868, 31 & 32 Vict., c. 100, s. 27.

systems of oral pleading used until the sixteenth century. Holdsworth describes the practice of 1312:[7]

> And this system of oral pleadings had one great advantage over the system of written pleadings. It made for far greater freedom in the statement of the case. A painful accuracy was no doubt required in the wording of the writ and count, in the correspondence between writ and count, and in the observance of the elaborate rules of process. But when all objections to the writ and process had been disposed of, and when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or rulings of the judge, allowed the parties considerable latitude in pleading to the issue. Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled.

The English Summons for Directions and the historical traditions of the common law which it subsumes are generally thought to be the natural historical predecessors to the American pretrial conference.[8] But such an assumption ignores the original and primary purpose of the Wayne County experiment, which was to settle cases. The British modes of procedure are more directed towards better narrowing and simplification of the issues, which is to a large extent a different objective. This is particularly so in a system of procedure like the English, which has little provision for discovery even of parties, let alone of witnesses. A proper search for origins of North American pretrial conference procedure must venture beyond the United Kingdom, and onto the continent of Europe.

In 1924 the German Code of Civil Procedure was amended for the purpose of expediting litigation. The amendments introduced a procedure, the framework of which still exists today. Under this procedure the majority of cases are assigned individually to a single "reporting" or "designated" judge shortly after issuance of the summons.[9] Service of the plaintiff's summons on the defendant is followed by a personal appearance by the parties or their counsel before the reporting judge, whose duty is described in the Code as follows:[10]

> The presiding judge shall see to it that the parties make full statements regarding all important facts and make all appropriate motions, in particular that the parties enlarge upon insufficient statements regarding the facts which they plead and that they indicate means of proof. To this end, so far as necessary he shall discuss the case and the issues with the parties and ask questions.

[7] W.S. Holdsworth, A History of English Law (1923), Vol. 3, p. 635.

[8] See for example Edson R. Sunderland, The Theory and Practice of Pretrial Procedure (1937), 36 Mich. L. Rev. 215; Hon. Milton Pollack, Pretrial Conferences (1970), 50 F.R.D. 449, at p. 453.

[9] B. Kaplan, A.T. von Mehren and R. Schaefer, Phases of German Civil Procedure (1958), 71 Harv. L. Rev. 1193, at p. 1206.

[10] *Ibid.*, at p. 1224.

The powers of the reporting judge are several. The case is for the most part under his control from first instance to the time it is ready for hearing by the full court. The reporting judge is expected to clarify the issues, accelerate the endeavours of counsel, and if possible induce settlement. He deals with what are according to English common law conceptions virtually all interlocutory matters. Significantly, the designated judge authorizes the *viva voce* examination of witnesses, called "proof taking". Indeed, it is he who actually questions the witnesses. He regulates the presentation of expert evidence, by report or otherwise, in similar fashion. This power to control substantive evidence as well as procedure is of extreme importance in a system like the German, where "trial" is not a single climactic event, but instead a continuum of sessions or hearings adjourned intermittently for the gathering of further evidence. This is of course in marked contrast to the clear division between trial and pretrial stages of the common law system. In Germany, cases mature by means of successive appearances in court, and issues are defined concurrently with the taking of evidence. The designated judge directs, normally at the instance of the parties but to some extent on his own motion, each stage of this process. If the case proceeds to a full and final hearing, the reporting judge normally sits as one of the panel of three judges responsible for the ultimate adjudication.[11]

In 1935 the office of *juge chargé de suivre la procédure* was created in France. The specific objective was to decrease calendar congestion by inducing settlements, simplifying issues and monitoring the efforts of the *avoués*. The institution followed the German model of designated judge. The powers of the *juge chargé* were equally as extensive as his German counterpart. Indeed, they included the prerogative of summoning the parties and their *avoués* at any time in order to attempt conciliation.[12]

These continental systems of civil procedure are sometimes referred to as "inquisitorial". In its connotation the term is perhaps unfair.[13] But when viewed in the context of judicial power to control procedure the word has meaning. The authority of an English master on a Summons for Directions is removed in nature as well as degree from that of the German reporting judge or the French *juge chargé*. This distinction illustrates the difference between "issue oriented" and "conciliation oriented" hearings.

Returning to the North American form of pretrial conference, it can be seen that its roots are to be found, whether by design

[11] *Ibid.*, at p. 1216.

[12] P. Herzog, Civil Procedure in France (1967), p. 266.

[13] In terms of the judiciary's role in the litigation process the systems might be described as "participatory".

otherwise, not only in English and Scottish measures designed to deal with "issue related" aspects of procedure, but also, and to a meaningful extent, in systems of continental Europe devised for the purpose of increasing the rates at which cases are settled.

In continental Europe and the United States these respective forms of pretrial conference have gained widespread acceptance and continue in extensive use. In France, the powers of the *juge chargé* were broadened in 1965 under the newly-titled office of *juge des mises en état* so as to give the judiciary even greater powers of supervision over impending cases.[14] In the United States it is often said that the pretrial conference disposes of a significant percentage of cases before trial and by doing so considerably reduces expense in litigation, with a corollary reduction in the time required of witnesses, jurors and other trial participants. The resultant saving in time devoted to cases by judges and in reduced numbers of appeals in turn reduces the time required for cases to reach trial. The conference procedure is said to promote satisfaction among litigants, in that its practical results involve their participation and agreement.[15]

In the 1960s the American version of the pretrial conference was imported into Canada. In British Columbia the procedure has been in existence since 1961, and in Alberta since 1969, but in both provinces it is optional and rarely used.[16] In Nova Scotia, where a pretrial conference rule was adopted in 1968, the procedure is used in approximately one case in five, and is considered to be effective and worthwhile.[17]

In Ontario the practice of trial judges calling counsel into chambers before trial for an informal conference to discuss the issues in the case, and even prospects of settlement, has long been known to occur. This type of meeting has traditionally been voluntary, and the power of the court based exclusively on agreement or persuasion. The pretrial conference as a form of procedure was not the subject of any significant interest until 1976, when the Supreme Court commenced its experimental use of the conference as a means of increasing rates of settlement, increasing the productivity of the court, and reducing costs to litigants. The experiment involved samples and comparisons

[14] Decret No. 65-872.

[15] See Nims, *op. cit.*, footnote 3; Sunderland, *op. cit.*, footnote 8; Hon. N.P. Fox, Settlement (1971), 53 F.R.D. 129; Pollack, *op. cit.*, footnote 8; Hon. T.M. Kennerly, Pretrial Hearings under Rule 16 (1939), 1 F.R.D. 185; Hon. A.M. Dobie, Use of Pretrial Practice in Rural Districts (1940), 1 F.R.D. 371; Hon. B.J. Laws, Pretrial Procedure (1940), 1 F.R.D. 397.

[16] Ontario Law Reform Commission, Report on the Administration of Ontario Courts (1973), Part III, p. 110.

[17] *Ibid.*, p. 113.

of various types of cases on the court's lists, to see if in fact these objectives could be verified empirically. An interim report on the results of the experiment is considered below. The focus of interest was the settlement directed pretrial conference similar in form to that envisaged by Federal Rule 16. As we have seen, this American form is, in its elements, comparable to continental means of dispute resolution rooted in broad powers of judicial discretion and participation. This does not of itself justify the comment that the procedure is categorically "inquisitorial". But it does indicate that the theoretical base of the Ontario pretrial conference is to a meaningful extent grounded in systems of practice alien to that of the English adversarial model. The question as to whether this feature of the conference gives rise to practical effect is dealt with in what follows.

II. *Ontario Rule 244: "Pretrial Conference".*

Pretrial conference procedure in Ontario is now governed by Rule 244 of the Supreme Court Rules of Practice:[18]

Pretrial Conference

244(1) When an action, cause or matter has been set down for trial or hearing, the Court, upon the application of a party or upon its own motion, may, in its discretion, direct the solicitors for the parties or any part not represented by solicitor, to appear before it, in the case of the solicitors, with or without the parties, for a conference to consider:
- (a) The simplification of the issues;
- (b) The possibility of obtaining admissions which might facilitate the trial or hearing;
- (c) The quantum of damages;
- (d) Estimating the duration of the trial;
- (e) Fixing a date for the trial or hearing;
- (f) The advisability of directing a reference; or
- (g) Any other matters that may aid in the disposition of the action, cause or matter or the attainment of justice.

(2) Following the conference, counsel may sign a memorandum reciting the results of the conference and the Court may make an order giving such directions as the Court considers necessary or advisable and any such memorandum or order shall be attached to the record and shall bind the parties, provided that the judge at the trial or hearing may modify the order as he deems just.

(3) The judge who conducts a pre-trial conference in any action, cause or matter shall be deemed not to be seized of such action, cause or matter and shall not thereafter try or hear such action, cause or matter.

(4) All documents which may be of assistance in achieving the purposes of the pre-trial conference, such as medical reports and reports of experts, shall be made available to the judge presiding at the pre-trial conference.

(5) Unless otherwise ordered by the judge presiding at the pre-trial conference, the costs of the pre-trial conference shall be costs in the cause.

(6) Nothing in this rule shall prevent a judge before whom a case has been called for trial from holding such a conference either before or during the trial without disqualifying himself from trying the action.

[18] *Op. cit.*, footnote 1.

"A Conference"

In practice, the typical pretrial conference takes place in the chambers of a trial division judge. Counsel for the parties invariably attend. Members of the public do not. The parties themselves may attend, but generally do not. There is neither clerk nor court reporter, nor are minutes of any kind taken. Counsel do not gown. Evidence is for the most part what counsel predict will be the case at trial. There is little or nothing in the way of format or "rulebook" procedure apart from what the presiding judge may in his discretion direct. The emphasis is on simplicity and flexibility; the *raison d'être* of the conference is to deal with a large number and variety of cases quickly and at minimal cost. The practical emphasis is on discussion. Because framework is at a minimum much depends on the respective roles of the participants.

The Participants

The role of counsel is in practice as well as in theory somewhat ambiguous. The objective of the meeting is said to be "to consider". The neutrality of this term leaves open the question as to whether counsel, generally an adversarial agent, is under any duty not to obstruct enquiry, or under any broader duty to bargain in good faith, particularly in the case of settlement oriented conferences. Counsel's own view of these matters must often influence the outcome of the proceedings. The rule provides little guidance on this question and at present counsel are left to their own conceptions. In practice counsel appear to be willing to participate and co-operate in discussion with a view towards simplification of issues and in many cases toward settlement as well. But it is not difficult to conceive of cases in which to do so would not be to a party's advantage. Is the pretrial conference to suffer counsel's insistence on benefits to be derived from an adversarial approach to the proceeding? In England it clearly would, and in France it clearly would not. In Ontario the answer remains unclear, but would in all probability depend upon the approach of the presiding judge, which in turn will depend to a large extent upon his conception of his role as participant in the conference.

The role of the judge is the most significant feature of the Ontario pretrial conference from various points of view. The fact that the court may order a pretrial conference on its own motion suggests a somewhat novel way in which the court may enter the controversy between the parties. This departure from tradition is discussed below. It has several implications for the values we attach to our system of justice generally. The breadth of language in Rule 244(2) implies a significant measure of judicial control over the course of the action. Taken even at its most mechanical, the role of the judge will to a large degree determine the format and outcome of each pretrial conference.

Is a judge of the Supreme Court of Ontario actively to encourage the parties to settle their case? Rule 244(1)(g) speaks in terms of "disposition of the action". Is the role of the judge therefore to mediate, to arbitrate, to conciliate? Need he adopt a role different from that of the traditional judiciary to do so? Or is the role of the judge to be limited to its historical aspect, that of a kind of "umpire" functioning in a "sporting" mode of adversarial procedure? The origins of the conference indicate that the role of the presiding judge is something different from and in addition to that which exists in traditional common law procedure. In Ontario pretrial conference practice this is the case, in varying degrees. Some judges direct the proceedings in much the same fashion as an English Master would hear a Summons for Directions, taking stock of the issues, dealing with applications of the parties, suggesting how evidence at trial might be called or presented. Other judges will go further, assessing points of evidence and offering firm views as to quantum of damages and probable results of a trial. Other judges will go further still, making active and positive recommendations to counsel regarding the issue of settlement considered in isolation. Each of these respective roles, and the infinite variations that lie between, are of course perfectly justified by the language of Rule 244. **The role a presiding judge will choose is as a single factor the most important determinant of the form the pretrial conference will take and the results it will achieve.**

"Action, Cause or Matter"

Pretrial conference procedure is available for use in any civil case before the court, irrespective of its subject matter, amount involved, probable length or degree of complexity. This may reflect an optimism that the conference is so flexible a mode of procedure as to be of at least some use in any kind of case, and underscores its potential significance as an important means of dispute resolution generally. Broad availability is characteristic of pretrial conference procedure in other jurisdictions where the system or its analagous equivalent has existed for some time.[19]

"Set Down for Trial or Hearing"

In Ontario the pretrial conference takes place at a time procedurally well-advanced in the lawsuit. This choice of the stage at which the conference will occur is significant. It determines the matters which will be discussed. It influences the attitude and preparation of the parties. It circumscribes the power of the presiding

[19] See, for examples, the articles cited, *supra*, footnotes 9, 12 and 15.

judge. It affects the impact the conference will have on the outcome of the proceeding seen in its entirety.

To schedule the meeting after the preparations of the parties have been completed and while the litigants await trial may seem obvious. But this is not so. In England the Summons for Directions is issued following the close of pleadings or shortly after the date fixed for discovery where the latter procedure is automatic.[20] This of course reflects the primary purpose of the proceeding as a forum for consolidation of all interlocutory applications, and its secondary purpose as a "stock taking" process whereby the master may consider whether the case is ready for trial, and whether all evidence of assistance to the court is available. In New York State a procedure is available under which cases may be assigned shortly following their commencement to a single judge, who will hear all motions and preliminary applications, conduct the pretrial conference, and preside at the trial itself. The procedure, roughly analogous to the German system of designated judges, is widely used in cases of complexity.[21] In pre-1949 France an action could be commenced before the *tribunal civil*[22] only if the parties had first met with the court for a conciliation and settlement attempt.[23] Interestingly, the requirement was eventually abandoned as ineffectual.[24] In the German *Landgericht*[25] a preliminary conference before the reporting judge normally takes place within four weeks of service of the complaint on the defendant.[26] It is at this point that the reporting judge takes charge of the case for purposes of conciliation, proof taking, matters of evidence and other applications by the parties, until it is ready to be heard by the full court for final disposition at a single sitting.

In contrast to the practice in these other jurisdictions, Ontario litigants are at least in theory fully prepared for trial when the pretrial conference takes place. By this time there is little more to be saved or improved upon than the trial itself, apart from any proceedings which may be taken by way of appeal. Thus, questions canvassed at the conference will be almost exclusively related to the trial or the possibilities according to which the trial may be avoided. Results and

[20] R.S.C., Ord. 25, Rules 1 and 3.

[21] Pollack, *op. cit.*, footnote 8, at pp. 456-457.

[22] At that time the approximate equivalent of the Ontario High Court in jurisdiction and subject matter.

[23] Herzog, *op. cit.*, footnote 12, at p. 234.

[24] In 1948 less than one case in fifteen was settled as a result of this procedure. For further statistics and references see Herzog, *op. cit.*, footnote 12, Ch. 5, note 11.

[25] The most common court of original jurisdiction in West Germany, roughly equivalent to the Ontario High Court in jurisdiction, subject matter and judicial hierarchy.

[26] Kaplan *et al.*, *op. cit.*, footnote 9, at p. 1206.

orders will be circumscribed accordingly. This is of course in marked contrast to the systems described above, where the participation of the judiciary at earlier stages has greater influence over pleading, discovery and interlocutory matters generally. Earlier involvement of the court, acting with a view to conciliation, will almost certainly encourage earlier and more frequent settlements in many cases.

"Or Upon Its Own Motion"

In Ontario pretrial conference procedure is not compulsory in every case, as it is in almost all of the other jurisdictions already referred to. But the court has power to order such a conference not only upon application by a party but also upon its own motion. This is a probable reflection of an intention on the part of the conference to accelerate cases by means of greater judicial participation. The question arises as to whether the court's jurisdiction ought to be extended in this manner where the system's basis is adversarial.

Can the court compel the parties to conciliate? If the conference is indeed a conciliatory procedure, the answer must clearly be affirmative. *Words and Phrases* defines the term "conciliation":[27]

> Conciliation is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposals formulated.
>
> The fact that the parties are perfectly free to decide whether or not to adopt the proposal terms of settlement distinguishes conciliation from arbitration.

That the settlement-directed conference is a conciliatory procedure by this definition can admit of little doubt. But what of the issue-directed or "trial preparation" conference? One American trial judge comments on this question:

> Treatment of settlement and trial preparation as separate and distinct purposes of pretrial results from too narrow a reading of Rule 16. Such a distinction is also rather meaningless for the administration of pre-trial practice.[28]

If there is a distinction in practice between the two approaches and they are, further, capable of neat categorization, the "preparation" or "issue" style of conference may still be viewed as a process of conciliation, although of different and more narrow subject matter. Simplification of issues, obtaining of admissions and so forth necessarily involve the agreement of the parties, at least on specific matters. The means by which the pretrial conference achieves such agreement is conciliation.

A process of conciliation connotes a particular role for the court. The role is novel. It refuses to be categorized by the traditional

[27] Words and Phrases Legally Defined (2nd ed., 1969), p. 301.

[28] Fox, *op. cit.*, footnote 15, p. 134.

conception of the court as imperator between parties in an adversary system. It demands an active participation in the controversy. The advisability of this role must depend upon fundamental values inherent in the court's procedure and in the public for whom the system exists. This question is further considered below.

"With or Without the Parties"

In France and Germany the parties generally attend the initial meetings of judge and counsel; in England and the United States they generally do not. Under the Ontario Rule the parties have a right or privilege to attend, although in practice they do so only infrequently. When they do attend it is usually at the specific request of counsel or the presiding judge, and normally for a stated reason. The manner in which the language of Rule 244 is framed seems to indicate that the presence of a party is a matter subject to the court's discretion. The question arises as to how this discretion would be exercised in a case where a party insisted on attending, without invitation and contrary to the advice of his counsel. Another case would be that where a counsel objects to the presence of a party adverse in interest. Such an objection need not necessarily be arbitrary, as in the case where counsel wishes to refer to evidence he intends to raise in cross-examination of the party at trial. Irrespective of how the court's discretion might be exercised in individual cases, **the purposes of the conference and the subject matter normally discussed imply that the usual form will be that of a business-like meeting between counsel and the presiding judge, in the absence of the parties.**

"To Consider"

The term "consider" has a somewhat neutral meaning, particularly for legal purposes. Its dictionary definition is "to view or contemplate attentively, to survey, examine, inspect, scrutinize,"[29] "to fix the mind on, with a view to careful examination".[30] The word does not imply nor does it exclude any particular activity or result. It remains to be seen how the word affects the discretion of the court or the obligatons, if any, of counsel in the setting of the pretrial conference.

As we have seen, in practice the conference takes the form of a discussion, with a view to agreement, if not on the broad issue of settlement, then on specific issues concerning matters of evidence and procedure at trial. This broad and unrestricted format permits the meeting to proceed in a conciliatory manner. But as was suggested

[29] The Oxford English Dictionary.

[30] Black's Law Dictionary (rev. 4th ed., 1968).

above the question arises as to whether the participants are under any duty, presumably to the court, to conciliate. A forceful illustration of such a duty appears in the Ontario Labour Relations Act:[31]

> [The parties] shall bargain in good faith and make every reasonable effort to make a collective agreement.

The implications are practical. A party or his counsel, if under such a duty, may invoke a penalty in costs pursuant to subrule (5) of Rule 244 should the duty not be performed satisfactorily. In the United States it has been suggested that the court should have and use this power:

> Doubtless the effectiveness of any pretrial system in eliminating unsubstantial and fictitious issues would be greatly enhanced if the court had the power and were willing to penalize parties by the imposition of costs when they unreasonably refuse to admit facts or to abandon issues which ought not to be contested.[32]

The propriety of such an order as to costs depends largely on what value one sees fit to attach to pretrial conference procedure as a suitable or even necessary element of the civil process.

"All Documents"

Similarly the question of disclosure. Subrule (4) puts the proposition that "all documents which may be of assistance . . . shall be made available". It is another open question as to whether the court may in the proper exercise of its discretion order that documents a party is not compelled to disclose under any other rule be made available, if not to the opposite party then at least to the presiding judge at the conference. In France the *juge des mises en état* may order a party to make available any document it plans to use in the proceeding, not only to the court but also to opposing parties.[33] In Germany the reporting judge has a straightforward but very broad power to order a party to produce documents in his possession.[34] These powers of continental judges are particularly significant in systems such as theirs where rules of evidence are relatively unrestrictive.

As we have seen, in Ontario the purposes of the pretrial conference differ in material respects from those of continental procedure largely as a result of chronological position in the proceeding, and also because of traditional conceptions related to the judicial role in adversary procedure. If these conceptions are to change with the introduction of pretrial conference procedure, or for purposes

[31] R.S.O., 1980, c. 228, s. 15.

[32] Sunderland, *op. cit.*, footnote 8, at p. 226.

[33] Herzog, *op. cit.*, footnote 12, p. 266.

[34] Kaplan *et al.*, *op. cit.*, footnote 9, at p. 1208.

pretrial conference procedure, the subrule as it now stands may confer the discretion to compel disclosure of documents in the absence of any other obligation to such effect. This would of course signal a significant departure from existing practice. It would to some greater degree equate the Ontario system of procedure with that of continental Europe. If one wishes to re-inforce the equation, a broad interpretation of the court's power to order disclosure under subrule (4) may be read in conjunction with a broad interpretation of subrule (2), under which:

> . . . the court may make an order giving such directions as the Court considers necessary or advisable. . . .

What of an order from the court that a party disclose the means by which he intends to prove particular aspects of evidence? This could be achieved by a simple order directing a party to make available a witness statement. Such an order may be of indirect means, but would surely "be of assistance in achieving the purposes of the pretrial conference", to borrow the wording of subrule (4), and may therefore be seen as a proper exercise of discretion. The availability of a sanction in costs is yet another powerful consideration in favour of clarifying the role of the court on this issue.

Interestingly, in Germany full disclosure including disclosure of a party's means of proof occurs as a matter of course, not only by virtue of a judicial order but more frequently from the parties themselves in the system of pleading.[35] Also of interest is the American approach, which often equates the pretrial conference with increased disclosure. An illustration is the case of *Burton* v. *Weyerhaeuser Timber Co.*[36] There the plaintiff claimed to have received a muriatic acid burn to his hand while handling the defendant's container. At trial the defendant led evidence from an expert to prove burns such as those suffered by the plaintiff could not have been caused by muriatic acid, but were in fact the result of exposure to sulphuric acid. The evidence took the plaintiff by surprise. A new trial was ordered, on the ground that this evidence, although available, was not disclosed to the plaintiff at the time of the pretrial conference. The following statement appears in the judgment:

> Faithfully administered in spirit as my senior colleague and I are endeavouring to administer them, the new rules outlaw the sporting theory of justice from federal courts.[37]

It remains to be seen how this aspect of the Ontario Rule will be interpreted.

[35] *Ibid.*, at p. 1215.

[36] (1940), 1 F.R.D. 571 (Oregon District Court).

[37] *Ibid.*, at p. 573.

"Deemed Not to be Seized"

Ontario departs from the American and indeed most other systems of practice in that the judge who presides at the conference "shall not thereafter try" the case: Rule 244(3). This position is largely the result of the Ontario Court of Appeal's decision in *Majcenic* v. *Natale*.[38] In that case an informal conference took place between the trial judge and counsel shortly before trial with a jury. After reading the medical reports and hearing counsel at the conference the judge volunteered his opinion of the general damages. This assessment was repeated to counsel following commencement of the trial. Later the case was withdrawn, upon application, from the jury. Notwithstanding the defendant's objection the trial judge assessed the plaintiff's damages and gave judgment. In the Court of Appeal the defendant's appeal was allowed and a new trial was ordered. The following statement appears in the judgment of Mr. Justice Evans:[39]

> The judge, presumably on consideration of the medical reports, had already volunteered his estimates of the range within which he considered the general damages should fall. I am unable to perceive the necessity for or the desirability of such unsolicited comment, particularly when the case is to be tried by a jury. I have no doubt that counsel in a non-jury action may be assisted in arriving at a settlement by jointly requesting an expression of opinion as to quantum from the trial judge. In doing so counsel assume the risk inherent in such procedure. When the opinion is expressed gratuitously counsel is forced to accept a risk which he did not invite and with which he should not be confronted and the risk is particularly onerous when counsel do not agree with the opinion expressed: it becomes oppressive in a jury trial when offers and counter offers of settlement are made known to the judge who expresses his own opinion and later withdraws the case from the jury.

The problem in *Majcenic* is of course only one specific instance of a more general difficulty. In the United States conventional wisdom is that a judge who conducts a pretrial conference is himself better prepared to thereafter try the case. His influence at the conference is increased. He is expected to put aside the influence of statements made at the conference in a manner analogous to that of the judge who conducts a *voir dire* at trial in the criminal courts.[40] The Ontario Rule reflects the alternate view that discussions at the pretrial conference will almost inevitably lead the presiding judge to form some reasonably firm opinion not only as to certain evidentiary questions but in many instances an opinion as to the central issues of liability or remedy that form the basis of the entire claim or defence. And that a trial judge would form such an opnion by any means other than evidence given in the presence of the parties in open court is thought not to be acceptable.

[38] [1968] 1 O.R. 189, refd. to O.L.R.C., *op. cit.*, footnote 16.

[39] *Ibid.*, at pp. 203-204.

[40] See Fox, *op. cit.*, footnote 15, at p. 144.

It is therefore somewhat curious, on fundamental grounds, that subrule (6) authorizes a trial judge to hold such a conference either before or during trial. Presumably the subrule was inserted to allow for the continued practice of informal discussions between counsel and trial judge in chambers. But consideration seems not to have been given to the extended areas of discretion conferred by Rule 244.

Subrule (6) becomes applicable when the case "has been called for trial". The phrase is somewhat ambiguous. Perhaps an analogy may be drawn to the chronological jurisdiction of the master, which in interlocutory matters is said to end only when the trial actually commences. Merely speaking to a case on the list for trial does not oust this jurisdiction.[41] Such a narrow interpretation of the phrase "called for trial" would give substantial effect to the disqualification proviso of subrule (3), but is unlikely, as it would appear to render meaningless the power of the trial judge to hold a conference before trial under subrule (6). Accordingly, it is a safe assumption that the judge who presides at the pretrial conference will in some number of cases go on to try the action himself.

Review

Because the discretionary power of the court to make an order giving directions under subrule (2) is so very broad, one may have thought a specific right of review would have been provided by Rule 244 itself. There is of course no such specified right. Presumably, orders of an interlocutory nature may be appealed to a single judge of the court,[42] assuming that leave can be obtained,[43] and any final order may be appealed to the Court of Appeal.[44] But the precise position remains unclear.

III. *The Pretrial Conference and Traditional Justice.*

Does pretrial conference procedure enhance or add something of benefit to Ontario's system of traditional civil justice? The origins of the procedure indicate a rather novel departure from the institutions of the English common law system. An examination of its empowering rule raises a number of uncertainties about its workings in practice. But perhaps this is to be expected of new procedure. These considerations do not of themselves lead one necessarily to conclude whether the pretrial conference is a worthwhile addition to Ontario practice.

[41] *Hutchins Transport Co. Ltd* v. *Sharpe*, [1955] O.W.N. 683; *Miller* v. *Miller*, [1951] O.W.N. 236; *Wardak* v. *Fluxgold*, [1968] 2 O.R. 849.

[42] O. Reg. 32/78, s. 2, Rule 514.

[43] O. Reg. 32/78, s. 2, Rule 499.

[44] The Judicature Act, R.S.O., 1980, c. 223, s. 28.

This question as to the proceeding's true value is better answered by reference to necessary requirements of good procedure.

The material that follows suggests nine standards according to which civil procedure in a court such as the Supreme Court of Ontario may be assessed. They are, in probable order of general importance:

1. **Procedure which the public accepts and respects, and in which it has confidence.**
2. **An independent and impartial judiciary.**
3. **Means which are accessible.**
4. **"Fairness, Justice, Due Process and Legality."**
5. **Proceedings which are public, visual and oral.**
6. **Procedure which produces a timely result.**
7. **An opportunity for review.**
8. **A simple but flexible system.**
9. **Development and publication of the common law.**

These standards of traditional justice are not always capable of neat categorization. To some extent they overlap, and in some instances they come into conflict with one another. In specific cases their order of importance may differ with what is here suggested. But, for the reasons described below, they are of fundamental importance to an acceptable system of procedure in Ontario. **Taken together they offer a formidable test of suitability according to which the pretrial conference may be judged.**

Some may suggest that these tests are too stringent, the standards too high. As a practical matter, can we afford a system of justice which approaches these ideals? Lord Devlin comments:[45]

> I should like Justice to sooner or later cast a radical eye on the processes current in this middle class of civil litigation. It will be no use looking at them in the traditional way or in the spirit that believes that in search for justice no stone should be left unturned. Litigants do not care all that much about stones being turned, particularly legal stones. What they want is a fair settlement speedily arrived at, by agreement if possible, and if not, by an impartial judge. Some of them like the paraphernalia of the trial and the sound and smell of battle; others hate it. I believe that the majority would welcome at least as better than nothing, a simple process producing quick results, even if it involved the departure from traditional methods.

His Lordship's statement emphasizes the importance of maintaining balance within the criteria. A good process must not only reflect "fairness" and "justice" but must also be economically accessible. In what follows consideration is given to the need for "a simple process producing quick results". But such a consideration needs be approached with caution when the setting is the Supreme

[45] Forward to Justice (British Section of the International Commission of Jurists), Going to Law: A Critique of English Procedure (1974).

Court of Ontario, where jurisdiction is unlimited, and subject matter is not, for the most part, what Lord Devlin has referred to as "this middle class of litigation". The traditional objective of the High Court has been to provide the highest standard of justice humanly attainable while at the same time being mindful of the requirement that the means be accessible. Put flatly, it is not intended to be a forum for minor disputes, but rather a source of considered judgment whose standards set the judicial example for other tribunals of Ontario. It is with due attention to this view that the following proceeds.

The criteria are considered in reverse order of their approximate importance.

Development and Publication of the Common Law

> There can be no law without some general rules. In the common law system these general rules are to be found in the generalizations, or *rationes decidendi* enunciated in the particular cases, supplemented by statutes and some traditional principles of the common law, which form an ever-present background save as varied by case law or statute. It is in these materials that there is to be found the element of certainty necessary to enable people to regulate their conduct and enable Judges to adjudicate.[46]

The principle of *stare decisis* is fundamental to the common law. One prerequisite to sound dispute resolution in the common law system is that the method chosen give full effect to this principle. The benefits are many. Creation and publication of law accentuates clarity, certainty, predictability and stability at various levels. In turn, the number of cases which require actual adjudication, either at interlocutory or trial stages, are reduced, with the promise of economy and a timely result for cases individually as well as generally. Effective performance according to this criterion reflects favourably on several other standards of traditional justice; an added sense of "fairness", a public quality to the proceeding, observance of judicial impartiality and logical precision, easier opportunity for fair review and a higher degree of public acceptance.

What is of course required for effective operation of *stare decisis* is a broad variety of claims and defences, competent counsel, well-defined issues, and a trained and experienced judiciary with adequate time and proper resources. Questions of law must at times be researched and carefully considered, with judgment inevitably reserved.

It is difficult to see how a pretrial conference in the form prescribed by Rule 244 will aid development and publication of law according to these practical requirements. It is possible for such a proceeding to have an adverse effect. In theory, each case disposed of

[46] Lord Wright, Precedents (1943), 8 C.L.J. 118, at p. 141.

by pretrial conference procedure dispenses with an opportunity, by way of trial or appeal, for a judicial decision which might be made available to the legal profession and public. But speaking realistically, the existing figure of 1,135 trials in the High Court annually[47] should provide a sample sufficient for the operation of *stare decisis*.

One concerned with improvement under this heading must unavoidably look to bench and bar. In Ontario the system of legal education and qualification for the bar demands a comparatively high standard of initiation, and includes three years of case law study at the university level. It is difficult to conceive of a system which could better prepare counsel in the principles of law. The bench are chosen from the practising bar and are accordingly without specific judicial training. Of comparative interest is a system such as the French, where the judiciary is a career service requiring three years of specific education at a school for judges, in addition to a prerequisite university-level degree in law.[48] Although Ontario traditions would give such a system little chance of practical implementation, its underlying rationale is worth a moment's reflection, even in a jurisdiction where judicial competence to develop legal principle is beyond question.

Simplicity and Flexibility

Although development and publication of law is an important requirement, even a common law system of civil procedure could survive with limited adherence to this ideal. Of greater importance is the requirement that the system be simple but flexible. It should be capable of comprehension and operation by its professional participants in its intricacies, and by the public in its fundamental elements. It should therefore achieve some degree of simplicity. But it must also be capable of dealing with an infinitely broad variety of human transactions, relationships and affairs. It must cope with social and economic change, the personal capacities and characteristics of litigants, and variations in financial power, yet offer a broad range and measure of relief. It should, ideally, accord the simple and straightforward action a degree of respect appropriately comparable to that of the serious or complex case. It must be flexible.

A realistic model of comparatively simple procedure is the English. Stages of pretrial and trial procedure are clearly divided. The purpose of the former is for the most part to allow preparation for the latter, which is the focal point of the entire process. Pretrial discovery is limited: there is no provision for oral examination of parties or

[47] Hon W.G.C. Howland, Hon. G.T. Evans, Judge W.E.C. Coulter, Judge F.C. Hayes and Judge H.T.G. Andrews, Reports on the Administration of Justice in Ontario at the Opening of the Courts for 1980 (1980), 14 L. Soc. of U.C. Gaz. 113, at p. 129.

[48] For a more detailed description see Herzog, *op. cit.*, footnote 12, pp. 124 *et seq.*

witnesses. Rules as to procedure, evidence and substantive right are clear and strict compliance is required. Most interlocutory applications are, in theory at least, consolidated into a single Summons for Directions.

The West German system is an example of very flexible civil procedure. Its most significant comparative feature is its unfettered judicial discretion which, in the result, necessarily implies substantially less party presentation and participation, and very few fixed rules of evidence or practice. As we have seen, the taking of proofs, argument and adjudication occur in stages, from time to time, in no clearly set manner. In this type of system cases may be dealt with less categorically, more on an individual basis.

Although the format of the Ontario pretrial conference is basic and capable of easy comprehension the addition of the procedure to the system viewed in its entirety appears at present to have greater potential for complication than for simplification. When one speaks of simplification the question would seem more to be "what can be taken away?" than "what can be added?" Introduction of the pretrial conference procedure adds a fresh step, novel in its format and not capable of easy comparison to other aspects of common law practice. Rule 244 is less than clear in a number of respects. Addition of any novel procedure implies fresh material for judicial consideration, with some added complexity in individual actions as well as in lawsuits generally. There is little to suggest the pretrial conference will prove to be an exception. Indeed, as was indicated above, the conference raises a number of questions which remain undecided: Is the role of the court subject to limitation? Are counsel to "bargain in good faith" or "consider" issues with a view to agreement? Is the court to order broad disclosure of documents and means of proof? Does a party have any right, as opposed to privilege, to attendance or audience? To what extent may the court make orders of its own motion to control procedure? What rights of review, if any, are available?

Although introduction of the procedure may add some level of complication, it should at the same time make the process more flexible. It is available for use in virtually any kind of case and lends itself to a very broad range of subject matter. The simple format, absence of "rulebook" restrictions and broad measure of judicial discretion allow for consideration of large numbers and types of issues at a suitable level of expertise, and in business-like fashion. Unlike any other form of common law procedure, it provides a means for conciliation. It adapts easily to changes in law or procedure. Like the German, it is a system capable of use in successive stages, at intervals of a case's maturity, and the broad power of the court to give directions allows for a wide range of remedies. The conference merits a high assessment according to this standard.

Review

English law regards the right of appeal as a rule of substantive law and not merely a matter of procedure.[49] The right is based upon a recognition of the human capacity to err, particularly in matters of complexity, and perhaps somewhat politically the principle holds that no individual should be subject to the power of one man, however carefully chosen and trained or however competent.

Recognition of this right dates back to use of the writ of certiorari in the early days of English common law. By this writ decisions of the law courts could be brought for review before the King's Court and quashed in the event of excess jurisdiction or error of law shown on the record, what in the middle ages was literally a long scroll of parchment. The right was taken seriously. Records from the thirteenth and fourteenth centuries indicate the availability of criminal proceedings against judges who delivered a wrong judgment, and against juries whose verdicts were obviously contrary to the evidence.[50]

As described, Rule 244(2) imports a broad measure of judicial discretion capable of use in an adjudicatory manner. This discretion may conceivably be applied to matters of substance as well as procedure. Examples would be orders striking out a jury or splitting the issues of liability and damages for separate treatment at trial. Some may find cause for concern in that no clear right of appeal is given in the Rule as it is, for example, in a case of a decision by the master which in many cases may have less significant effect on the action.

Aside from this question of review of decisions made at the conference itself the procedure would seem not to affect the capacity of the system, considered in its entirety, to provide rights of review.

A Timely Result

The oft-quoted phrase "Justice delayed is justice denied" has been the subject of much recent attention, not only in Ontario[51] but in all of the jurisdictions whose systems of civil procedure have been referred to thus far.[52] This is not surprising. Any responsible method

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[49] Sir I.H. Jacob, The Lessons of English Civil Procedure (1973), p. 61.

[50] Lord Atkin, Appeal in English Law (1927), 3 C.L.J. 1, at p. 3.

[51] See Ontario Law Reform Commission, *op. cit.*, footnote 16; Canadian Institution for the Administration of Justice, Expeditious Justice (1979); S. Shetreet, The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts (1979), 13 U.B.C.L. Rev. 52; Ontario Ministry of the Attorney General, White Paper on Courts Administration (1976); Hon. W.G.C. Howland *et al.*, *op. cit.*, footnote 47.

[52] For examples of English studies see the Report of the Winn Committee on Personal Injury Litigation (1968); Report of the Royal Commission on Assizes and Quarter Sessions (1969); Forward to Justice, *op. cit.*, footnote 45. Herzog, *op. cit.*

of dispute resolution should continually search for means productive of more timely justice. The Ontario problem is noteworthy. In the years 1974 to 1977 the backlog of civil cases in the Supreme Court rose numerically from 1,084 to 2,183, a percentage increase of 101 per cent.[53] As we have seen, it is this concern with resultant delay, together with that of economic accessibility, that prompted introduction of the pretrial conference on an experimental basis first in the United States then subsequently in Ontario. The conference merits close investigation according to this criterion.

A "timely" result should be distinguished from a "speedy" result. The word "timely" is used to describe a system which provides relief when, speaking practically and with a view to the nature and seriousness of the right involved, relief is required. This may mean "speed" in many instances but not always. It will not mean "speed" in many cases of complexity. Two or even three years may be a perfectly justifiable period to await results in cases involving large amounts and complex issues where there is no serious hardship to the parties. Such cases not only merit but require close examination, investigation and treatment which is thorough and considered. Even in straightforward cases speed may damage a party who is not given adequate time and opportunity to prepare for adjudication. What good procedure demands is the machinery to provide a "timely", not necessarily "speedy" result.

The implications of failure on this ground can be several. Delay can cause serious hardship in individual cases. One example is the fatal accident action, but there are others. These examples bring the court system into disrepute. Confidence in the administration of justice can erode. Individuals are left with a sense of futility. There are those who will take advantage of this. Men resort to self help. A contribution is made to a failure of social order.

Lengthy delays in the process detract from its inherent "fairness": memories dim, witnesses are lost, intelligent opinion becomes difficult. Parties experience long periods of denial and uncertainty.

There are many points of possible delay in the Ontario system, only some of which relate to procedure before the court. From the

footnote 12 and Kaplan *et al.*, *op. cit.*, footnote 9, contain several references concerning French and West German procedure respectively. For American studies see M. Rosenberg, The Pretrial Conference and Effective Justice (1964); W.E. Meyer Research Institute of Law, Dollars, Delay and the Automobile Victim (1968); Zeisel, Kalven and Bucholz, Delay in the Courts (1959). S. Shetreet, The Limits of Expeditious Justice, in Canadian Institute for the Administration of Justice, *op. cit.*, footnote 51, has comparative statistics.

[53] Judge P.S. Millar and C. Baar, a Management Philosophy for the Canadian Courts (1979), 17 W. Ont. L. Rev. 199, at p. 201.

outset, a person may not be aware of his cause of action. Or he may wait some time before consulting a solicitor. There are times when this may not be unreasonable. The solicitor may advise self-help or consider it prudent to wait for a period, at times for sound reason such as to view the progress of his client's or another party's injury. The solicitor will in many cases require time to gather evidence, a particularly time-consuming process where experts are involved. Negotiations, although *bona fide*, may become protracted. Even in a system such as Ontario's which makes pre-judgment interest available to a plaintiff there is in most cases little incentive for a defendant to conclude his case promptly. Ultimately, an action may be commenced. In Ontario the standard requirement is that the writ of summons be served personally. Formal pleadings are required, with the strict rules that attend them. Following the close of pleadings any party may be examined orally for discovery at the offices of a special examiner, an important but very time-consuming feature of Ontario pretrial procedure. There are, in addition, rules respecting discovery of documents, inspection and preservation of property *pendente lite*, and medical examination of a plaintiff by a physician chosen by the defence in cases of personal injury. Interlocutory applications, normally to the master with a right of appeal to a single judge, are available in respect of any irregularity which may arise during the pretrial process. A lengthy period of waiting follows the setting down of the case for trial.

Trials may be adjourned, judgments may be reserved. Appeals are available as of right. In order to deal with the question of timeliness this framework must be viewed in its entirety.

In the United States pretrial conference procedure, from its inception in the late 1920s, achieved a large measure of acceptance in several states as a suitable and effective remedy for delay.[54] Then in the early 1960s Professor Rosenberg published the results of his statistical study of the pretrial conference in New Jersey.[55] He concluded:[56]

1. The conference failed to reduce the number of cases which had to be tried.
2. The conference failed to reduce hours spent at trial.
3. The conference failed to shorten the time period between filing and disposition of cases generally.
4. The conference consumed appreciable Judge time without compensating saving.

In England the majority of the Winn Committee on Personal Injury Litigation, having considered these findings, refused to recom-

[54] See the articles referred to, *supra*, footnote 15.

[55] Rosenberg, *op. cit.*, footnote 52.

[56] *Ibid.*, p. 69.

mend the pretrial conference as a possible remedy for delay. The committee also took into account the opinion of the English bar, which was unfavourable to introduction of the procedure.[57]

In Ontario the conference was, as we have seen, introduced only on an experimental basis. The experiment included statistical monitoring to assess the effects, if any, of specifically settlement-directed pretrial conferences. Preliminary results based on eighty-one test cases and a control sample of the same size were released in 1977[58] and indicated the following:

1. The conference increased the percentage of cases settled before judgment by 17.6 per cent (86.4 per cent of the pretried cases settled, as compared to 68.8 per cent of the non-pretried cases).
2. The conference increased the percentage of settlements before trial by 23 per cent (73 per cent, as compared to 50 per cent).
3. The conference had no significant influence on the average time spent at trial.[59]

Use of the procedure was found to be of equal effect in personal injury as compared to other cases, but slightly more effective in cases where the amount involved was less than $20,000.00.[60] Interestingly, settlement rates for groups of cases pretried by different judges ranged from seventy-two per cent in the case of one judge, to 100 per cent in the case of another.[61]

The number of cases surveyed by this preliminary test is admitted by its director to be too small for safe reliance.[62] In some instances the significance levels of the data are not high by accpetable statistical standards. More recent indications of the final results are said to suggest a less dramatic disparity between the settlement rates of pretried and non-pretried cases.[63] One may wish to consider whether these preliminary results may reflect a high degree of interest in a new procedure, an interest which may wane with the passage of time. One should contemplate that what has been surveyed is the settlement-oriented form of conference exclusively. Nonetheless, the preliminary results are favourably impressive.

What is the impact of these findings on the Ontario system of civil procedure considered in its entirety? Three observations are worthy of note. First, the cases surveyed are those which have been

[57] *Op. cit.*, footnote 52, p. 102.

[58] Stevenson *et al.*, *op. cit.*, footnote 2.

[59] *Ibid.*, at pp. 601-602.

[60] *Ibid.*, at p. 606.

[61] *Ibid.*, at p. 612.

[62] G. Watson, Civil Pretrial Procedure and Expeditious Justice, in Canadian Institute for the Administration of Justice, *op. cit.*, footnote 51, p. 141.

[63] *Ibid.*, p. 143.

set down for trial. Therefore any measurement of effect is restricted to cases which have survived to the final stages of litigation. Because the conference takes place only shortly before trial the only real saving in terms of delay is the time spent at trial and any subsequent process of appeal. Second, there are those who would hold that the conference may in many cases postpone settlement, as the parties may procrastinate negotiations until the conference. The statistics do not account for this factor. Third, it is generally accepted that a range of ninety to ninety-five per cent or more of actions commenced in the High Court settle at some stage, without a pretrial conference. If this is so, the seventeen per cent increase in the percentage of cases settled before judgment should be applied only to this residual five to ten per cent of unsettled cases. When one views the figures in this way the range of overall effect in terms of additional cases settled during formal proceedings is only zero point eighty-five to one point seven per cent.

If the value of the pretrial conference in providing more timely results is limited, are there other means by which such results may acceptably be achieved? There have been several suggestions. Rules of evidence may be made more restrictive, trial of issues split, degrees of negligence determined by fixed rules, rights of appeal restricted or trial by jury abolished. These kinds of remedies are generally distasteful in that they sacrifice rights of substance in favour of practical expediency, a sacrifice which ought to be considered, particularly in the Supreme Court, only for very compelling reasons and with clear evidence of benefit. Other theories of procedural reform suggest a more authoritarian role for the court, recommending strict enforcement of time limits under the rules of practice, refusal of adjournments and more widespread use of sanctions in costs. These theories fail to account for practical realities, and involve the court in concerns removed from rights of the litigants. It is difficult to see how other recommendations, for example taking of evidence by videotape for presentation at trial, will be of any significant benefit in saving procedural time.

There are however other alternative recommendations worthy of more serious consideration. Some of these are very attractive in that they entail little alteration to existing institutions. For example, pre-judgment interest awarded as a matter of course would provide a meaningful incentive for defendants to consider settlement at an early stage in the process. Ontario has a Master system which works successfully, and consideration might be given to jurisdictional expansion. Professional managerial expertise could be consulted for guidance with a view to more sophisticated and systematic resource management by the court.[64] Greater emphasis on orality during hear-

[64] The Ontario Ministry's White Paper, *op. cit.*, footnote 51, proposes transfer of the court's administrative functions to an "office of Courts Administration", responsi-

ings, particularly at trial and on appeal, not only from the bench but also in a well trained litigation bar, would benefit the entire system in a number of ways.

Other worthwhile alternatives imply changes in structure some of which are significant. Compulsory rules of pretrial disclosure, not only of facts but also of evidence and means of proof, including particulars of witnesses, may obviate the necessity of cumbersome pretrial procedure such as the present. Cases which do not require the high degree of attention and consideration provided by Supreme Court procedure should be reclassified and diverted to simpler and more straightforward means of resolution. These theories of reform are discussed in the final section of this article.

Publicity, Visuality and Orality

A distinguishing feature of the English common law system is its provision for orality. This characteristic may in fact be more broad than the term "orality" would at first seem to imply. For the principle that matters be presented verbally and in open court necessarily implies a proceeding which is public and visual as well as oral. Sir Maurice Amos describes the practical effect:[65]

> Any member of the public who understands the special vocabulary of the law and who, going one morning into a King's Bench Court or into the Cambridge County Court, manages to get a good seat, hears a case opened, and can spare the time to stay until his Lordship or His Honour has delivered judgment, ought if he has listened carefully all the time, to know all about the case, and to be in a position to form his own opinions as to whether it has been fairly and patiently tried, and, as regards the facts at any rate, whether the decision is reasonable. If there are witnesses he will have heard them all examined and cross-examined: if there is expert evidence, he will have heard this in full, in precisely the same manner. If the case turns upon the interpretation of documents, or upon the upshot of a correspondance, our dispassionate listener in the public gallery will have heard every reluctant passage read out in court, probably several times, and its effect debated between Judge and counsel. At the end of the proceedings the spectator will be in a position to give a verdict on the facts, and, if he is a trained lawyer, he will be in a position to give judgment.
>
> This way of doing things appears to most of us to be a matter of course: and it is only when we discover that it is exceptional, and that it is only made possible by remarkable and exceptional conditions and antecedents that we are proud of it.

The apparent obviousness of principle may disguise its true significance. Orality incorporates the fundamental rules of natural justice. It allows a man to participate in the process by which he or his case is judged. Assuming that rules of substantive law are applied

ble to a judicial council composed of six judges. This recommendation underscores the need for specific attention to this problem and emphasizes the requirement of judicial direction but gives little consideration to an operational solution.

[65] Sir M. Amos, A Day in Court at Home and Abroad (1962), 2 C.L.J. 340, at p. 343.

with intelligence and impartiality it virtually ensures an acceptable result. If it does not give rise to such a result, publicity in itself provides an effective measure of review. Orality implies simplicity, flexibility and economy. Historically, it is a fundamental element of the common law process and a feature of Ontario procedure which is deeply entrenched.

It is difficult to see how the pretrial conference in its present form accentuates the orality, publicity and visuality of Ontario proceedings. Practically, it is for the most part a process of private decision by agent. Parties attend only infrequently, the public do not. There are no witnesses. There are few rules as to propriety of form. What a litigant will normally receive is a report from his counsel emphasizing the judge's view of his case. Recommendations will follow. Those recommendations will very often include an opinion respecting settlement. Under these circumstances, publicity, visuality and orality are present only in limited quantity. Indeed, to some the procedure may be seen to import a measure of secrecy.

"Fairness, Justice, Due Process and Legality"

"Fairness" and "justice" are somewhat elusive terms, not capable of simple or precise definition. They subsume a broad variety of subjects upon which there is little agreement. In meaning they are qualified by the concepts of "due process" and "legality", suggestive of a sense of order and close attention to rule of law.

What readily comes to mind are the oft-quoted rules of natural justice, already briefly mentioned, by force of which a party is allowed not only to participate in the litigation process, but to participate in a manner which is informed. The principle is sometimes referred to as "openness". A party has the right to know the case he has to meet, and to be given reasons for decisions which affect his interest. Procedure must labour towards a decision which is patient, thorough and precise. Substantive rights in law must be given recognition, not according to process arbitrary and unstructured but in accordance with a pre-determined order equally applicable to all cases. The principle of openness is an effective safeguard against the possible abuses of procedure which is arbitrary or secret.

These considerations are generally thought to be of greater importance than those of mechanical efficiency. In the words of Mr. Justice Dickson:[66]

> Whatever the reforms adopted, they must not be allowed to jeopardize the safeguards presently found in our system that we prize so highly. The concern for

[66] Hon. B. Dickson, The Role and Function of Judges (1980), 14 L. Soc. of U.C. Gaz. 138, at p. 169.

> fairness and humanity must win out over the need for efficiency. We must have more expeditious justice, but not at the expense of a deterioration in the quality of justice dispensed. In a choice between efficiency and justice, we must choose the latter.

The limitations of the pretrial conference in terms of publicity, visuality and orality were referred to above. The procedure may be somewhat unsettling when one views "fairness" in the context of a litigant's opportunity to participate personally in areas of the process which substantially influence the final results of his case. The presence of the court in a conciliatory role, directing the conference with a view to settlement, distinguishes the proceeding from other aspects of pretrial procedure. In this setting one may wish to distinguish the right of a party to be heard from the right of a party's agent to be heard, recognizing that the force of the principle goes beyond the question of a man's confidence in his advocate.

Does the requirement of "fairness" imply that the Ontario system of civil procedure should "open" its framework so as to provide for greater disclosure of fact, evidence and means of proof? If a litigant is to know the case he has to meet the answer would appear to be in the affirmative. But traditionally in Ontario as well as in England the courts have given recognition to practical difficulties in the theory of complete evidentiary disclosure.[67] As we have seen, in some of the United States the pretrial conference has been employed as a means of greater disclosure. Theoretically it is capable of the same results in Ontario if used in such a way and if such results are indeed thought desirable.

The pretrial conference may affect other questions of "fairness". Positively, it may neutralize disparate skills in advocacy. It may encourage more thorough trial preparation. Risks in proceeding to trial may be attenuated. These effects in combination may increase opportunities for trials which are thorough, well ordered and precise, and thereby enhance the sense of "fairness" the system hopes to achieve.

Accessibility

A system of procedure which fails to provide access for persons aggrieved is of negligible value. Access may be denied where an individual is inadequately informed as to his rights. He may fear reprisal. Or his efforts may, in a large geographic area such as Ontario, be frustrated by distance. But speaking practically, in Ontario an individual is most likely to be denied access to the courts as a result of prohibitive expense.

[67] See for example N.J. Williams, Discovery of Civil Litigation Trial Preparation in Canada (1980), 58 Can. Bar Rev. 1.

What is the cost of a lawsuit, and why? The answers are so varied as to permit only generalization. But some points are clear. The main expense a litigant must bear is the cost of his lawyer, who in turn is duty bound to represent his client according to the dictates of the system. Adversarial procedure dictates not only that a party must present his own case to the court but also that he must pay for the presentation. The scale of costs awarded to the successful party is very often substantially lower than actual fees and disbursements. Amounts are for the most part determined by the time spent in the resolution process, particularly in matters of complication.

Ontario pretrial conference procedure demands some degree of preparation by counsel for the conference itself, in addition to an attendance in chambers and a subsequent report to the litigant. The financial investment is therefore of significance. The potential economy is in time spent at trial and that is of course a very considerable saving if it in fact can be achieved. The preliminary results of the Ontario pretrial conference experiment, described above, are worthy of consideration not only in respect of timeliness but also regarding this question of expense. Those results indicated that in a sample of ninety-nine cases tested seventy-two point eight per cent of those pretried settled without trial; only fifty per cent of the non-pretried cases settled without trial.[68] Subject to the difficulties mentioned, these figures imply a significant saving in expense. Although the study showed no difference in average time spent at trial itself, the average judge-time required to dispose of cases on the civil non-jury list was reduced by thirty-three per cent,[69] again a noteworthy achievement. Widespread use of specifically settlement-directed pretrial conferences may reduce expense not only to litigants but also to the court and public.

The most effective method of reducing expense in the system would appear to be replacement or reduction of complicated and consuming areas of the process. In the same manner in which the settlement-directed pretrial conference may encourage a less expensive alternative to trial, incentives might be created to replace or limit the use of expensive and time consuming pretrial procedures such as oral examination for discovery and repeated interlocutory applications. Specifics are suggested in the concluding section of this article.

An Independent and Impartial Judiciary

The value of the courts as an impartial forum for the resolution of disputes depends

[68] Stevenson *et al.*, *op. cit.*, footnote 2, p. 602.

[69] *Ibid.*, at p. 610.

upon the public perception of the independence of the courts from the parties and particularly their independence from their government.[70]

The practical questions of direction, supervision and control of the judiciary by the executive branch of government are in the modern context related for the most part to finance. In Canada the share of the courts in the federal justice budget has declined steadily from thirty eight point ninety-two per cent in 1900 to five per cent in 1974, and provincially from thirty point five per cent in 1961 to twenty-nine point six per cent in 1971.[71] At the same time, the number of cases before the High Court has risen dramatically, on a *per capita* as well as actual basis.[72] The obvious result is heavier caseloads for individual judges, which exposes very important areas of the system to the dangers of overload and inadequacy. The obvious solutions are more money and more efficiency. As we have seen, the pretrial conference may be of some assistance in respect of the latter. The former is another matter, beyond the scope of the present enquiry.

In specific terms the concept of impartiality is closely associated with the adversarial nature of Ontario procedure. As in England, adversarial procedure has traditionally been the universal form of dispute resolution at the High Court level. Adversarial procedure is defined fundamentally according to the roles and restrictions of its participants. Each party is not only entitled but required to prepare, conduct and present his case to the court. And in turn, the function of the court is to ensure that each party observes the proprieties of procedure, and to ultimately decide, solely on the strength of what the parties have presented, what the final result will be. The system operates on the assumption that these respective roles are clear and distinct. Master Jacob comments on this distinction:[73]

> The basic concept in England is that the Court should stand aloof from the heat of the battle until it is called upon to pronounce judgment and it is considered that this concept enhances the dignity and independence of the Court, and makes it appear to be, as it is in fact, truly impartial. It carries into practice the fundamental notion that justice should not only be done, but should manifestly be seen to be done.

The necessary and fundamental implication is that the court remain inactive in the preparation and conduct of the proceedings:

> A corollary of the adversary system as practiced in common law countries is the principle of "party control". The major premise of this principle is that, subject to compliance with the Rules of the Court and subject, so far as the lawyers are concerned, to their duties and responsibilities as officers of the Court, the parties themselves are entitled to exercise control over the conduct of the proceedings, except perhaps those that have a public interest involved, and they retain the initiative at all stages of the proceedings before trial.[74]

[70] The Minister's preface to the White Paper on Courts Administration, *op. cit.*, footnote 51.

[71] Shetreet, *op. cit.*, footnote 52, pp. 41-42.

[72] *Ibid.*, p. 67.

[73] Sir I.H. Jacob, The English System of Civil Proceedings (1963-4), 1 Com. Market L. Rev. 294, at pp 316-317.

Or, as Lord Devlin puts it, "The Englishman would not be soothed by the sound of a *juge d'instruction* rustling in with his dossiers".[75] The question of how the public would view a participatory or conciliatory role for the court as part of Ontario adversarial procedure may be not quite so straightforward but is clearly unsettling. One imagines the following dialogue:

> *Counsel:* "The judge will meet with the lawyers to see if there is some way your case may be settled."
>
> *Party:* "But I do not wish to settle. My case is an important one, a case which needs to be heard."
>
> *Counsel:* "The judge understands this. But there are other cases too, which would all like to be heard; there is no time to hear them all."
>
> *Party:* "May I attend?"
>
> *Counsel:* "I advise that you should not."
>
> (and following a private conference . . . .)
>
> *Counsel:* "The Judge says you should settle."

To those trained in the niceties of the law this dialogue and its subject for discussion may cause no alarm. But it may not be well received by right-thinking members of the public whom the system is designed to serve. It may even lead to more serious apprehensions concerning the participation of the court.

Of perhaps even greater danger is the possibility of apprehended bias as a result of previous information, interest or association concerning a party's case. As the Franks committee indicated: "How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?"[76] As discussed, subrule (6) of Rule 244, which allows a judge before whom a case has been called for trial to hold a pretrial conference either before or during the trial without disqualifying himself from trying the action, stands to be questioned on this ground. One may be prompted to ask whether justice has "manifestly been seen to have been done".[77]

Public Acceptance, Respect and Confidence

An examination according to standards of traditional justice needs to be completed with some consideration of the interest for

[74] Sir I.H. Jacob, Models from Common Law Systems, in T.J. Fetter (ed.), State Courts: A Blueprint for the Future (1978).

[75] Lord Devlin, The Judge (1979), p. 82.

[76] The Franks Report (1957), Cmnd. 218., para 24.

[77] To paraphrase Jacob, *op. cit.*, footnote 73.

which the system exists, that of the public. It is not a subject to be understated:

> With unjustifiable confidence, we feel that miscarriages of justice are rare events, and regard them as inevitable as long as human frailty is involved in the processes of law. But a society is stable only while it believes it is treated justly. A sense of injustice—however imaginary, is the prerequisite for revolution or a political landslide, and while the rule of law exists it is important that any possible weaknesses in the judicial system are strengthened.[78]

To acquire a specific and detailed comprehension of what the public accepts and respects, how these attitudes are formed, how the collective sense is required, is a very difficult task. In 1978 a national survey was conducted in the United States for the purpose of gaining information helpful to an understanding of how the public view the court system and judiciary. Perceptions regarding court reform were examined, and the conclusions are enlightening. The public showed strong interest in means of dispute resolution other than existing formal procedure. Sixty-six per cent of those surveyed believed it would be helpful or very helpful to spend tax dollars to settle disputes by alternative means. But these alternatives were preferred only in respect of minor cases. As an example, formal trial in court was the preferred means in a personal injury case, irrespective of whether the amount involved was $500.00 or $25.000.00, and even though the trial process was the lengthiest alternative. Means other than formal trial became more acceptable as the amount involved in the case decreased. High value was placed on the right to appeal, particularly as the case became more severe. Sixty-two per cent supported public expenditure which would attempt to make courts handle their cases faster. Public perceptions of quality in formal procedure depended mainly on what was perceived to be the quality of the individual judges.[79] Courts were found to be significant sources of information about themselves, in that those who had occasion to personally observe the judicial system in operation, whether voluntarily or otherwise, were almost invariably influenced in some way by their observations.[80]

Is the introduction of pretrial conference procedure as a means of dispute resolution in the High Court likely to result in greater public acceptance, confidence and respect in the system considered in its entirety? This question is not capable of easy response. But the conclusions of the American study offer some useful guidelines to-

[78] L.R.C. Haward, A Psychologist's Contribution to Legal Procedure (1964), 27 Mod. L. Rev. 656, at p. 663.

[79] Yankelovich, Skelly and White, Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders, in Fetter, *op. cit.*, footnote 74, pp. 55-58.

[80] *Ibid.*, p. 84.

wards an answer. If the pretrial conference is to be employed as a means of conciliation alternative to adjudication at trial its opportunities for public acceptance seem to be greater where cases are of less individual significance. The procedure might therefore be more prudently put to effect in courts of lesser jurisdiction. The public equation of quality in the administration of justice with the quality of individual judges underscores the importance of a clearly defined role for the court, and questions the advisability of a procedure according to which the court may be viewed as a conciliator acting of its own motion. Public concern over the right to appeal emphasizes the need for clarification of this issue in Rule 244. In the conference's favour is its potential to produce a more timely result and a less expensive lawsuit.

In essence, it seems a safe assumption that the public will view the pretrial conference as an acceptable or unacceptable addition to civil procedure largely on the basis of consistency or inconsistency with the principles of traditional justice.

IV. *Ontario Procedure Reconsidered.*

A Theory of Reform

The Ontario system of dispute resolution is capable of alteration by several means independent of the pretrial conference. A number of these have been mentioned. Some, as was illustrated, are not consistent with standards of good procedure. Others merit more serious attention. An adequate treatment of court reform is its own subject, well beyond the scope of the present enquiry. What follows is intended only to add perspective to an examination of pretrial procedure, and is therefore suggestive rather than exhaustive.

A simple premise of judicial administration holds that cases not requiring highly detailed examination and attention ought to be associated not with elaborate procedure such as that of the Supreme Court but should instead seek disposition by more summary procedure. Achievement of balanced and proper association between the particular needs of individual cases and their most suitable modes of procedure promises significant benefits to the system in its entirety, in terms of more timely results, more accessible means, an increased measure of attention to the principles of traditional justice and greater "fairness" throughout.

As we have seen, a source of general difficulty for the Ontario pretrial conference is that it has been introduced, albeit on an experimental basis, in a court of unlimited jurisdiction obliged not only to provide close attention to cases of severity or complexity, but also to ensure exemplary standards of traditional justice. The High Court is therefore difficult ground for experiment. Consistent with observa-

tions in respect of public acceptance, as a second premise it is a safe conclusion that novel forms of procedure are best tested in the courts of inferior jurisdiction.

When one attentive to these premises considers the diversion of cases from the High Court to an alternative but appropriate forum one looks naturally to the County Courts. In Ontario, County Court procedure is a virtual copy of the Supreme Court practice. Detailed requirements of pleading and elaborate means of pretrial discovery, including oral examinations of parties without leave, are available in equal measure. Proceedings in the County Courts are therefore subject to the equivalent problems of delay, expense and abuse. This may be somewhat luxuriant in a court whose jurisdictional ceiling is intended to be $7,500.00. This absence of comparative procedural flexibility is a weakness of the Ontario system.

The defect becomes more apparent on closer examination. Under the Ontario practice there is, other than a discretionary possibility of a penalty in costs, no fixed rule which expressly forbids commencement in the High Court of an action involving less than $7,500.00. Further, one questions whether the simple monetary amount is not a somewhat unsuitable method of associating cases to appropriate procedure.

It is submitted that individual cases would be better matched to more suitable means of resolution if **rules such as the following were instituted:**

1. An action, cause or matter in which the County Court may have jurisdiction shall, irrespective of its subject matter or amount involved, be commenced in the County Court.
2. In a proceeding in the County Court a party shall disclose in his pleadings:

(i) The facts upon which he relies in support of his claim or defence;

(ii) The essential elements of the evidence he intends to lead at trial;

(iii) The means by which the essential elements of the evidence are to be proved; and

(iv) Particulars of his means of proof, such as specific documents, exhibits or reports, and names and addresses of his witnesses.

Failure of a party to observe this rule may, in the court's discretion, be remedied by an order for particulars, by an order refusing to admit undisclosed evidence at trial, or by an order as to costs.

3. Under County Court procedure there shall be no right to oral examination of a party for discovery, without leave of the court.
4. A settlement-directed pretrial conference shall take place within a specified time shortly following the close of pleadings and shall be compulsory in all cases, but shall otherwise be in the revised form described below.
5. Any action, cause or matter may, at any stage of the proceedings, be transferred to the Supreme Court upon application to a judge of that court.

The practice of the High Court would, subject to the amendments to pretrial conference procedure discussed below, remain unaltered.

The main objective of these suggestions is to provide a new and more summary means by which straightforward cases may be resolved, while at the same time ensuring preservation of a high standard of traditional justice for those cases which most require it. The decision as to which procedure is most appropriate is left to the judiciary of the Supreme Court, who are in the most favourable position to assess the overall needs of cases not only individually but generally. The obvious incentive is to use the more summary, more timely and less expensive County Court procedure in the absence of a specific need for the more scrutinizing methods and standards of the Supreme Court. An application for transfer ought to be successful only where the applicant demonstrates such a need on the basis of the amount involved, the degree of complexity, the seriousness to the parties, or an issue of importance to the public.

For the majority of cases which remain in the County Court the expensive and time-consuming process of oral examination for discovery is replaced by disclosure of fact, evidence and means of proof in a party's pleading, followed shortly thereafter by a pretrial conference for the purpose of conciliation. The conference would function in a manner similar to the English Summons for Directions, in that it would provide a forum at which any number of interlocutory applications could be decided, including the question as to whether oral examination for discovery ought to be ordered, either fully or subject to limitation, on the ground that it is for some stated reason essential. In addition, the question of settlement could be fully considered. If the case is not fully resolved, the conference should close with an order setting the action down for trial, either on a general ready list or if at all possible with a date fixed for hearing.

This new procedure would incorporate the strengths of the pretrial conference, the benefits of greater disclosure and a forum for consolidation of interlocutory applications. It shows promise for increased rates of settlement. And those actions which do not settle

ould see a final result less expensively attained and roughly speak- about six months earlier than presently is the case. To paraphrase ord Devlin, although procedure reformed in this way may in more raightforward cases leave stones unturned, it ought to achieve for a middle class of litigation" a "fair settlement speedily arrived at, by greement if possible, and if not, by an impartial Judge".

Pretrial Conference Revised

The introduction to this article puts the question: "Does the pretrial conference improve the system of dispute resolution in Ontario by suitable and effective means?" We may now conclude that in its present form it does not.

The pretrial conference under Rule 244 has roughly four particular areas of merit, two of which are dependant upon the assumption, the validity of which is supported by the preliminary results of the Ontario experiment, that the proceeding does in fact increase the rate at which cases can be settled. Such an effect implies a system not only more timely but, more importantly, less expensive and more accessible. Independent of these experimental results, judicial intervention by means of the pretrial conference promises better trial preparation, greater certainty and reduced risks in proceeding through trial. A conference may correct at least in part some of the natural imbalances of advocacy. The trial which follows ought therefore to be more thorough, better ordered, more precise. Finally, the conference procedure adds flexibility to the process by offering conciliation as a third alternative to the existing means of settlement and adjudication.

But there are difficulties which cannot be disregarded. The apparent power of the court to order on its own motion conciliation by private proceeding may give rise to misapprehension over the function of the judiciary in a forum such as the High Court. As we have seen, the implications of this can be several and serious. The discretion of a trial judge to conduct a pretrial conference then proceed to try the case further unsettles the effect, as does the absence of a clear right of appeal from any decision made during the conference. Several important questions regarding the breadth of the court's discretion, particularly in relation to its power to order disclosure of documents and other means of proof, remain unanswered. The proceeding adds yet another element of complication to practice already lengthy and encumbered. The privacy of the procedure may in some cases offend traditional rules of natural "fairness".

This is not to suggest a flat condemnation. These criticisms might be remedied if Rule 244 were revised so as to invest:

1. A pretrial conference available on a voluntary basis only.
2. A restricted discretion in the court to make orders, including orders as to costs, only in response to applications by the parties.
3. An improved undertaking that any judge who conducts the pretrial conference shall not thereafter try the case.
4. A specific right of appeal from orders made during the conference.
5. An expression of the conference's purpose as a voluntary means of conciliation.

In this revised form the pretrial conference would take place only on a voluntary basis. If a party applied for the procedure under another party's objection the latter would not be obliged to attend, and if he did not no order would be made against him in the absence of his consent or a formal Notice of Motion returnable at the conference but previously delivered in accordance with the Rules. Such would allow even a single party the advantage of judicial opinion concerning issues of evidence, arguments of law, means of proof, assessments of damages and the like.

Orders would be made at the conference only in response to specific applications, either verbally or by Notice of Motion. Costs of these applications would be ordered in the court's discretion and according to existing guidelines. The present discretion of a judge presiding at the conference to order, under subrule (5), costs of the conference itself on a basis other than costs in the cause could be retained. However one could expect such orders to be infrequent, and reserved for rare and exceptional cases. The specific and stated objective of the conference would be to provide a means by which the parties could work towards settlement not only of specific issues but also of the cause itself, voluntarily but with the assistance of the judiciary. The conciliatory purpose could be expressed by simple addition of the words "in good faith and with a view to agreement" to the word "consider" in Rule 244.

A specific subrule could provide rights of appeal from interlocutory and final orders to a single judge with leave and to the Court of Appeal respectively. Abolition of subrule (6) should warrant that any judge who presides at a pretrial conference will not try the case. This need not prevent the traditional discussions of trial judge and counsel in chambers, except in so far as any special powers conferred by Rule 244 would no longer be available.

This revised form of pretrial conference is consistent with the standards of traditional justice considered above, and offers the procedural benefits of existing analogous institutions such as the American pretrial conference, the English Summons for Directions and the continental forms of judicial conciliation. One may safely conclude that this form of pretrial conference would be a useful addition to the practice of the Supreme Court of Ontario.

(1977) 15 Osgoode Hall L.J. 591

THE IMPACT OF PRETRIAL CONFERENCES: AN INTERIM REPORT ON THE ONTARIO PRETRIAL CONFERENCE EXPERIMENT

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A. INTRODUCTION

It is generally accepted that the object of civil procedure is, or should be, to obtain not only a just determination of all disputes, but to do so speedily and at reasonable expense. However, today in Canada (and elsewhere) justice in the higher courts is expensive, and, if litigation proceeds all the way to trial, the process is far from speedy. The extent of delay varies from court to court, but in the large urban centres of Canada a timespan of three years from the commencement of proceedings to trial is not uncommon. While delay in litigation has many causes, once the case is placed on a trial list, ready for and awaiting trial, delay is largely a function of the court's ability (or inability) to reach the case for trial. In broad terms, this "court related" delay is a result of too many cases requiring trial in relation to the available judge time.

In an attempt to combat court congestion, delay, and the high cost of litigation, Canadian courts in the seventies have turned, as did their United States counterparts in the sixties and earlier, to the use of pretrial conferences.[1] In Ontario, the Supreme Court has employed pretrial conferences in civil jury cases in Toronto since 1975. The members of the Bar strongly supported the introduction of the procedure, and the court, attracted by the

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[1] Though not unknown, pretrial conferences were little used in Canada until the 1970's. Court rules in a number of Canadian jurisdictions now provide for pretrial conferences: see, Alberta Rules of Court, Rule 219; British Columbia Supreme Court Rules, Rule 35; Nova Scotia Procedure Rules 1971, Rule 26; Federal Court of Canada (General Orders and Rules), Rule 491. The Ontario Rules of Practice presently make no provision for the holding of pretrial conferences. For a general discussion of pretrial conferences in Canada and in the United States, see Ontario Law Reform Commission, *Report on the Administration of Ontario Courts*, (Toronto: Ministry of the Attorney General, 1973) Part 3 at 107 *et seq.*

potential of the procedure to increase the court's productivity, reduce the cost of litigation and speed up the resolution of disputes, contemplated its extension to the much larger Toronto non-jury list. At this point, however, the court responded to the suggestion that the proposed extension of the procedure should be done in such a way as to permit close monitoring of its effect, rather than simply extending the procedure and hoping for positive results. This decision on the part of the court was the genesis of the experiment reported here.[2] Essentially, it was agreed that the procedure would be introduced for only half of the cases on the non-jury list and that the court would co-operate fully with the authors in permitting the collection of the data necessary to evaluate the impact of pretrial conferences.

This article is a summary of the research design and the preliminary results of this experimental project.[3] The objective of the project is to determine, through a strictly controlled experimental study, the effects of the introduction of pretrial conferences on the subsequent disposition of civil cases set down for non-jury trial in the Supreme Court of Ontario at Toronto. It has been generally assumed that the introduction of the pretrial conference procedure has the effect of increasing the rate and speed of settlement and of reducing the length of trial in those cases that go to trial. This project is addressing itself, *inter alia*, to the following questions: whether or not these effects *do result* from the holding of pretrial conferences; whether such effects are common to all or only some types of litigation; whether such benefits are of a magnitude sufficient to produce a *net* benefit to the court, taking into account the judicial manpower required to conduct the pretrial conferences.

In the United States the use of pretrial conferences became prevalent with the introduction of the procedure into the Federal Rules of Civil Procedure in 1938. It has since been adopted in most state jurisdictions and it is now widely used throughout the country, although the manner and intensity of its use varies from court to court. The utility and effectiveness of pretrial conferences is a matter on which there is considerable disagreement. Based upon personal experience many (perhaps the majority) of judges and lawyers in the United States feel that trials are shortened and settlement rates increased by the use of pretrial conferences. However, the only major empirical study of the operation of pretrial conferences in the United States, conducted in the early sixties in the New Jersey courts by Professor Maurice Rosenberg,

[2] Earlier the Ontario Law Reform Commission, *id.* at 121, had suggested that consideration be given to conducting a controlled experiment in Ontario in the use of pretrial conferences.

[3] This Pretrial Conference Experiment Project is being directed by the authors, for the Supreme Court of Ontario, under the auspices of the Canadian Institute for the Administration of Justice and with the co-operation of the Institute for Behavioural Research of York University. Financial support for the project is being received from the Law Foundation of Ontario and the Ministry of the Attorney General of Ontario through the budget of the Civil Procedure Revision Committee. This co-operation and assistance is gratefully acknowledged.

cast severe doubt upon these conclusions.[4] Using a "partially"[5] controlled experiment involving only personal injury cases, Professor Rosenberg concluded that a pretrial conference procedure did not enhance the efficiency of the judicial process. More specifically, he found that pretrial conferences did not reduce the average length of trial, nor did they increase the rate at which cases settled prior to trial. Indeed, Rosenberg concluded that the use of pretrial conferences actually *reduced* the court's efficiency, since additional judge time was expended in conducting pretrial conferences without any improvement in the disposition rate.[6]

The general applicability of Professor Rosenberg's conclusions have been challenged in the United States[7] and pretrial conferences continue to be widely employed in that country. Many lawyers and judges still believe that pretrial conferences eliminate the need for, or shorten, trials. The result is that considerable confusion continues to exist as to the efficacy of pretrial in the United States.[8] Little is really known of the actual impact of pretrial conferences in the Canadian context. In Ontario, members of the judiciary and the Bar generally, strongly support the procedure but this project is the first opportunity to systematically test the efficacy of pretrial conferences in any jurisdiction in Canada. Furthermore, inasmuch as this project does not suffer from the problems (faced by Rosenberg) of non-random selection to the experimental procedures[9] and inasmuch as this project is not exclusively confined to the analysis of personal injury litigation, this study may be seen as a significant advance on the pioneering work in New Jersey.

The pretrial conference is a conference between the counsel in a case and a judge, typically held several weeks before the trial date and after the other pretrial proceedings are completed.[10] In Canada to date two basic

[4] Rosenberg, *The Pretrial Conference and Effective Justice* (New York: Columbia University Press, 1964).

[5] Rosenberg was unable to structure his experiment so as to stream all the control cases to trial without a pretrial conference. Lawyers in the control group were allowed to request a pretrial conference if they wanted one. Hence, instead of having two groups of cases (test and control) three groups resulted (mandatory pretried, optional pretried and not pretried).

[6] However, Rosenberg's study did conclude (*supra*, note 4 at 28 *et seq*) pretrial conferences led to an improvement in the quality of trials in that, in pretried cases, counsel were found to be better prepared, a clearer presentation of opposing theories of counsel was more common, gaps and repetition in the evidence was reduced and tactical surprise was curbed. We have not attempted to replicate this aspect of Rosenberg's study; see *infra*, note 45.

[7] See, e.g., Becker, "Efficient Use of Judicial Resources," 43 *Federal Rules Decisions* 421 (1967); Chantry, *et al*, "Pretrial Utility or Futility," 32 *Ins. Counsel J.* 602 (1965); Todd, "Pretrial Revisited," 50 *Judicature* 153 (1967).

[8] See, for example, the recent Federal Judicial Center's *District Court Studies Project Interim Report* (Washington: The Center, June 1976) 18-21, reporting data indicating, for the majority of courts observed, an *inverse* relationship between judicial involvement in settlement (through pretrial conferences) and terminations per judge.

[9] See *supra*, note 5.

[10] The timing of the conference may vary from court to court and from case to case. Also in some courts, or cases, the clients may be expected to attend or to be available for consultation.

forms of pretrial conference have emerged. The first has as its principal goal the readying of the case for an orderly trial: the *trial oriented conference*. The second has as its major goal pretrial settlement of the case: the *settlement oriented conference*.

In either form, the conference consists of a discussion between the judge and counsel concerning the case. In the *trial oriented conferences* the major emphasis is placed upon clarification and reduction of the issues in the case, the limitation of the number of expert witnesses, the obtaining of admissions of fact, and agreements to dispense with formal proof of documents. The aim of such conferences is to reduce trial time, and to improve the overall quality of the trial by increasing the preparedness of counsel, by facilitating the avoidance of surprise, and by generally aiding the clear presentation of the case. Typically, these *trial oriented conferences* will be conducted by the judge assigned to try the case. The possibility of settlement may or may not be discussed, but it is not the focus of the conference though it may be a by-product thereof.

At the *settlement oriented conferences*, the presiding judge seeks, through discussion with counsel, to assist them at arriving at an out-of-court settlement. The role of the judge here is essentially that of conciliator or third party mediator, who points out the strengths and weaknesses of each side's case and who gives his opinion as to the likely outcome of the trial, in terms of liability and damages. If it becomes clear that settlement is not possible, some time may be spent on limiting and clarifying the issues to be tried.

The pretrial conferences conducted in this experiment were intended to be primarily *settlement-oriented* rather than *trial-oriented*. They were not to be "head-knocking" sessions at which settlement was forced upon the counsel by the presiding judge, but rather exercises in third party mediation by the judge. An important ground rule of the conferences, made clear to counsel at the outset, was that under no circumstances would the judge presiding at the pretrial be the trial judge in the action. All discussions would be treated as confidential and privileged and would not be disclosed to any fellow judge. It was felt, by the Court, that this ground rule would discourage "head-knocking" and any likelihood or appearance of unfairness, and at the same time encourage full disclosure and frankness on the part of participating counsel.

The Rules of Practice governing proceedings in the Supreme Court of Ontario (of which the High Court is simply the trial division) presently make no provision for the holding of pretrial conferences. Hence, the conferences conducted as part of this experiment were neither required nor specifically sanctioned by the Rules. As explained below, the attendance of counsel was secured by a letter of invitation from the judge who was to preside at the conference. Although attendance was not mandatory in any legal sense, in only a very few cases did counsel fail to attend a scheduled conference.

B. RESEARCH DESIGN

It is worth indicating why controlled experimental evaluation is particularly necessary in determining the impact of pretrial conferences. Today, in almost any jurisdiction the settlement rate of cases is extremely high, vary-

ing, depending on the jurisdiction, between 75-85% of all actions commenced. When a pretrial conference procedure is introduced, many cases that are pretried will subsequently settle. But whether these settlements are a result of the pretrial conference or represent settlements which would have occurred in any event, cannot be determined in the absence of a control group,[11] i.e., an identical group of contemporaneous cases which have not been subjected to the pretrial conference experience. Moreover, since settlement rates are very high, with or without pretrial conferences, very careful precise measurement is necessary in order to isolate the impact of pretrial conferences.[12]

This project necessitated a number of novel approaches to the construction of a research design because it was a controlled experiment carried out "in the field." That is, while the research can be considered a true experimental design, it is not being conducted in the artificially controlled environment of a laboratory, but in the real world. While laboratory experiments have the rigour of complete (or almost complete) control, this strength is the basis of the major weakness of laboratory experiments, for the very artificiality of the setting makes it difficult to generalize findings to the "real world." There are a variety of problems associated with achieving a controlled experiment in a real world environment. First, research design is difficult because of the need to monitor the complex on-going process being studied, without affecting it in the course of the study, i.e., without turning the "real" world into an "artificial" world. A second problem is establishing the requisite control while at the same time obtaining and retaining the full co-operation of all participants in the milieu. In the context of this experiment obtaining the co-operation of the court was essential. This itself involved a number of aspects: the willingness of the court to initially acknowledge the need for experimentation; the need to refrain, during the course of the experiment, from carrying out other procedural or administrative reforms that seem plausible short-term solutions to institutional problems; and the willingness of the court to co-operate in the daily gathering of information. That this experiment is being conducted, and that the degree of control obtained in the study has been possible, is a direct result of the co-operation afforded by the Supreme Court of Ontario[13] and the practising Bar in Toronto.

[11] Another (but inferior) way to attempt to measure the impact of pretrial conferences is to compare settlement rates, etc., before and after the introduction of the procedure. One of the co-authors, Garry Watson, in an earlier project attempted to use this technique to measure the impact of the introduction of pretrial conferences on the Toronto *jury* list. The attempt was unsuccessful and the results inconclusive for two reasons. First, since the technique involved the comparison of statistics from different time periods there was no control of extraneous factors or variables, e.g., procedural, administrative or behavioural changes other than the pretrial conference. Secondly, the data regularly collected by the court was insufficiently detailed to allow any form of precise measurement. For a brief but useful discussion (citing examples) of research techniques for evaluating court procedures and changes in the administration of justice, see Rosenberg, *supra*, note 4 at 16 *et seq.*

[12] As the recent Federal Judicial Centre Study, *supra*, note 8 at 20, states, "evaluating settlement procedures presents the same difficulty as evaluating remedies for the common cold. All cold remedies appear to work as indicated by the fact that colds always go away. Similarly, all settlement procedures succeed as indicated by the fact that most cases settle no matter what procedures are used."

While the research design of this experiment uses complex statistical techniques and methods, the overall approach is nevertheless straightforward: to examine the differences in the manner and timing of disposition for cases on the civil non-jury list in the Supreme Court of Ontario as a function of whether or not they are assigned to pretrial conferences, and to indicate the probability that such differences are due to pretrial intervention rather than to chance or other factors. The ability to isolate this latter source of variation is based upon the controlled assignment of any case to either the test condition (pretrial conference) or a control condition (no pretrial conference) by a strictly random selection.

Every case on the civil non-jury list (this list does not include divorce cases)[14] was classified as either personal injury or other.[15] This stratification of the sample was done to ensure sufficient representation of personal injury cases in the study, since it was hypothesized that this type of case was particularly amenable to settlement through pretrial conference.[16] Randomly, each case in the list of personal injury and other cases was assigned to either the test (pretried) or control (not pretried) group. Each test case was assigned, on a random basis, a paired control case. Thus, there were four groups of

[13] Particular mention should be made of the contribution and support of Mr. Justice Richard Holland, Mr. Justice Peter Cory, and Mr. Justice Willard Estey, Chief Justice of the High Court (now a member of the Supreme Court of Canada).

[14] A separate list is operated for divorce cases. Contemporaneously with this project, pretrial conferences were introduced in the Supreme Court of Ontario in Toronto in divorce cases, but the impact of pretrial conferences in these cases is outside the ambit of this study. For an account of the operation of the procedure in such cases, see Lieff, *Pre-Trial of Family Law in the Supreme Court of Ontario — Simplify and Expedite*, 10 Law Society of Upper Canada Gazette 300 (1976).

[15] Inter-coder reliability (i.e., the agreement between three independent coders) for this classification was perfect, $r = +1.00$. These two basic subject matter classifications have been further broken down as follows: personal injury (motor vehicle and other); non personal injury (real estate, contract, and other). Analysis of any difference amongst these further category breakdowns must await the completion of the experiment when larger sample sizes in each category are available.

[16] This hypothesis was generated in discussions with members of the Court. The reasoning was that a major issue in personal injury cases is almost invariably the amount at which damages will be assessed. Since all of the cases are, *ex hypothesi*, on the non-jury list, that assessment (if the case goes to trial) would be made by a High Court judge, and the pretrial conference provides a forum in which a High Court judge can give his tentative opinion as to the likely assessment of damages. Given these factors it was felt that the pretrial conference might be particularly effective in achieving pretrial settlements in personal injury cases. (This hypothesis is not in fact borne out by these preliminary results, see *infra* at note 40.) In view of the differences between our preliminary results and those obtained by Rosenberg as to the impact of pretrial conferences, it is worth noting that our study dealt exclusively with non-jury cases, whereas his dealt principally with cases bound for trial by a jury. See Rosenberg, *supra*, note 4 at 21.

cases: test - personal injury; test - other; control - personal injury; control - other. Personal injury cases were only paired with personal injury cases, etc. Sampling was conducted in this manner in roughly two week intervals throughout the year, taking the set of cases at the head of the list in each time period as a separate cohort. That is, each block of cases sampled and assigned at the same time was called a cohort. This temporal separation of the sample will allow us to isolate the effects of changes over time, which include certain things as "learning" by counsel about the operation of the conferences, or changes in other court procedures introduced during the course of the experiment.[17]

The pairing between cases in test and control groups is a special feature in the research design of this study. The effect of pairing is to create a nest of two case mini-experiments. Usually attrition[18] is a problem in field experiments because test and control group cases may suffer from differential attrition rates. In our experiment the technique of pairing allows us to attrite both of these paired cases if one case attrites, making the remainder of the cases less likely to be biased. The best way to understand pairing is to see it as a randomly selected and assigned two case ($N = 2$) self-contained experiment. (In fact, the experiment can be seen as a nest of Chinese boxes, pairs within cohorts, and temporally distinct cohorts within the total sample).

The administration of the experiment, and the monitoring of the cases and their progress through the list can now be summarized briefly. At the commencement of the experiment in April 1976 all the cases then on the Toronto non-jury list (excluding approximately 130 cases at the top of the list)[19] were identified and coded with the date upon which they were set down for trial (i.e., added to the bottom of the trial list) and classified according

[17] One such change introduced during the course of the experiment was a "trial blitz," involving a concentration of judicial manpower in Toronto to try non-jury cases during the fall of 1976 (September – December, 1976). As opposed to the normal situation, in which the number of judges hearing cases in Toronto non-jury range between one and five, during the blitz a minimum of five judges sat continuously to hear cases on the Toronto non-jury list. In addition, during the blitz period different case scheduling techniques were in effect to expedite the flow of cases to the increased panel of judges. This preliminary report does not, in fact, include more than a handful of cases which were subject to the blitz experience. Our final report will, however, deal with a large number of such cases. However, the sampling techniques referred to above, i.e., temporal separation and pairing, will enable us to provide independent estimates of the effect of the blitz and the pretrial conference on the disposition of cases.

[18] By attrition we mean the slippage of cases from the experiment before the relevant measurements can be made, e.g., test cases may attrite through settlement prior to being called to a pretrial conference, or may fail to attend at the pretrial conference. (The actual reasons for attrition in this experiment are discussed in more detail, *infra*, note 26.) Cases also disappeared from the non-jury list (e.g., through settlement) prior to being sampled as part of the experiment. These cases never became part of the experiment.

[19] These cases were excluded simply because we wanted to avoid taking into the experiment cases which might be called for trial before they could be pretried.

to subject matter.[20] From then on, a block of cases (a cohort) was taken from the top of the list every few weeks.[21]

Ideally the time at which any cohort was drawn (and thus the ensuing pretrial conferences held) in relation to the likely trial date of the cases in the cohort, should have been constant over the course of the experiment in order to hold constant the time before trial at which pretrial conferences were held. Initially we attempted to do this. However, the rate at which cases are reached for trial on the Toronto non-jury list is inevitably a function of judge availability (which varies from week to week and month to month) and of the length of trials in those cases heard by the court. The resulting variability in the rate at which cases may be called for trial made it impossible to hold constant the period between pretrial conference and trial dates. All that we can say is that within cohorts the period between pretrial conference and likely trial date was more or less constant: across cohorts it varied considerably.[22]

Within each cohort the personal injury cases were randomly sampled for test and control group assignment as were the non personal injury cases. The resulting sampling status for each case was then coded. Counsel in those cases assigned to pretrial conferences were notified of dates and times of the conference in letters sent out over the signature of the judge who would preside at the pretrial conference.[23] These letters were sent out about two weeks before the pretrial conferences. The date of the conference for the test case was coded for both that particular test case and for its control pair.[24] For both groups of cases, information as to the timing of settlement, trial, adjournments, and appeal were subsequently coded, as was information as to the terms of settlement or judgment. In addition, information was collected

[20] A similar procedure was carried out for cases that were *subsequently* added to the Toronto non-jury list. Initially we had anticipated that the number of cases on the list as of April 1976 would provide us with the desired sample size. This turned out not to be the case, and an additional (approximately) 200 cases, added to the list after April 1976 but appearing at the head of the list before May 1977, were taken into the experiment. Hence, our final analysis will be based not upon (a portion of) the cases on the list as of April 1976, but on the universe of cases surviving to the top of the list during the period April 1976 – May 1977.

[21] The number of cases in each cohort was basically twice the number of available pretrial conference slots, so as to provide both test and control cases. In fact a slightly greater number of cases were included in each cohort so as to ensure replacements of pairs which attrited because the selected test cases could not, for one reason or another, attend a scheduled pretrial conference.

[22] In the analysis of the final data we will attempt to statistically estimate the effects of variation in the timing of the pretrial conferences. However, this will present difficulties, because it is impossible to determine what the trial dates would have been for cases which settled after the pretrial conference.

[23] This method of notification was decided upon by the Court. Ontario presently has no rule authorizing the holding of pretrial conferences or requiring the attendance of counsel at a pretrial conference. The Court felt that a personal request from the presiding judge to counsel to attend the pretrial conference would maximize the likelihood that counsel would attend the conference.

[24] This information allows for testing of the hypothesis that pretrial conferences produce *more speedy* settlements even if they do not affect the probability of settlement.

from the pretrial conference judge about the nature of the conference in each case.[25] Further information was collected and coded relating to the damages in dispute or other relief claimed, for payments into court, and for the identity of counsel involved in each case.

The analysis presented here is based on the first 307 cases sampled as part of the experiment between April and August 1976. Not all of these cases were used in the analysis, however, for the following reasons. First, some cases were struck from the list or adjourned *sine die* prior to or at trial and hence had not reached final disposition at the time of this analysis. Second, in some cases trials had been concluded, but reserve judgments had not been handed down at the time of the analysis. Third, a large number of cases were attrited because of problems of scheduling and holding pretrial conferences, particularly in the initial weeks of the experiment.[26] Cases attrited for any of these reasons were removed from the analysis with their pairs. This procedure maintains the sampling integrity of the analysis of the 161 cases discussed below, and we have checked and ascertained that the results of this preliminary report are not biased by the exclusion of the eliminated cases.[27]

[25] The judges gave information as to counsel present, quality of preparation, matters stressed (i.e., settlement or preparation of the trial through clarification of issues, etc.), judge time spent in preparing for and holding the conference and an estimate of the likelihood of out-of-court settlement or of trial time, as well as a summary evaluation of the usefulness of that particular pretrial conference.

The collection of the diverse sets of information, and the supervision of the pretrial conference scheduling, was carried out from a project office in the court house by Ms. Anne Burke and her associate Ms. Sue Carson. This information was subsequently converted to machine readable files, and computer-analysed, at the Institute for Behavioural Research, York University, with the assistance of Ms. Mirka Ondracek.

[26] The major reason for attrition was that the early cohorts contained many more (test) cases than there were available pretrial conference slots. Hence, some test cases were never summoned to a pretrial conference and were attrited (with their control pair). A second reason for attrition was that one or both of the paired cases were called to trial before the holding of the pretrial conference. A third reason was that a number of *test* cases, when summoned to the pretrial conference, indicated they had already settled and were consequently attrited along with their pairs. A very small number of cases were attrited due to the failure or refusal of counsel to appear at the pretrial conference.

[27] The checks conducted indicate: (a) amongst the cases not analysed because of reserved judgments, there were a greater number of control as opposed to test cases that had gone to trial rather than settled; (b) amongst the cases struck or adjourned *sine die*, more of these were test than control cases, but the settlement rate for the control cases paired with struck or adjourned test cases was not greater than that reported for the control group in our analysis, and the exclusion of these cases does not bias the conclusions from our analysis; (c) an examination of the 100 cases attrited revealed no distributional differences in amounts in dispute or manner of disposition inconsistent with the control cases analysed. In short, except for attrition, these cases were not atypical.

Further, it should be noted that in this preliminary analysis the cut off point of 307 cases represented the set of cohorts for which disposition was recorded in *all* cases excepting those struck off, adjourned, or under reserve judgment. While more than 307 cases were disposed of when we began this analysis, we refrained from using these additional cases because of ignorance as to the manner of disposition of other cases entering the experiment at the same time. That is, no bias is introduced into the analysis as a result of the inclusion of only those cases disposed of at the time of the analysis.

In summary, the composition of the sample used for analysis and the distribution of the attrition is as follows:

161	cases analysed (81 test; 80 control)[28]
100	cases attrited (50 pairs)
30	cases struck off the list or adjourned *sine die* (15 pairs)
16	cases under reserved judgment (8 pairs)
307	TOTAL

The present status of the project is that the sampling of cases and the conduct of pretrials is now complete; the last conference having been held in May 1977. In total, some 940 cases have been taken into the experiment. As already indicated, the analysis presented here is based upon 161 usable cases from the first 307 cases sampled. The balance of the cases (approximately 630) remain to be disposed of by settlement or trial and to be fully coded.[29] It is hoped that the final report from the project will be available in the spring of 1978.

C. ANALYSIS

The analysis that follows examines the extent to which pretrial conferences affect the settlement rate of cases,[30] the time spent in trial, and the speed, as opposed to the rate, of settlement. Further, in light of these effects, we assess the impact of the use of pretrial conferences on the court's efficiency. Finally, we explore whether there are differences in the substantive outcome of cases resulting from the use of pretrial conferences. Also, assessed, wherever possible, is the extent to which pretrial conferences produce differential effects as a result of differences in the characteristics of cases, i.e., the type of litigation and the amount in dispute or because of differences in the characteristics of the pretrial conference procedures employed, i.e., the identity of the presiding judge and the level of preparation of participating counsel.

1. *Impact of Pretrial Conferences on Settlement Rates*

a. For All Cases

The effectiveness of pretrial conferences as a means of increasing the rate of settlement can be estimated initially by an examination of the data in Table 1. The Table shows that 86.4% of the cases pretried were disposed

[28] It so happened that one cohort (sampling block) contained an uneven number of cases. Through random assignment, this case ended up in the test group.

[29] As of November 1, 1977 approximately 160 cases still remain to be disposed of by trial or settlement. We anticipate that the bulk of these cases will be disposed of by the end of December 1977.

[30] It is important to note with regard to the analysis presented below, that when we speak of settlement rates we are talking about the settlement rate of those cases taken into the experiment and used in the analysis (i.e., not attrited). These settlement rates do not represent the *overall settlement rates* of cases on the Toronto non-jury list. This latter figure will be higher because if a case was settled prior to the sampling point, it never became part of the experiment.

of by settlement, in contrast to a settlement rate of 68.8% for those cases not pretried. Expressed differently, the evidence indicates that pretrial conferences increased the rate of disposition by settlement by slightly more than 25%. This difference in settlement rates can be inferred to be the result of pretrial conferences because, given experimental control, the only alternative explanation would be chance. The statistical significance of the differences observed (i.e., p. $\leq$ .005) is such that these results could be obtained by chance in only five out of 1,000 random assignments of this number of cases to experimental or control groups.[31]

TABLE 1

Disposition by Settlement or Judgment for Cases With and Without Pretrial Conference Experience

		DISPOSITION: Judgment	Settlement	
EXPERIMENTAL SELECTION:	CONTROL (No Pretrial)	25 cases (31.2%)	55 cases (68.8%)	Total: 80 cases (100%)
	TEST (Pretrial) Conference)	11 cases (13.6%)	70 cases (86.4%)	81 cases (100%)
	Total:	36 cases	125 cases	161 cases

$X^2 = 7.19$
p. $\leq$ .005

At the 95% confidence level, a confidence interval of $\pm$ 10.2% can be placed around the 68.8% settlement rate for the control group. At the same confidence level the interval is $\pm$ 7.51% around the 86.6% settlement rate in the test group.

While the data in Table 1 indicate a marked difference in the proportion of cases disposed of by settlement rather than by judgment, this Table does not distinguish between cases settling prior to trial and cases settling in trial. Some cases settle only after the trial has commenced. Table 1 groups as "settled," cases settled before trial and cases settled during trial. Because this

[31] We refer to statistical significance as a means of indicating the confidence with which we can decide that differences between pretried and non-pretried cases are due to exposure to pretrial conferences, rather than to chance. (Because of the controlled nature of the experiment we can reject, *a priori*, alternative substantive hypotheses as an explanation of differences). "Statistical significance" is simply the phrase used to describe the probability that differences observed between (or within) random samples are a result of chance. By social science convention, when the probability that the observed difference could have resulted from chance is fewer than 5 times in 100 (p $\leq$ .05), the hypothesis that the differences *do* result from chance is rejected in favour of substantive explanations for the differences. When this probability is greater than 5 times in 100, the convention is to retain chance as a reasonable competing explanation for the observed differences.

latter group clearly involves the use of judge time in court, the impact of pretrial conferences on the productivity of the court as suggested by Table 1 will vary depending upon the balance between in trial as opposed to pretrial settlements. Table 2, therefore, specifies the effect of pretrial conferences on settlement before trial, during trial, or disposition by judgment.

TABLE 2

Disposition of Cases by Settlement Without Trial, Settlement During Trial, and Judgment After Trial

		DISPOSITION: Judgment after trial	Settlement during trial	Settlement without trial	
EXPERIMENTAL SELECTION:	CONTROL (No Pretrial)	25 cases (31.2%)	15 cases (18.8%)	40 cases (50%)	80 (100%
	TEST (Pretrial Conference)	11 cases (13.6%)	11 cases (13.6%)	59 cases (72.8%)	(100% 81
	Total:	36 cases	26 cases	99 cases	161

$X^2 = 9.7$
p. $\leq$ .007

The more detailed information in Table 2 confirms the suggestion in Table 1 that greater efficiency in the disposition of cases results from the use of pretrial conferences. It is apparent from the data in Table 2 that the rate of settlement *without trial* is substantially greater in the test group (72.8%) than in the control group (50%): the rate of disposition only after full trial proceedings and judgment is substantially lower in the test group (13.6%) than in the control group (18.8%). The statistical significance of the differences in these rates of disposition is marked (p. $\leq$ .007), indicating that such differences could be expected by chance, only 7 times in 1,000.

Therefore, the general conclusions indicated, are that pretrial conferences increase the number of settlements prior to trial by 48% and reduce the number of trials required to obtain a disposition (either by settlement or judgment) by 45%.

On the basis of these preliminary results, the impact of pretrial conferences is substantial. As well, this is surprising in light of the results from Rosenberg's study.

One important difference between the situation studied by Rosenberg and the one reported on here is that the New Jersey court had for some time previous to the Rosenberg experiment employed pretrial conferences, whereas in the Toronto non-jury list no such procedure had been used prior to the

start of our experiment.[32] That is, Rosenberg studied an established procedure, whereas we are studying a new procedure. Thus it is possible that the novelty of the pretrial conference, rather than its substance, played a role in producing the difference between test and control cases in our experiment and the extent of these differences may diminish over time as the Bar becomes more familiar with the procedure.[33] Further, the differences between test and control groups may be due simply to the effect of increased court interest in a case as perceived by counsel rather than the particular vehicle through which this interest was expressed (i.e., the pretrial conference).

It should be noted that the findings here may be influenced by a "Hawthorne Effect."[34] That is, the difference between test and control cases evident in Tables 1 and 2 may be due to attempts by the participants to modify their behaviour so as to fit in with their perception of the kinds of behaviour expected to result from the experiment. In other words, it is possible the participants were particularly interested in achieving the settlement of cases through pretrial because they knew an experiment was being conducted. It

[32] Other presently apparent differences between the two studies include the following: (2) nearly all of Rosenberg's cases were headed for jury trial, whereas ours are all non-jury cases; (3) Rosenberg's cases were all personal injury cases, while ours are mixed (but with an identified sample of personal injury cases); (4) the vast majority of Rosenberg's cases involved small claims, by comparison our cases involve relatively large claims (see note 42, *infra*); (5) whereas in Rosenberg's study a very large number of judges (some 49 different judges) conducted pretrials, for the cases reported on here in our study only 4 judges conducted the pretrials; Rosenberg's judges were (presumably) a cross-section of the bench, whereas ours were highly motivated, favoured pretrial and were selected (by the court) for this reason (see *infra*, note 35); (6) in our study a ground rule was that the pretrial judge was disqualified from trying the case, whereas this was not so in New Jersey; (7) in our study it was clearly understood by the pretrial judges (and probably by counsel) that the purpose of the conference was to try and achieve settlement; in New Jersey it appears that the pretrial judges may have pursued more diverse goals. In addition, there are significant methodological differences between the two studies; in New Jersey the "control" cases were allowed to opt for a pretrial conference (see note 5, *supra*), thereby reducing the degree of experimental control, whereas this was not permitted in our study; we have employed the devices of "pairing" and "attrition" which Rosenberg did not.

[33] We may be able to explore the plausibility of this "newness" effect as influencing the difference in settlement rates between test and control groups, by making use of the multiple or replicate sampling procedure employed in this study, whereby samples were drawn from segments of the list at different times during the progress of the study. We have examined the breakdown for Table 1 in the four independent samples drawn between April and August 1976. To date, there is no alternation of the difference in settlement rates as we move from the early to the later sample "cohorts" (i.e., the difference in settlement rates between test and control groups was consistent throughout the five month period). However, even if differences due to the novelty of the pretrial conference procedure were in effect they would be unlikely to wear off so early. Such a decrease in the differences between test and control groups may yet become apparent in the data for cases entering the experiment after the period he reported. However, of course, this effect may be present but not demonstrable at all during the course of the experiment.

[34] So called after a famous experiment at the Hawthorne plant of the Western Electric Company in the 1920's, in which it was found that the observed effects were caused by the fact of participation in an experiment and not by the variables being studied experimentally. See F. J. Roethlisberger, and W. J. Dickson, *Management and the Worker* (Cambridge: Harvard Univ. Press, 1939).

may be that this interest produced the substantial positive results we have reported, which might not have resulted from pretrial conferences in a non-experimental setting.[35]

There are two additional factors which may also effect settlement rates and which by chance may not be randomly distributed between the test and control groups. These are "payments into court"[36] and informal conferences conducted between the trial judge and counsel on the day of trial.[37] For this report, we have been unable to code and analyse information on these two variables and, therefore, we need to caution that when analysed, these factors may modify the preliminary conclusions drawn here on the impact of pretrial conferences.[38]

Some of the cases reported on here were subject, in addition to their differential exposure to pretrial, to another judicial intervention, a "trial blitz" procedure used by the court to increase judicial manpower and control

[35] In our view, the likelihood of their being a Hawthorne effect of the kind described in the text as a result of the behaviour of participating *counsel* is quite low. However, it seems to us that such an effect might well have resulted from the behaviour of the four participating judges, since they were all strongly committed to making the pretrial conference program work effectively, and they were chosen, in part, to conduct the pretrials for just such reasons.

Alternatively, it may be the case that these particular judges behaved in the experiment as they would in a non-experimental situation and that the relevant *caveat* is whether their commitment to the desirability of achieving settlement through pretrial conferences is representative of the commitment of the Court as a whole.

[36] Payment into court is a procedure by which a defendant may deposit monies with the court by way of an offer to settle the plaintiff's claim. This payment is not revealed to the trial judge until after he has given his decision on the merits of the case. (See the Ontario Rules of Practice, Rules 306 *et seq*). The important impact of this rule is that if a plaintiff refuses the monies paid into court and subsequently at trial he fails to recover more than the amount paid into court, he will normally be ordered to pay the defendant's costs (including lawyers' fees) from the date of the payment into court. This will, of course, include the very significant trial costs. When a realistic payment into court is made it obviously (because of these cost consequences) puts a great pressure on the plaintiff to settle. However, it should be noted that among the cases here analysed the proportion of cases in which a payment into court was made was not high.

[37] In the High Court of Ontario it is not uncommon for the trial judge to have conferences with counsel involved in the case either immediately prior to the commencement of the trial and/or during the course of the trial. At such conferences the possibility or desirability of settling the case may be discussed, in a variety of ways. Some judges may vigorously pursue settlement at such conferences, particularly where they take place prior to the commencement of the trial. Even judges who do not feel this is an appropriate role for the trial judge may, during the course of the trial, call counsel into their chambers and indicate to them their tentative assessment of the evidence to date, e.g., that to date the plaintiff's case is going very badly because his witnesses have not been believable.

[38] We anticipate no difficulty in eventually analysing the date with regard to payments into court. However, with regard to informal conferences between judge and counsel, a lack of accurate information may prohibit any reliable analysis of this factor.

All judges trying cases which were a part of the experiment (including both test and control cases) were provided with a form which required them to note whether, in respect of every case, they had one or more conferences with counsel concerning the case. At present we are uncertain as to reliability of the reporting in respect of this information.

over the list in order to reduce the existing backlog.[39] However, both test and control cases were equally subject to the "blitz" and there seems no reason why it would have had a different effect on one group rather than the other. Some of the cohorts not yet coded or analysed were not subject to the "blitz" experience and in the final report we hope to be able to analyse the difference between cases that were, and were not, subject to this blitz.

b. Differences in the Impact of Pretrial Conferences on Settlement Rate due to Subject Matter

Given the apparent impact of pretrial conferences on the settlement rate of all cases in the experiment, we now turn to a more detailed analysis of its impact on particular types of cases, i.e., on personal injury cases as compared with non personal injury cases.

Table 3 shows the differences in settlement rates for personal injury cases and non personal injury cases within the test and control groups. Each box indicates the percentage of cases of that kind which settled, e.g., of the personal injury cases that were in the control group, 83% settled, etc.

TABLE 3

Impact of Pretrial Conferences and Type of Litigation (Personal Injury and Non Personal Injury) on the Rate of Settlement

		EXPERIMENTAL SELECTION	
		CONTROL	TEST
TYPE OF LITIGATION	Personal Injury 47 Cases	83%	96%
	Other 114 Cases	63%	82%

Significance Tests for Differences

Source of Variation	F Ratio	Significance of F
(a) Experimental Selection	7.531	.007
(b) Type of Litigation	5.431	.020
(c) 2-Way Interaction	.187	.999

N.B. 1. The above significance tests indicate that: (a) there are only 7 chances in 1000 that the difference in the probability of settlement due to the presence or absence of pre-trial conference exposure could have occurred by chance; (b) there are only 2 chances in 100 that the difference in the probability of settlement associated with the different types of litigation could be expected by chance; (c) the evidence indicates there is no differential effect of pre-trial conferences in personal injury cases as opposed to non personal injury cases.
2. The settlements referred to in this table include both pre-trial and in-trial settlements.

[39] See *supra*, note 17.

Several observations can be made with respect to the data in Table 3. First, it is apparent that even without the pretrial conference there is a higher settlement rate among personal injury cases (83%) than among non personal injury cases (63%). Second, the settlement rate in both classes of cases is increased by a pretrial conference: from 83% to 96% in personal injury cases, while that of non personal injury cases is increased from 63% to 82%. Third, notwithstanding the very high rate of settlement resulting when personal injury cases are pretried (96%), there is no evidence of any differential affect of pretrial conferences in personal injury cases as opposed to non personal injury cases, that is, pretrial conferences are neither more, nor less, effective with respect to personal injury or non personal injury cases.[40]

As part of the experiment, these two basic subject matter classifications have been further broken down as follows: personal injury (motor vehicle and other); non personal injury (real estate, contract, and other). Because of the small number of cases being analysed as the basis of this interim report, no attempt has been made to measure the impact of pretrial conferences on these further subject matter breakdowns. However, in the final report, when a much larger volume of cases is available to be analysed, we hope to be able to measure the differences of settlement rates associated with these further sub-classifications.

c. Differences in the Impact of Pretrial Conferences on Settlement Rates due to Amount in Dispute

Although no differential impact of pretrial conference is apparent as between personal injury and non personal injury cases, is there such an impact as a function of other aspects of the cases set down for trial, i.e., as between cases involving different amounts in dispute?

Table 4 shows the difference in settlement rates for cases involving different amounts in dispute within the test and control groups. The first, and most surprising factor indicated by this Table is again unrelated to the impact of the pretrial conference. This is, the dramatically lower settlement rate, with or without pretrial intervention, for cases involving relatively small amounts in dispute, as compared to cases involving more substantial monetary claims.[41]

[40] This third point follows from the significance test for the two-way interaction reported in Table 3. The finding that pretrial conferences are no more, nor less, effective in personal injury as opposed to non-personal injury cases or (see note 42, *infra*) in cases of small or large amounts in dispute, have important implications with regard to how a court should use available pretrial judge time (at least where that is a limited resource). For example, the non-differential impact would suggest giving pretrial priority to those classes of cases which are likely to produce the longest trials (e.g., cases where large amounts are in dispute).

[41] One possible explanation for the phenomenon is that the $0 – $19,900 category of cases, includes cases in which no monetary relief was claimed, e.g., specific performance cases, and the possibility that these cases are more difficult to settle. However, to date there are too few cases involving equitable relief to determine whether or not they are more difficult to settle. See also the following note.

TABLE 4

Impact of Pretrial Conferences and the Amounts in Dispute on the Rate of Settlement of Cases

AMOUNT IN DISPUTE:	EXPERIMENTAL SELECTION: CONTROL	TEST
$ 0 – 19,900 (50 cases)	54%	71%
$20,000 – 50,000 (47 cases)	74%	96%
$50,000 + (64 cases)	77%	91%

Significance Test for Differences

Source of Variation	F Ration	Significance of F
(a) Experimental Selection	7.249	.008
(b) Size of Claims	5.235	.006
(c) 2-Way Interaction	.149	.999

N.B. 1. The above significance tests indicate that: (a) there are only 8 chances in 1,000 that the difference in the probability of settlement due to the presence or absence of pretrial conference exposure could have occurred by chance; (b) there are only 6 chances in 1,000 that the difference in the probability of settlement associated with the difference size of claims could be expected by chance; (c) the evidence indicates there is no differential effect of pretrial conferences in respect of cases involving different amounts in dispute.

2. The settlements referred to in this table include both pretrial and in-trial settlements.

A second observation is that the pretrial conference has a positive effect upon the settlement rate of cases in all three categories and the relative magnitude of the effect of pretrial conferences is more or less similar for cases involving small, medium and large amounts in dispute, i.e., pretrial conferences raise the absolute proportion of such cases settled rather than going to judgment by about 20%. The third conclusion, which follows from the second, is that the pretrial conference appears to have no differential impact on the settlement rate of cases involving different amounts in dispute.[42]

[42] The inferences drawn in the text from Table 4 may be to some extent an artifact of the categorization of the amounts in dispute and finer breakdowns of any of these categories might well reveal differential effects. For example, a distinction between cases involving less than $10.000 and cases involving larger amounts in dispute might reveal that for these smallest cases pretrial conferences have no effect. We are grateful to Professor Maurice Rosenberg for suggesting this point.

We should here elaborate another difference between Rosenberg's and our studies. The vast majority of cases in Rosenberg's study involved relatively small amounts, e.g., in 68% of his cases the recovery was less than $3,000, and in only 14% of his cases was the recovery in excess of $6,000. By contrast, our cases (because the lower, County Courts have jurisdiction over claims up to $7,500) will all, or nearly all, involve claims in excess of $7,500.

2. *Impact of Pretrial Conferences on Trial Time*

The number of cases actually going to trial in this preliminary sample is too small to allow a precise analysis of the impact on time spent in trial. However, we can give some indication of the likely conclusions by comparing the test and control groups, i.e., by computing the trial time for the 81 test cases and for the 80 control cases. Table 5 summarizes the distribution of time in trial for the test and control groups and gives the total time involved in trials for each of these two groups. The figures indicate an absolute reduction in total trial time in favour of the test (pretried) cases of 140.25 hours. The differences in trial times for cases on the two lists are not statistically significant, but approach significance ($p. \leq .09$). The reduction in total trial time is, of course, largely attributable to the substantially higher pretrial settlement rate of the test cases, i.e., many more control group cases (40) went to trial than did test group cases (22). Thus, this calculation of differences in total trial time, cannot be viewed as a benefit additional to that of an increased settlement rate for pretried cases: it is simply another way of measuring the overall impact of the pretrial conference procedure.

TABLE 5

TIME IN TRIAL

Hours	TEST GROUP # of cases	TEST GROUP % of cases	CONTROL GROUP # of cases	CONTROL GROUP % of cases
0	59	72.8%	39*	48.7%
.25 – 1	5	6.1%	10	12.5%
1.25 – 2	2	2.5%	3	3.7%
2.25 – 4	5	6.1%	6	7.4%
4.25 – 7	2	2.5%	6	7.4%
7.25 – 10	3	2.5%	6	7.4%
10.25 – 20	2	3.6%	7	8.4%
20. – 80	2	2.5%	3	3.6%
missing	1	1.2%		
	81	100%	80	100%
TOTAL TIME IN TRIAL	158 hours		298¼ hours	

* 0 trial time indicates cases settled before trial. This figure (39) is one less than the figure reported in Table 2 for the number of control cases settling without trial. The difference is accounted for by an infant settlement case (coded as a pretrial settlement) which took more than a quarter of an hour of trial time to obtain judicial approval. All infant settlements must be approved by the court.

Any reduction in average in-trial time would represent an additional benefit to that of an increased pretrial settlement rate.[43] Calculating the aver-

[43] A reduction in average in-trial time might be due to the effects of pretrial conferences in making for speedier in-trial settlements and/or in reducing the trial time to judgment. Given the small number of cases going to trial to date we have made no attempt in this Table to separate cases settled in trial from those going to judgment.

age in-trial time for all cases which went to trial, we find that the average in-trial time for test cases is 158/22 = 7.18 hours as compared to 298.25/40 = 7.46 for control cases. Consequently the differences in average trial time for test and control cases is not (for these data) substantial. Whether or not such differences become more substantial in the final analysis of all cases studied in this project, remains an important question.

3. *Overall Impact on Court Efficiency*

While the use of pretrial conferences may have other benefits (e.g., a reduction of the expense and delay experienced by individual litigants) an important question is the ability of the procedure to increase the efficiency of the operations of the court. In this context, the crucial question is whether pretrial conferences reduce the amount of judicial time spent in disposing of a given number of cases? Basically, this can be calculated by offsetting against any savings in trial time the judicial time expended in conducting pretrial conferences.

The aggregate trial time consumed by the test and control cases has already been set forth in Table 5. Table 6 shows the actual, direct, judicial time expended in conducting the pretrial conferences in the test cases analysed to date. (This information was derived from the questionnaire filled out by each judge presiding at the pretrial conference.) The Table shows the distribution of time spent by judges in preparing for pretrial conferences, and in presiding over the conference sessions and, in each case, the aggregate times involved.

TABLE 6

Time in Pretrial Conference

Time	Time for Judge Preparation # of Cases	Time in Conference # of Cases
0	4	0
0 – 5 Minutes	15	4
6 – 10	26	0
10 – 15	19	6
16 – 20	3	4
21 – 30	5	28
31 – 40	0	19
41 – 50	1	8
51 – 80	0	3
Missing (i.e. no information provided by judge)	8	9
	81	81
Total time involved	14.58 hours	38.03 hours
Adjusting for Missing data by adding average time	8x.20=1.60	9x.53=4.77
	16.18 hours	42.80 hours

How the total judicial time expended in conducting pretrial conferences should be calculated presents some difficulties. Obviously conducting pretrial

conferences (on a regular basis) consumes more judge time than can be measured simply by aggregating the time spent preparing for, and actually conducting, each pretrial conference held: additional judge "down-time" results from gaps in the pretrial conference schedule, and while assigned pretrial conferences, a judge is kept away (possibly for the whole day) from trial duty. On the other hand, the calculation of *trial time* used in this experiment includes only the actual in-court trial time expended on each case: it does not include the time spent by the judge in preparing for trial or in writing reasons for judgment, or any "down-time" in which the court recessed for chamber's conferences between counsel and the judge or adjourned for other purposes (e.g., for discussion between counsel). On balance (at least until we have more information on these matters) it seems reasonable to assume that there is an equivalent amount of "down-time"[44] expended in conducting both trials and pretrial conferences, and aggregate only the actual time spent by the judges in presiding over pretrial conferences.

Taking this approach, as Table 7 indicates, there is a difference of 97.45 hours (in favour of the pretried cases) in the aggregate judge time spent in disposing of the test and control cases. Based on these figures, universal pretrial conferences would result in a 33% reduction in judge time required to dispose of cases on this civil non-jury list.

TABLE 7

Impact of Pretrial Conferences On Judge Time Spent in Disposing of Cases

	Total in Trial Time		Total in P.T.C. Time		Total
Control (80 Cases)	298.25 hrs.	+	–	=	298.25 hours
Test (81 Cases)	158 hrs.	+	42.80 hrs.	=	200.80 hours
			Difference		97.45 hours

A further way of expressing this overall effect of the pretrial conference is to express the above conclusion in terms of "average judge time spent per disposition." For test cases this would be 200.8/81 = 2.48 hours, and for control cases would be 298.5/80 = 3.73 hours.

How would the saving in judge time, resulting from the use of pretrial conferences, translate into increased court productivity? That is, how would the reduction in judge time, using pretrial conferences, affect the absolute number of cases disposed of in a given number of judge hours? The increase

[44] If anything the "down-time" in trial is probably greater (and it can be hypothesized that pretrial conferences may decrease trial "down-time" for pretried cases going to trial). Moreover, the scheduling "holes" experienced in conducting pretrial conferences to date were to a large extent necessitated by the experiment itself: in non-experimental conditions more flexible and efficient scheduling may be possible.

can be estimated in the following way. Using the figures in Table 7, if all 161 cases had proceeded without a pretrial conference they would have consumed approximately 600 judge hours. Had all been pretried only 400 judge hours approximately would have been consumed. In the 200 hours thus saved the court could dispose of a further 80 cases (employing pretrial conferences), thereby increasing the number of cases disposed of (241 rather than 161) by 50%.

4. *Time to Settlement*

We have already seen that pretrial conferences increase the likelihood that a case will be disposed of by settlement rather than by judgment after trial. Do pretrial conferences also produce a further benefit to litigants in the form of a more rapid settlement?

Calculating the time which elapsed from the date which cases were set down for trial to the date on which settlements were reported (for all settled cases, including both pretrial and in-trial settlements), our preliminary evidence is that the average time to settlement for pretried cases was 353 days, as opposed to 404 days for cases that were not pretried. This difference is not significant ($p. \leq .09$) by conventional standards and the average reduction in time is not very marked. Moreover, the reliability of the data on which these average times are based is open to question. For test cases, settlement dates were reported by counsel, as requested at the pretrial conference, directly to our pretrial administration office and this contact allowed us to ascertain the actual date of settlement. Information as to the settlement of control cases was only received through the Trial List Office and on a less systematic basis. Since some of these cases only reported settlement when called for trial, their exact date of settlement was only roughly estimated, or the date of the report had to be treated as the date of settlement. Thus there is a possible bias in favour of over-estimating time to settlement in the control cases.

5. *Factors Influencing the Efficacy of the Pretrial Conference*

Having examined the impact of pretrial conferences on the timing and manner of disposition of cases on the civil non-jury list, let us now touch briefly on the internal dynamics of the pretrial conference which may explain the ways in which the conferences effect the case. We have not systematically observed pretrial conferences in progress, but have obtained information from the presiding judges (and will be obtaining further information from participating members of the Bar) as to the content, emphasis and utility of these procedures. For the moment, however, all we are in a position to evaluate are preliminary data on the differences in the results of pretrial conferences, depending upon the judge presiding and the level of preparation of participating counsel.

a. Presiding Judge

Four judges presided over the pretrial conferences in the 81 test cases reported here. One might suppose that these and other judges would vary in their ability to stimulate settlement through pretrial conferences. The only indirect evidence we have of the likelihood of such variation is the rate of

settlement for the cases pretried by each judge. As it happens, there *was* a variation in the settlement rate of the groups of cases pretried by each judge. One hundred percent of the cases pretried by one judge were disposed of by settlement; another judge pretried a group of cases of which 90% settled; a third judge was involved in pretrials in which 83% of the cases settled; and a fourth pretried cases of which only 72% settled. However, this last judge requested that only non personal injury cases be assigned to him and, as indicated already in this report, those cases have a significantly lower conditional probability of settlement. Moreover, this self-selection of cases by the fourth judge resulted in another judge receiving an increased proportion of personal injury cases for pretrial. In any event, the number of cases that each judge dealt with was never more than 24 and proportional settlement rates for such small numbers must be treated with caution. Moreover, to properly isolate the impact of the presiding judge would require control over other factors affecting rates of settlement, e.g., the amount in dispute and the type of litigation.

Therefore, whether the identity or ability of the presiding judge is a factor influencing the efficacy of the pretrial conference is a question that cannot be resolved at this time. We hope that the larger sample to be analysed in the final report will permit an analysis of this question in greater depth.

b. Preparation of Counsel

A second characteristic of the pretrial conferences that may be expected to affect the impact of the procedure on settlement rates is the preparation of participating counsel. We obtained from the presiding judges their assessment of the quality of preparation of counsel. The first point to emphasize is the generally high quality of preparation. In 75% of the pretrial conferences, the judges were satisfied that both counsel for plaintiff and defendant were well prepared. In only 11% of the conferences were there any assessments that both counsel were not well prepared. This said, it is also apparent that the settlement rates following conferences in which all counsel were well prepared are almost identical to those for the conferences at which no counsel were well prepared, or to those for conferences in which only the counsel for the plaintiff was well prepared. The only deviation from this pattern is a significantly lower settlement rate for those cases at which counsel for the plaintiff was not well prepared and counsel for the defendant was well prepared.

However, considering the very small number of cases in which any counsel was unprepared, whether or not differences in the preparation of counsel affect the outcomes of pretrial conferences must await analysis of the complete set of data from this experiment.

6. *Impact of Pretrial Conferences on the Outcome of Cases*

The final issue we can discuss on the basis of the data available so far, relates to the question of whether pretrial conferences affect the outcome of the litigation. This question has two aspects. First, do pretrial conferences affect "who wins", i.e., do settlements or judgments tend to go more often in

favour of defendants or plaintiffs in pretried cases as opposed to non-pretried cases? Second, do pretrial conferences affect the amount of recovery, i.e., do plaintiffs recover more (or less) from settlements or judgments in pretried cases as opposed to non-pretried cases?[45]

In connection with the first question of "who wins" in settlements or judgments as a result of pretrial conferences our data indicate an unexpected result. Whereas Rosenberg had reported no difference in the recovery rate for plaintiffs in pretried and non-pretried cases,[46] the analysis of our preliminary data indicates that plaintiffs recover more frequently after pretrial conferences than they did without pretrial conferences. That is, in 95% of our pretried cases the plaintiff recovered something by means of either settlement or judgment, whereas in non-pretried cases plaintiffs recovered something only 80% of the time.[47] The data as to "who wins" *in settlements* are particularly interesting. In pretried cases that were disposed of by settlement the plaintiff always won something. But in those non-pretried cases disposed of by settlement, the plaintiff won something only 85% of the time.[48]

We will not attempt in this interim report to speculate as to how and why the pretrial conference should produce this differential impact in terms of who wins. That is not to say that there are no tempting, "obvious" explanations, e.g., the difference between "who wins" in settlement resulting after pretrial conference (plaintiffs "win" in 100% of cases) in contrast to settlement without a pretrial conference (in which plaintiffs "win" in only 85% of the cases) suggest that at the pretrial conference judges tend to recommend that the defendant pay something to plaintiffs with very tenuous cases in order to settle the case. Assuming a similar pattern emerges from the final data the impact of the pretrial conference on "who wins" will present a major issue requiring further analysis in the final report.

Turning to the question of whether pretrial conferences affect the amount recovered, the preliminary results show that the average recovery (expressed as a proportion of the original claims) received in settlement or judgment is 31% for the cases that were exposed to pretrial conferences and 24% for

[45] Another question relevant to the impact of pretrial conferences is whether or not pretrial conferences improve the "quality" of trials. This is a question that Rosenberg investigated in his New Jersey experiment (and he reported that there was such a positive effect: see Rosenberg, *supra*, note 4 at page 29 *et seq*. In our view the difficulty of establishing criteria by which the quality of the trial should be assessed and the further difficulty of getting reliable data indicating the perceptions of judges and counsel as to the extent to which these criteria have or have not been met in any case, led us to the decision not to pursue this issue. Moreover, improving the quality of trials has not been considered a major objective of pretrial conferences by members of either the bench or bar in Ontario, for whom the issues of cost, delay and improved court efficiency are paramount.

[46] See Rosenberg, *supra*, note 4 at 60.

[47] $X^2 = 8.229$; $.01 > p < .001$ indicating that this could have occurred by chance between 1 time in 100 and 1 time in 1,000. That is, the statistical significance is high.

[48] A similar breakdown as to "who wins" in cases terminated by judgment (with or without pretrial) is not reported here because, owing to the small number of cases going to judgment, the data could not approach statistical significance.

cases not so exposed.[49] This difference is not significant ($p. \leq .25$) by normal scientific criteria, but if a similar difference is present in our final data the statistical significance will likely increase as a result of the larger number of cases involved.[50]

Hence, it is worth noting that there is an indication that pretrial conferences may favour (either through settlement or judgment) plaintiffs. If such a substantive bias is established, particularly if it is sufficiently marked in degree, it may raise questions as to the viability and justifiability of the pretrial conference procedure.

D. CONCLUSION

The preliminary results discussed in this interim report suggest that pretrial conferences in Ontario have dramatically more impact than would have been predicted from interpolations based on past research in other jurisdictions.

Despite the caveats expressed in this report and the marginal statistical significance of the results dealing with time in trial, it is reasonable to expect that the analysis of data relating to the balance of the cases in the experiment, based on a larger sample, will confirm the trends indicated in these preliminary results. Such a prediction is reasonable given that the data analysed here are a true random sample, albeit small. In some instances (e.g., the settlement rate data) the significance levels are already very high. Where the significance levels are not high (e.g., the data on time in trial) they approach significance and are reasonably high given the small number of cases that actually go to trial. It seems probable that the statistical significance of all these results will increase when the analysis is based upon a larger sample.

We have in this article reported the preliminary results of *quantitative* research into the impact of pretrial conferences. This analysis indicates what happens when pretrial conferences are employed, but it tells us nothing about the mechanisms by which pretrial conferences produce these impacts. Obviously how and why pretrial conferences have these impacts are interesting questions, the answers to which may have important implications in terms of both the likely long-term effect of pretrial conferences and their desirability in terms of social policy.

[49] Rosenberg, *supra* note 4 at 61 *et seq*, reported that plaintiffs recovered appreciably more in pretried cases than in non-pretried cases. He reported they recovered 20-30% more measured by the average or medium recovery, not by comparison (as in our figures) of the amount recovered as a percentage of the amount claimed.

[50] It is to be noted that the data on amounts recovered mentioned in the text are for all dispositions, whether by settlement or judgment. Differences in percentage recovery may vary as between cases terminated by judgment or settlement: we have been unable to breakdown our present data in this way. It may be particularly interesting to see whether a significant proportion of pretried cases settle for nominal monetary awards, i.e., whether the difference between "wins" at settlements (100% for plaintiffs in pretried cases, as opposed to 85% recovery for the plaintiffs in non-pretried cases) is to be explained in part or in total by the fact that while plaintiffs win at settlement after pretrial, often all that is involved is a nominal recovery.

In our final report we hope to analyse not only the quantitative impact of pretrial conferences based on the more extensive set of cases to be analysed, but also to explore some of the qualitative aspects of the implementation of a pretrial conference procedure.

ADDENDUM

Since this article was submitted for publication the Ontario Rules Committee has passed a rule, effective March 1, 1978, providing for the holding of pretrial conferences. The rule provides as follows:

Pre-Trial Conference

244(1) When an action, cause or matter has been set down for trial or hearing, the Court, upon the application of a party or upon its own motion, may, in its discretion, direct the solicitors for the parties or any party not represented by solicitor, to appear before it, in the case of the solicitors, with or without the parties, for a conference to consider:

(*a*) the simplification of the issues;

(*b*) the possibility of obtaining admissions which might facilitate the trial or hearing;

(*c*) the quantum of damages;

(*d*) estimating the duration of the trial;

(*e*) fixing a date for the trial or hearing;

(*f*) the advisability of directing a reference;

or

(*g*) any other matters that may aid in the disposition of the action, cause or matter or the attainment of justice.

(2) Following the conference, the Court may make an order reciting the results of the conference and giving such directions as the Court considers necessary or advisable. If such an order is made, it shall thenceforth control the course of action, cause or matter, provided that the judge at the trial or hearing may modify the order as he deems just.

(3) The judge who conducts a pre-trial conference in any action, cause or matter shall be deemed not to be seized of such action, cause or matter and shall not thereafter try or hear such action, cause or matter.

(4) All documents which may be of assistance in achieving the purposes of the pre-trial conference, such as medical reports and reports of experts, shall be made available to the judge presiding at the pre-trial conference.

(5) The costs of the pre-trial conference are to be in the discretion of the judge presiding at the pre-trial conference.

(6) Nothing in this rule shall prevent a judge before whom a case has been called for trial from holding such a conference either before or during the trial without disqualifying himself from trying the action.

It is worth noting that this new rule makes no express reference to the obtaining of a settlement as one of the purposes of the pretrial conference.