

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 or

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 better 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 obligations, 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 procedures 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 of

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 opinion 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 annually⁴⁷ 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 Ontario⁵¹ 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

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 1977⁵⁸ 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 acceptable 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 correspondence, 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 visibility 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, visibility 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

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.

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

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

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

A 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.
