

CIVIL PRETRIAL CONFERENCE PRIVILEGE: "A COSMIC BLACK HOLE"?¹

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The civil pretrial conference is designed to provide an opportunity for the court to supervise the progress of an action to trial, prepare it for a more efficient trial, and encourage settlement. For the potential of the pretrial to be realized the participants must be free to engage in frank discussions secure in the knowledge that their comments will remain privileged unless otherwise intended. This need conflicts with the court's basic function of ascertaining the truth. Only one-half of the civil jurisdictions in Canada have addressed the issue of civil pretrial conference privilege in rules of court. Statute and common law supplement the protection offered by certain rules. However the protection is not ideal. In some provinces the protection is insufficient while in others it is too extensive. An appropriate balance must be found. The draft rule presented will aid in this quest.

La conférence préparatoire à un procès civil a pour but de permettre au tribunal de surveiller le déroulement de l'action jusqu'au procès, de favoriser un règlement ou de faciliter le procès. Pour rendre cette conférence aussi fructueuse que possible il faut que les participants soient libres d'avoir des discussions franches sans crainte de voir leurs commentaires divulgués à moins qu'ils n'en décident autrement. Cette nécessité est incompatible avec la fonction fondamentale du tribunal qui est d'établir la vérité. Seulement la moitié des systèmes juridiques canadiens, dans les règles de procédure de la cour, traitent du droit au secret lors de la conférence préparatoire à un procès civil. Lois et common law complètent la protection donnée par certaines règles, mais la protection n'est pas parfaite. Dans certaines provinces la protection est insuffisante alors que dans d'autres elle est trop importante. Il faut donc trouver un juste milieu. L'ébauche de la règle présentée dans cet article devrait aider à la recherche d'une solution.

Introduction

The civil pretrial conference is relatively new to Canada. The various civil jurisdictions in Canada began to adopt this procedural tool only over the past three decades.² Even today the extent of its use varies from jurisdiction to jurisdiction.³

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¹ McLeod J. in *Penteluk Estate v. Penteluk* (1990), 82 Sask. R. 184, at p. 187 (Sask. Q.B.), aff'd (1990), 85 Sask. R. 302 (Sask. C.A.), hereafter referred to as *Penteluk*.

² J.A. Epp, *Saskatchewan Pre-Trials: An Empirical Record and Proposed Amendments* (1991), 55 Sask. L. Rev. 43, at p. 48.

³ In Saskatchewan the vast majority of cases will be pretried, see Epp, *ibid.*, at p. 54; all cases in Manitoba will be pretried unless a judge orders otherwise, see L. Fainstein *et al.*, *Manitoba Queen's Bench Act and Rules Annotated* (1989), p. 207, r. 48.01(3); Quebec

The traditional pretrial, which is usually held as the last step prior to trial, has two main purposes. It provides an opportunity for the parties to meet to discuss settlement⁴ and if a settlement is not reached it provides the court with an opportunity to prepare the case for an efficient trial by considering the completeness of the pleadings, dealing with any outstanding motions, seeking admissions, and narrowing issues. An alternate use of this procedural tool is case management, wherein the judiciary takes an active role in guiding the case from commencement to completion.⁵

In this article I will address the question of the privilege of communications made by participants at pretrial conferences. At the conference the parties are encouraged by the court to engage in full and frank discussions of the case, thereby allowing the conference to realize its full potential.⁶ The full consequences of this only come to light when one acknowledges that the trial court is charged with the responsibility of ascertaining the truth. To fulfill this responsibility the court needs to hear all relevant evidence. For the most part the law of evidence facilitates this desire, excepting only certain communications for policy reasons.⁷ Should any pretrial communication be kept from the trier of fact or other tribunals? Should all communication between the participants of a pretrial conference be privileged and fall into, as McLeod J. describes it, the "judicial equivalent of a cosmic black hole"?⁸

In this context privilege is an exclusionary rule of evidence. It excludes relevant, probative and trustworthy evidence which would aid in the search for

pretrial cases that are expected to last more than two days unless the pretrial briefs (which summarize the admitted facts and issues) are clear, see L.A. Poitras, *Fine-Tuning a Traditional Approach: The Quebec Experience*, in *Annual Meeting Papers of the Canadian Bar Association* 1989, p. C.2.05; British Columbia has an additional feature, requiring judicial case management in cases projected to require ten or more trial days, see J. Bouck *et al.*, *British Columbia Annual Practice* 1992, p. 200, r. 39(15).

⁴ As McLeod J. comments in *Penteluk*, *supra*, footnote 1, at p. 186 (Q.B.):

The pretrial conference aims to have the parties explore the case in an atmosphere of disciplined freedom. There are no rules of evidence. The parties are free to express themselves or to offer or pursue various settlement alternatives, often with greater flexibility or options available than might be available at trial.

⁵ R.E. Holland, *Pre-Trial Conferences in Canada* (1986-87), 7 *Adv. Q.* 416, at p. 429; H.A.L. Semenuk and N.H. Smith, *American and Canadian Practice and Procedure in Medical Malpractice Litigation - A Plaintiff's Perspective* (1991), 70 *Can. Bar Rev.* 557, at p. 582; G.D. Watson and M. McGowan, *Guide to Case Management and Class Proceedings* (1993).

⁶ *Penteluk*, *supra*, footnote 1, at p. 186 (Q.B.). See also *Williamson v. Joseph Baruch Construction Ltd.* (1979), 12 C.P.C. 122, at p. 123 (Ont. H.C.); *Sandboe v. Coseka Resources Ltd.* (1988), 64 *Alta. L.R.* (2d) 172, at p. 174 (Alta. C.A.).

⁷ The policy reasons which justify withholding evidence from the court vary in the extreme. The complex nature of law gave life to the privilege surrounding the retention and instruction of counsel; see *Dickson J. in Solosky v. R.*, [1980] 1 S.C.R. 821, at pp. 834-835, (1979), 105 D.L.R. (3d) 745, at p. 756, while reasons stemming from a belief in the oneness of matrimony led legislators and courts to recognize the sanctity of communications within marriage; see *Canada Evidence Act*, R.S.C. 1985, c. C-15, s. 4(3); *Rumping v. D.P.P.*, [1962] Cr. App. Rep. 398, at p. 400, [1962] 3 All E.R. 256, at p. 258 (H.L.).

⁸ *Penteluk*, *supra*, footnote 1, at p. 187 (Q.B.).

truth.⁹ The law of evidence recognizes a limited number of categories of privileges.¹⁰ Further after the Supreme Court of Canada's decision in *Slavutych v. Baker*¹¹ it now may be argued that the equitable rules of breach of confidence have their place in any discussion of privilege and the law of evidence.

The decisions of *Penteluk Estate v. Penteluk*¹² and *Condessa 2 Holdings Ltd. v. Brown's Plymouth Chrysler Ltd.*¹³ provide a good backdrop for a discussion of the privilege of pretrial communications, while the Supreme Court of Canada decision in *R. v. Gruenke*¹⁴ provides guidance on many important aspects of the discussion.

Briefly, in *Penteluk* the estate wanted to prove that a settlement was reached at the pretrial. However, it was not allowed to use any of the pretrial communications as evidence and the attempt failed. A trial was held and an appeal heard and eventually the defendant unsuccessfully sought leave to appeal to the Supreme Court of Canada on the quantum issue.¹⁵ In *Condessa 2*, the plaintiff wanted to prove that a settlement of some or all of the issues had been concluded at the pretrial but failed on reasoning in keeping with that in *Penteluk*.

In addition to actual settlement discussions there are many other types of communications that take place at a pretrial. These communications will be identified and addressed in order to define the scope of the problem at hand.

I then propose to examine the pretrial rules in Canada's thirteen civil jurisdictions to determine if any of them provide a privilege for pretrial communications. Of those which have relevant provisions I will examine their subrule to determine how it might handle the scenarios raised in *Penteluk* and *Condessa 2* as well as the issues raised by the other identified categories of pretrial communications.

As will be seen, not all pretrial rules address the issue of privilege. Therefore it will become necessary to examine statute and common law to determine if pretrial communication privilege is handled in a satisfactory manner. The examination of these various sources will reveal alternative methods of addressing the various aspects of the issue of the privilege of pretrial communications. I will suggest that certain aspects of these alternate approaches should be combined to form an appropriate statutory provision to

⁹ John Sopinka *et al.*, *The Law of Evidence in Canada* (1992), p. 623.

¹⁰ See Sopinka, *ibid.*, pp. 734 (self incrimination), 793 (affairs of state and public interest), 719 ("without prejudice" communications), 626 (various types of confidential communications based on the category of relationship).

¹¹ [1976] 1 S.C.R. 254, (1975), 55 D.L.R. (3d) 224, [1975] 4 W.W.R. 620.

¹² *Supra*, footnote 1.

¹³ (1992), 102 Sask. R. 78 (Sask. Q.B.), hereafter referred to as *Condessa 2*.

¹⁴ [1991] 3 S.C.C. 263, at pp. 286 *et seq.*, [1991] 6 W.W.R. 673, at pp. 686 *et seq.* (*sub nom. R. v. Fosty*), (1991), 67 C.C.C. (3d) 289, at pp. 303 *et seq.*

¹⁵ *Penteluk v. Penteluk Estate* (1991), 95 Sask. R. 128 (Sask. Q.B.), (1992), 100 Sask. R. 178 (Sask. C.A.); S.C.C. (Sask.) (22955), application for leave dismissed (1992), 105 Sask. R. 79 (S.C.C.).

govern the exclusion of certain pretrial communications. To aid in the process of the evolution of the pretrial rules a draft rule will be presented.

I. *The Backdrop*

In *Penteluk* the executor brought an application for judgment based on an alleged agreement arising out of a settlement pretrial conference held pursuant to the 1986 version of Saskatchewan's Queen's Bench Rules 191 and 192¹⁶ as altered by Practice Directive No. 1.¹⁷ At the conclusion of the pretrial the pretrial judge left a memorandum which noted: "[s]ettlement discussed at length during [the] pre-trial conference and [the offer] will be accepted or rejected on May 26/89 at 11:00 a.m."; and: "[p]re-trial conference [is] adjourned to May 26/89 at 11:00 a.m."¹⁸ Later the judge added to the memorandum the note: "[s]ettled - consent judgment to be filed".¹⁹ The parties could not agree on the terms of the consent order, specifically payment amounts and dates. The executor, believing that an agreement had been reached, sought judgment.

In his decision McLeod J. referred to Practice Directive No. 1 which, in part, states: "[n]ote: [n]othing said or disclosed at a pre-trial conference may be quoted in later proceedings".²⁰ He conceded that the Directive did not have the authority of a rule of court but he found that "it represents nonetheless the expectations of the parties who participate in a pretrial conference".²¹ He concluded that "the pretrial conference is the judicial equivalent of a cosmic black hole from which no light is allowed to escape".²² That being the case, he decided that he was not able to hear evidence of the events at the pretrial either from the pretrial judge or the participants. On the basis of the limited evidence before him he concluded that the parties had simply agreed to agree on a consent order, which was something that the court could not enforce.

The decision in *Condessa 2* also arose from a pretrial conference. In that case the plaintiff attempted to subpoena the judge who presided over the pretrial conference to establish that a settlement agreement had been reached, or alternatively that there was an agreement between the parties on all but one issue. The plaintiff argued that the parties met as a group only briefly. The majority of the discussions were completed as the individual parties met with the judge.

Scheibel J. stated that "[t]he very nature of the pretrial settlement [conference] requires fair and frank exchange between the parties including certain compromises which the parties would not be prepared to make unless they felt

¹⁶ S. Gaz. 1986.I.2507.

¹⁷ Pre-trial Conference Practice Directive (Civil) (1989). This directive was redrafted and combined into the current pretrial rules; see S. Gaz. 1991.I.111, r. 191 and 192, or N.R. McKeague and W.M.B. Voroney, *The Queen's Bench Rules of Saskatchewan: Annotated* (1985), vol. 1, pp. 207-212.

¹⁸ *Penteluk Estate v. Penteluk*, *supra*, footnote 1, at p. 185 (Q.B.).

¹⁹ *Ibid.*

²⁰ *Ibid.*, at p. 186, quoting Practice Directive, *supra*, footnote 17.

²¹ *Ibid.*

²² *Ibid.*, at p. 187.

secure in the position that in the event of a trial, they could revert to their original stance".²³ He went on to emphasize that in accordance with Practice Directive No. 1, "[t]he parties are given the assurance at the outset of the pre-trial conference that its nature is confidential and the statements made during the pre-trial conference will not be used in subsequent proceedings".²⁴ After determining that the pretrial judge was not a compellable witness the court noted that even if the judge was compellable his testimony would be excluded. To allow such evidence would have the effect of the courts misleading the litigants into believing the conference was confidential and privileged when it was not.²⁵

In addition to the issues raised by *Penteluk* and *Condessa 2* many other questions regarding pretrial communications arise when an inventory of the types of communications that occur at a pretrial is completed.²⁶ For the purposes of the discussion at hand the following main categories of communications can be identified:

(1) communications and agreements made by the parties which address the conduct and timing of pretrial steps and the trial itself. The parties acknowledge that they are bound by their agreements for the purposes of the action though the full and frank discussions leading up to the agreement are in practice usually regarded as confidential;

(2) communications which are relevant to the issues at hand, given conditionally or unconditionally, that are either self-incriminating or against interest. In practice, these communications are regarded as confidential;

(3) communications that address the settlement of any or all of the outstanding issues. In practice these communications are regarded as confidential;

(4) communications that are not relevant to the issues at hand including those that are against interest or self-incriminating.²⁷ Unless the communicator specifically states that he is communicating in confidence arguably there is no presumption of confidence;

(5) communications which communicate that an agreement has been reached and that one or all issues are settled. These communications are not confidential;²⁸

(6) communications from a pretrial judge. These may range from simple words of encouragement to opinions on the fair disposition of the case through to high pressure lectures and threats. The latter communications may be very important in determining whether there truly was an agreement to settle. In practice these communications are regarded as confidential.

²³ *Condessa 2*, *supra*, footnote 13, at p. 79.

²⁴ *Ibid.*

²⁵ *Ibid.*, at p. 80.

²⁶ Of course only a few can be handled within the confines of this article.

²⁷ For example, in a pretrial conference arising out of a fatal accident the defendant, in response to an assertion that he does not appear upset by the plaintiff's (who is a policewoman) husband's death says: "It doesn't bother me; I have killed nicer guys with my bare hands. I love to observe death".

²⁸ *Sopinka, op. cit.*, footnote 9, p. 730.

In some exceptional circumstances a person who receives information during a pretrial conference may be under an obligation to disclose. Thus, information about child abuse may have to be disclosed to an appropriate authority.²⁹ Subject however to any specific statutory obligations of this nature, the general question is which pretrial conference communications are privileged, or in other words which communications, though relevant and probative, may not be considered in evidence by the trial judge or another tribunal.

II. Rules and Cases Addressing the Issue of Pretrial Privilege

Each of Canada's thirteen civil jurisdictions has rules dealing with pretrial conferences.³⁰ However, in only one-half have the rules addressed in some fashion the issue of the privilege of pretrial communications. These jurisdictions are Manitoba, Ontario, Prince Edward Island, British Columbia, Yukon and Saskatchewan.³¹ Of these, Saskatchewan's Queen's Bench Rules³² offer the most protection from disclosure for pretrial communications while the rules common to British Columbia³³ and Yukon³⁴ offer the least. The rules of Ontario³⁵ and Prince Edward Island³⁶ are more akin to the provisions in Saskatchewan, while the Manitoba Rule³⁷ and the case law in Nova Scotia,³⁸ though taking a different approach, do offer some protection.

An examination of Saskatchewan Rule 191 is an appropriate place to begin. The applicable subrules are 191(14) and (15) which provide:

- (14) No communication shall be made to the trial judge as to the proceedings at the pre-trial except as disclosed in the pre-trial conference report form.

²⁹ See, for example, Child and Family Service Act, R.S.O. 1990, c. 11, s. 72; The Child and Family Services Act, S.S. 1989-90, c. C-7.2, s. 12.

³⁰ Alberta Rules of Court, Alberta Reg. 390/68, as amended Reg. 124/73, r. 219; British Columbia, Bouck, *op. cit.*, footnote 3, p. 180, r. 35; Manitoba, Fainstein, *op. cit.*, footnote 3, p. 215, r. 50; Rules of Court of New Brunswick, Judicature Act, R.S.N.B. 1973, c. J-2, Reg. 82/73, r. 50; Newfoundland, Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sch. D., r. 39; Rules of Court of the Supreme Court of the Northwest Territories, Can. Gaz. 1979 I.3760 (SOR/79-768), November 14, 1979; D.S. Ehrlich, Nova Scotia Annotated Rules of Practice (1984), p. 122, r. 26; G.D. Watson and M. McGowan, Ontario Supreme and District Court Practice 1990 (1989), p. 564, r. 50; Rules of Court (P.E.I.), Royal Gaz. (P.E.I.), vol. CXVI, No. 29, Part I, July 21, 1990, p. 29, r. 50; Rules of Practice of the Supreme Court of Quebec in Civil Matters, Official Gaz. Que. vol. 120, No. 17, Part 2, April 27, 1988, p. 1941, r. 18; Saskatchewan: McKeague and Voroney, *op. cit.*, footnote 17; Judicature Act (Yukon), R.S.Y. 1986, c. 96, s. 37 (adopts the Rules of the British Columbia Supreme Court); D. Sguyias, Federal Court Practice 1988 (1987), p. 493, r. 491.

³¹ *Ibid.*

³² McKeague and Voroney, *op. cit.*, footnote 17.

³³ Bouck, *op. cit.*, footnote 3.

³⁴ *Ibid.*

³⁵ Watson and McGowan, *op. cit.*, footnote 30.

³⁶ *Supra*, footnote 30.

³⁷ Fainstein, *op. cit.*, footnote 3.

³⁸ *Begg v. East Hants (Municipality) and Nova Scotia (Director of Assessment)* (1986), 74 N.S.R. (2d) 231, 180 A.P.R. 231 (N.S.T.D.), rev'd on other grounds (1986), 75 N.S.R. (2d) 431, 186 A.P.R. 431, 33 D.L.R. (4th) 239 (N.S. App. Div.), hereafter referred

- (15) All communications in the course of the pre-trial conference are privileged and shall not be admitted as evidence in any proceeding.

These two subrules provide broad protection for pretrial conference communications. Two of the motivating factors for this may have been the fact that litigants are required to attend pretrial conferences,³⁹ and that the judge may request the attendance of others whose assistance may be required.⁴⁰

Whatever the reasons, the subrules operate broadly. The choice of the term "communications" is significant. According to Sopinka⁴¹ "[c]ommunication is the act of imparting information and thus logically should include all conduct, oral, written or otherwise which is intended to convey a thought or message ...". By using the word "communication" rather than the word "statement" for example, the drafters expanded the scope of the protection not only to oral or written statements but to notes and gestures or evidence of emotion.

The scope of the Rule's protection is further enhanced by the choice of the phrase "in any proceeding". The result is that not only are pretrial communications beyond consideration at trial but they are barred from consideration at any judicial or quasi-judicial proceeding.

The decision in *Penteluk*⁴² confirms that the time frame of protection extends through the period where an agreement may have been reached. Arguably the protection extends to all written submissions filed in compliance with the Rule⁴³ prior to the conference, as subrule 15 uses the phrase "in the course of pre-trial".

Because a provincial statute delegated the rule making power to the Rules Committee⁴⁴ the subrule effectively creates a statutory privilege. As there is no provision for the unilateral or joint waiver of the privilege it cannot be removed,⁴⁵ unless another statute asserts paramountcy.⁴⁶

The one exception to the privilege is found in the final words of subrule 14. The privilege does not extend to the pretrial report form. This may include any remarks made by litigants, counsel or the pretrial judge. It appears that if a settlement of one or all of the issues resulted from a misrepresentation by a party or duress from the judge, with only the settlement noted on the report form, the form could be used to prove and enforce the agreement while the communications in the conference could not be used to prove the defence.

to as *Begg v. East Hants*. This case is not a strong precedent given that the comment are *obiter dicta* and on a procedural matter. The relevant Nova Scotia rule does not address privilege: Ehrlich, *op. cit.*, footnote 30, p. 122, r. 26.

³⁹ McKeague and Voroney, *op. cit.*, footnote 17, r. 191(6).

⁴⁰ *Ibid.*, r. 191(12).

⁴¹ *Op. cit.*, footnote 9, p. 679, commenting on s. 4(3) of the Canada Evidence Act, R.S.C. 1985, c. C-5.

⁴² *Supra*, footnote 1, at p. 187 (Q.B.).

⁴³ McKeague and Voroney, *op. cit.*, footnote 17, r. 191(3).

⁴⁴ Saskatchewan Evidence Act, R.S.S. 1978, c. S-16, s. 55.

⁴⁵ *Piercy v. Piercy* (1990), 29 R.F.L. (3d) 18, at p. 20 (B.C.S.C.).

⁴⁶ See *supra*, footnote 29.

If these subrules and the decisions in *Penteluk*⁴⁷ and *Condessa* 2⁴⁸ are applied to the categories of communication set out earlier⁴⁹ all that is said or done at a pretrial is lost in outer space. Settlement communications cannot be used to prove a settlement agreement.⁵⁰ The absurd result is that the parties must formally end the conference and then proclaim or re-proclaim the agreement earlier made if they wish it to be confidential (therefore not recorded in the pretrial report form) yet enforceable.

The pretrial rules of Ontario⁵¹ and Prince Edward Island⁵² are very similar and reference will only be made to Ontario subrules 50.02 and 50.03, which provide:

50.02(1) At the conclusion of the conference,

(a) counsel may sign a memorandum setting out the results of the conference; and
(b) where the conference is conducted by a judge, the judge may make such order as he or she considers necessary or advisable with respect to the conduct of the proceedings,

and the memorandum or order binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.

50.03 No communication shall be made to the trial judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in the memorandum or order under Rule 50.02.

The protection provided under this rule is narrower than Saskatchewan Rule 191. The term "statement" is used rather than "communication". Thus, the subrule would not protect gestures or other forms of communications that could not be categorized as statements.⁵³ Further if as a result of undue influence by a judge or a misrepresentation by a party in a pretrial conference an agreement was reached and noted in the closing memorandum it appears that evidence of non-statement communications could be used to resist an attempt to enforce the alleged agreement. The use of the phrase "hearing of the proceedings" restricts the protection to statements made during the pretrial which occurred in preparation for the case before the court. Arguably the protection envisaged begins only when the conference is called to order, thus defining a narrower window of time. Though the pretrial statements may be confidential the protection from strangers seen in Saskatchewan Rule 191 is absent. Strangers, it would appear, could seek disclosure and tender these communications in evidence at other proceedings.⁵⁴

⁴⁷ *Supra*, footnote 1.

⁴⁸ *Supra*, footnote 13.

⁴⁹ *Supra*, p. 341.

⁵⁰ *Penteluk*, *supra*, footnote 1, at p. 187 (Q.B.).

⁵¹ Watson and McGowan, *op. cit.*, footnote 30.

⁵² *Supra*, footnote 30.

⁵³ For example, in response to the wife's question to her estranged husband: "Did you kill our son's goldfish in front of him?" he nods affirmatively and cries with remorse. See generally Sopinka, *op. cit.*, footnote 9, p. 284.

⁵⁴ A stranger may not be able to discover or use without prejudice discussions but even this issue is not finally settled in Canada. See *I. Waxman & Sons Ltd. v. Texaco Canada*

Thus, the privilege in Ontario and in Prince Edward Island is confined to "statements" made at the pretrial conference, and extends only to the "proceedings" in question. Within these limitations, it would cover statements which do not end in agreement, and would equally cover subtle statements whether relevant or irrelevant to the issues in the case in question.

There is no provision allowing the parties to waive this privilege at trial. Though there is no reference to the pretrial being held in camera the Ontario Rule implies that the judge will allow only the parties and their lawyers to attend.⁵⁵ The judge may order the parties to attend⁵⁶ but there is no fixed practice on this point.⁵⁷

It is reasonable to suggest that the rule common to Ontario and Prince Edward Island would produce different results if the *Penteluk*⁵⁸ scenario was applied to it. *Penteluk* was an action to enforce an agreement. This would fall outside of the restriction of hearing pretrial statements in further proceedings in the same action because an action to enforce an agreement is notionally a new action. The communications would be available to prove the agreement. In *Condessa*²⁵⁹ on the other hand, the plaintiff sought to show that all issues were agreed but one. This motion would have to take place within the same action and as such the rule would apply to exclude the evidence.

Manitoba Rule 50.01(8)(9) states:

(8) Following a pre-trial conference, the judge

(a) shall issue a memorandum setting out the results of the conference and indicating the issues that are resolved and the issues requiring a trial or hearing; and

(b) may, by order, give such directions as the judge considers necessary or advisable for purposes of the proceeding.

(9) Discussions at a pre-trial conference are without prejudice and shall not be referred to in subsequent motions or at trial of the action except as disclosed in the memorandum or order under subrule (8).

By implication the court in Manitoba may compel the litigants to attend⁶⁰ and, though there is no provision in Manitoba Rule 50 requiring the conference to be held in camera, since settlement discussions are on the pretrial agenda it is reasonable to assume that it will be held behind closed doors.⁶¹ As a safeguard

Ltd. (1968), 67 D.L.R. (2d) 295, [1968] 1 O.R. 642 (Ont. H.C.); aff'd (1968), 69 D.L.R. (2d) 543, [1968] 2 O.R. 452 (Ont. C.A.); *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. Ltd.*, [1990] 4 W.W.R. 39, (1990), 72 Alta. L.R. (2d) 330, 105 A.R. 4 (Alta. Q.B.); aff'd, [1990] 5 W.W.R. 377, (1990), 74 Alta. L.R. (2d) 271 (Alta. C.A.), which forbids the use of without prejudice communications by strangers, while *Schetky v. Cochrane*, [1918] 1 W.W.R. 821, (1917), 24 B.C.R. 496 (B.C.C.A.) and *Derco Industry Ltd. v. A.R. Grimwood Ltd.*, [1985] 2 W.W.R. 137, (1984), 47 C.P.C. 82, 57 B.C.L.R. 395 (B.C.C.A.) come to the opposite conclusion.

⁵⁵ Watson and McGowan, *op. cit.*, footnote 30, r. 50.01.

⁵⁶ *Ibid.*

⁵⁷ Holland, *loc. cit.*, footnote 5, at p. 421.

⁵⁸ *Supra*, footnote 1.

⁵⁹ *Supra*, footnote 13.

⁶⁰ Fainstein, *op. cit.*, footnote 3, r. 50.01(6).

⁶¹ *Ibid.*, r. 50.01(1).

to those parties, Rule 50.1(8)(9) seeks to confer on all discussions, not just settlement discussions, the privilege accorded without prejudice settlement discussions at common law.

It is reasonable to suggest that the privilege extends to all discussions engaged in by all participants, therefore protecting statements made by the judge. The protection would again include statements irrelevant to the issues at hand. On the wording of subrule (9) the right to sue on such an agreement would be lost unless the agreement was disclosed in the closing memorandum under subrule (8). If an agreement was reached and noted in the memorandum, in theory communication classified as “discussions” could not, but “non-discussion” communication could be used to prove duress and thereby resist the enforcement of the agreements. There is no provision allowing the parties to waive the privilege at trial.

There are however significant limitations on the scope of the rule. Subrule (9) exempts a memorandum or order made under subrule (8). Beyond that, two points may be noted. First, the rule uses the term “discussion” rather than “communication”. “Discussion” appears to be wider in scope than does the word “statement”, but it is certainly narrower than the term “communication”. The term “discussion” still excludes from protection many methods of communication. Second, the protection provided by Manitoba Rule 50 is limited to discussions in the actual pretrial itself as evidenced by the phrase “at a pre-trial”. Again the protection from disclosure is limited to the trial or other proceedings within the same cause of action.

Had a Manitoba court the *Penteluk* or *Condessa 2* cases before it, it would be reasonable to assume that it would have come to the same conclusion as did the Saskatchewan court. Since there were no written memoranda which recorded either settled issues or a full settlement, no evidence of those discussions could be led.

In Nova Scotia *Beggs v. East Hants*⁶² addressed some of the issues relating to the admissibility of pretrial communications. Nathanson J., in *obiter dictum*, remarked that “everything stated by counsel at a pre-trial conference is ‘without prejudice’ unless acknowledged to be otherwise or to be an explicit admission or unless the court orders pursuant to Civil Procedure Rule 26.01(2) [the closing order which reports the results of the pretrial]”.⁶³ Even though Nathanson J. specifically refers to statements by counsel, it is reasonable to assume that if the parties themselves attend their statements would also be protected.⁶⁴

The conclusion drawn in *Begg v. East Hants* appears to take the same approach as Manitoba Rule 50 by extending a privilege to all statements whether or not their subject matter is settlement, and this whether or not the statements are relevant or irrelevant. There are important distinguishing features. The “closing” order is privileged unless the court orders otherwise.⁶⁵

⁶² *Supra*, footnote 38.

⁶³ *Ibid.*, at p. 233 (T.D.).

⁶⁴ Nova Scotia Rule 26.01 authorizes the judge to determine who will attend the pretrial conference; see Ehrlich, *op. cit.*, footnote 30.

⁶⁵ *Begg v. East Hants, supra*, footnote 38, at p. 233 (T.D.).

If an order removing the privilege is not made the least cumbersome and most reliable evidence of what was stated by the parties with an intention to be bound is barred. Statements, not communications, are protected. The privilege does not extend to remarks made by the judge. If a party was forced to agree by the pretrial judge and the agreement could be demonstrated by explicit statements (without reference to the closing memorandum) the comments of the judge would be admissible, subject to other evidential issues. It appears that the privilege only extends to statements at the pretrial itself. The decision did not address whether the statements are admissible in other proceedings so one must turn to other authorities on the point.⁶⁶ Since the case adopts the traditional common law without prejudice settlement discussion privilege it is reasonable to argue that the privilege is a joint privilege as between the parties, and therefore can only be waived by joint consent.

Should the *Penteluk*⁶⁷ or *Condessa* 2⁶⁸ scenarios be addressed in Nova Scotia the results would be considerably different. In each case evidence of what had been said at the pretrial would have to be considered to determine what was stated as an explicit admission or with an intention to be bound. Potentially in each scenario a settlement of some or all the issues would have been proven.

British Columbia and the Yukon (which uses the British Columbia rule) have taken another approach to pretrial confidentiality and privilege in Rule 35(6).⁶⁹ The rules provide simply that settlement pretrials are to be held "in camera". This provides very little guidance other than directing that the settlement conference, as opposed to a case management conference or one focused on preparing the case for an efficient trial, is to be held behind closed doors.

The use of the term "in camera" does not significantly extend the protection from disclosure or admissibility. Based on the decision of the House of Lords in *Scott v. Scott*,⁷⁰ it appears that the parties are not enjoined to perpetual silence about what took place at an "in camera" conference. Therefore statute and common law privilege will govern the vast majority of questions that arise with respect to the exclusion of such pretrial communications.

The *Penteluk*⁷¹ and *Condessa* 2⁷² facts would lead to different results in British Columbia and Yukon. In each case the communications at the pretrial, including the categories of pretrial communications listed earlier,⁷³ could be used to prove agreements on some or all of the issues. No communications

⁶⁶ See discussion *supra*, footnote 54.

⁶⁷ *Supra*, footnote 1.

⁶⁸ *Supra*, footnote 13.

⁶⁹ Bouck, *op.cit.*, footnote 3.

⁷⁰ [1913] A.C. 417, at p. 450, [1911-1913] All E.R. Rep. 1, at p. 25 (H.L.), per Lord Atkinson.

⁷¹ *Supra*, footnote 1.

⁷² *Supra*, footnote 13.

⁷³ *Supra*, at p. 341.

would be protected except those excluded by statute or common law.⁷⁴ Of course, there is an exception to the exception - if a settlement on an issue is reached discussions leading up to the settlement are admissible to prove the settlement.⁷⁵

Bearing in mind that six out of thirteen jurisdictions in Canada have no provision in their pretrial rules or case law (other than *Begg v. East Hants*⁷⁶ which is a weak precedent) for pretrial communication privilege and that a further two jurisdictions⁷⁷ have added little to the current statutory and common law protection from disclosure or admissibility, an examination of scope and nature of the common law and statutory protection is appropriate.

III. Other Sources of Privilege

A. Statute

The effect of a privilege is to deny the court access to evidence, a portion of which may be critical to the court's final determination. It is not surprising to find that there are very few statutory privileges and even fewer which affect or assist those who participate in a pretrial.

Since the pretrial judge and the opposing party do not have the power to compel a party to answer all questions put during a pretrial, rendering the statutory protection against self-incrimination irrelevant,⁷⁸ as far as I can ascertain there is only one statutory privilege which facilitates the exclusion at trial of a communication made at a pretrial conference. The Divorce Act, section 10,⁷⁹ provides that evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings. This section has the effect of excluding any evidence as to what occurred during a reconciliation attempt,⁸⁰ including those made during a pretrial. It is a statutory privilege and therefore it cannot be waived.⁸¹

The privilege is confined to divorce actions. If the action before the court is under a provincial act, such as the British Columbia Family Relations Act⁸² as in the case of *Piercy v. Piercy*⁸³ (where the substance of the action was property division pursuant to the provincial statute), then the privilege does not apply.

⁷⁴ For example, "without prejudice" settlement negotiations.

⁷⁵ *Cameron Packaging Ltd. v. Ruddy* (1983), 41 C.P.C. 154 (Ont. H.C.), aff'd (1984), 41 C.P.C. 154 (Ont. C.A.). See also Sopinka, *op. cit.*, footnote 9, p. 730.

⁷⁶ *Supra*, footnote 38.

⁷⁷ British Columbia: Bouck, *op. cit.*, footnote 30; Yukon: Judicature Act (Yukon), *supra*, footnote 30.

⁷⁸ Canada Evidence Act, *supra*, footnote 5, s. 5, and for actions involving the Crown the Canadian Charter of Rights and Freedoms, Constitution Act, 1981, Part I, s. 13.

⁷⁹ R.S.C. 1985, c. C-3 (2nd Supp.).

⁸⁰ *Piercy v. Piercy*, *supra*, footnote 45.

⁸¹ *Ibid.*, at p. 20.

⁸² R.S.B.C. 1979, c. D-8, s. 3.

⁸³ *Supra*, footnote 45.

B. Common Law

1. *R. v. Gruenke*

*R. v. Gruenke*⁸⁴ provided new guidance on the extension of privilege to non-traditional categories of confidential communication. In *Gruenke* the accused was charged with first degree murder. The Crown sought to introduce statements which the accused had made to a counsellor and to the pastor of her church. This gave rise to the question of whether the common law recognized a privilege which excludes this type of confidential communication.

Both Lamer C.J.C., with the concurrence of six judges, and L'Heureux-Dubé J., with the concurrence of Gonthier J., affirmed the trial judge's decision that the statements were admissible. L'Heureux-Dubé J. was prepared to find that a new class of privilege should be added to the established privileges based on an examination of policy considerations.⁸⁵ Lamer C.J.C., on the other hand, was not prepared to recognize a new blanket privilege but he did find that a case-by-case privilege did exist for religious advisor-advisee communications.⁸⁶

Lamer C.J.C. stated that the law in Canada recognises two categories of privilege. The first is traditional or common law privilege which has also been referred to as a "blanket", "*prima facie*", or "class" privilege.⁸⁷ This category includes, among others, communications between solicitor and client. These relevant communications are the subject of a *prima facie* presumption of exclusion on the basis of paramount policy reasons.

To determine whether there is a blanket common law privilege for religious communications a principled approach has to be used as opposed to seeking to find a "pigeon hole" for religious communications in the traditional categories of privilege in the law of evidence.⁸⁸ The inquiry then, as with all other classes of non-traditional communications, was "essentially one of policy".⁸⁹ To judge whether policy reasons supported a blanket privilege for religious communications Lamer C.J.C. chose as a yardstick the policy reasons underlying the common law privilege for solicitor-client communications. He stated those policy reasons to be:⁹⁰

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor-and-client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desired the disclosure of the communication ...

The Chief Justice found that religious communications, though of social importance, were not inextricably linked with the legal system. Therefore he concluded that there was no blanket privilege for religious communications.⁹¹

⁸⁴ *Supra*, footnote 14.

⁸⁵ *Ibid.*, at pp. 309 (S.C.R.), 704 (W.W.R.), 320 (C.C.C.).

⁸⁶ *Ibid.*, at pp. 289-291 (S.C.R.), 689-691 (W.W.R.), 305-307 (C.C.C.).

⁸⁷ *Ibid.*, at pp. 286 (S.C.R.), 686 (W.W.R.), 303 (C.C.C.).

⁸⁸ *Ibid.*, at pp. 287-288 (S.C.R.), 688 (W.W.R.), 304 (C.C.C.).

⁸⁹ *Ibid.*, at pp. 288 (S.C.R.), 688 (W.W.R.), 304 (C.C.C.).

⁹⁰ *Ibid.*, at pp. 289 (S.C.R.), 689 (W.W.R.), 305 (C.C.C.).

⁹¹ *Ibid.*

The second category of privilege is case-by-case privilege.⁹² The Chief Justice found that the Wigmore criteria⁹³ provided a general framework through which the requirement of ascertaining the truth could be balanced against policy considerations. The Wigmore criteria are:⁹⁴

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

This approach was broad enough to take into account the particular circumstances of the matter before the court, including the seriousness of the charge and the probative value of the evidence, as well as all policy considerations including the guarantee of freedom of religion under the Charter of Rights and Freedoms.⁹⁵ Lamer C.J.C. concluded that religious communications may be privileged if the Wigmore criteria were satisfied in a particular case. However, since on the facts the accused did not make the damning communication with an expectation of confidentiality, the communication failed to satisfy the first Wigmore condition and therefore the statements were admissible in evidence.

In sum, the Supreme Court re-affirmed the traditional common law privileges, provided a yardstick against which to measure all future claims to blanket or "class" privilege and transformed⁹⁶ the Wigmore criteria of determining new classes of privilege into a test for determining when a privilege exists on a case-by-case basis.

2. Blanket or Class Privilege

Given the fact that participation in the various pretrial models is often mandatory⁹⁷ and frequently a condition precedent to obtaining a trial date,⁹⁸ one might suggest that the common law is ready to recognize a blanket privilege for pretrial communications. One must however bear in mind the warning in *R. v. Gruenke*⁹⁹ that "highly probative and reliable evidence is not excluded from

⁹² *Ibid.*, at pp. 286 (S.C.R.), 686 (W.W.R.), 303 (C.C.C.).

⁹³ J.H. Wigmore, *Evidence in Trials at Common Law* (1961), vol. 8, para. 2285.

⁹⁴ *Ibid.* (Emphasis in original).

⁹⁵ *Supra*, footnote 78, s. 12.

⁹⁶ *Supra*, footnote 14, at pp. 309 (S.C.R.), 705 (W.W.R.), 321 (C.C.C.), per L'Heureux-Dubé J.

⁹⁷ Bouck, *op. cit.*, footnote 3, r. 39(15) (case management pretrials for cases of ten or more days).

⁹⁸ For example, Fainstein, *op. cit.*, footnote 3; McKeague and Voroney, *op. cit.*, footnote 17, p. 207, r. 191(1); Watson and McGowan, *op. cit.*, footnote 30, Practice Direction, December 2, 1985, pp. 564-565.

⁹⁹ *Supra*, footnote 14, at pp. 296 (S.C.R.), 694 (W.W.R.), 310 (C.C.C.).

scrutiny without compelling reasons". Are there compelling reasons to protect confidential communications made at a pretrial conference with a blanket privilege? The policy reasons are to be measured against the solicitor-client yardstick.¹⁰⁰ The yardstick can be broken down into three components. First, there must be a relationship; second the relationship and the communication must be necessary to the effective operation of the legal system; and third, the communication must be inextricably linked to the legal system.

The solicitor-client relationship is special. It allows the client seeking legal advice or assistance to provide every detail knowing that it will only be used to his benefit. The privilege, which is held by the client, prevents a compellable witness from revealing confidential communications subject to well established exceptions.¹⁰¹

Is there such a relationship in a pretrial conference? There will be three basic participants in a pretrial: the judge, the plaintiff and his counsel, and the defendant and his counsel. Certain features of the pretrial bear some resemblance to the solicitor-client relationship. For example, in some jurisdictions, the communications between the participants are protected by varying degrees of privilege.¹⁰²

However, when one considers the tripartite format generally the analogy breaks down. Just as solicitor-client privilege is waived when adverse parties engage the same solicitor, so too the trial court must assume that neither party could have expected to maintain confidentiality unless the governing provision expressly guaranteed it. Clearly confidentiality is the root of privilege.¹⁰³ The revelations of adverse parties to a common pretrial judge must end the expectation of confidence at common law. With respect to the nature of the relationship it is fair to say that, in practice, the depth of the honesty and detail shared by a client with his solicitor will rarely be shared among the pretrial participants. Further, certain statutes¹⁰⁴ may require the judge (and the opposing party) to report various facts, exempting only the offender's counsel. Overall, therefore, the required relationship is not present and any request for a blanket privilege must, if it is submitted, fail.

Notwithstanding this conclusion, an examination of the applicability of the second component is instructive. Can it be said that the relationship and the confidential communication at a pretrial conference are necessary to the effective operation of the legal system? It appears that the pretrial conference does not achieve a level of importance that could be described as essential or fundamental. It is a relatively new procedural tool in Canada.¹⁰⁵ The various

¹⁰⁰ *Ibid.*, at pp. 288 (S.C.R.), 689 (W.W.R.), 305 (C.C.C.).

¹⁰¹ Sopinka, *op. cit.*, footnote 9, pp. 642-645, discusses the exceptions.

¹⁰² See the discussion of pretrial rules, *supra*, Part II. The judge is not a compellable witness; see *Condessa 2, supra*, footnote 13, at p. 80, nor would one volunteer to testify so as to require another judge to adjudicate her veracity or accuracy.

¹⁰³ Per Lamer C.J.C. in *R. v. Gruenke, supra*, footnote 14, at pp. 291-292 (S.C.R.), 691 (W.W.R.), 307 (C.C.C.).

¹⁰⁴ See *supra*, footnote 29.

¹⁰⁵ Epp, *loc. cit.*, footnote 2, at p. 48.

models were introduced to address the large backlog of cases awaiting trial.¹⁰⁶ There is little that occurs at a pretrial conference that could not be accomplished by a meeting between properly motivated and instructed counsel. While the pretrial conference provides a motivator and a mediator for the disproportionately high number of lawyers who need motivation and mediator assisted negotiation, and thereby serves a purpose in today's litigation environment, it would not be accurate to describe the conference as essential.¹⁰⁷

Having come to this conclusion it would be superfluous to consider the third component of the yardstick. Communications at a pretrial do not achieve the same urgency as those that give rise to solicitor-client privilege, and as such it appears that the common law will not provide a blanket privilege for pretrial conference communications.

3. Case-by-Case Privilege

Is the common law prepared to recognize a privilege for confidential pretrial communications on a case-by-case basis? Lamer C.J.C. in *R. v. Gruenke*¹⁰⁸ adopted Wigmore's criteria as the framework for this type of inquiry.¹⁰⁹ The facts of *Penteluk*¹¹⁰ and *Condessa 2*¹¹¹ may be used as a basis for this analysis.

With respect to the first Wigmore condition, the communications in both cases did originate in a confidence that they would not be disclosed. The parties, as is the practice in Saskatchewan, were given an assurance at the beginning of the conference that the proceedings were confidential.¹¹²

The second criteria, that the element of confidentiality be essential to the relationship, is more troublesome. It can be broken into two parts: is there a relationship,¹¹³ and is confidence essential to the full and satisfactory maintenance of it?

With respect to the first part a relationship begins when the judge is assigned to the conference. She begins to read the pleadings and submissions which not only impart basic information about the parties, but (in certain models) may contain confidential comments.¹¹⁴ Her office tells the parties a good deal about the judge. Just as with a banker's or a doctor's confidence it is the first act or meeting that crystallizes the fact of a relationship.¹¹⁵

The parties themselves are in at least one relationship albeit adversarial. The pretrial rule, however, redefines the relationship. The parties expect that

¹⁰⁶ Epp, *ibid.*; Poitras, *loc. cit.*, footnote 3, at p. C.206; Holland, *loc. cit.*, footnote 5, at p. 417; J. Resnik, *Managerial Judges* (1982-83), 96 Harv. L. Rev. 374, at p. 417.

¹⁰⁷ See discussion *infra*, the text at footnotes 126-151.

¹⁰⁸ *Supra*, footnote 14, at pp. 289-290 (S.C.R.), 689-91 (W.W.R.), 305-306 (C.C.C.).

¹⁰⁹ The four criteria are set out, *supra*, p. 350.

¹¹⁰ *Supra*, footnote 1.

¹¹¹ *Supra*, footnote 13.

¹¹² *Condessa 2*, *ibid.*, at p. 79.

¹¹³ *Strass v. Goldsack* (1975), 58 D.L.R. (3d) 397, at p. 422, [1975] 6 W.W.R. 155, at p. 167 (Alta. C.A.).

¹¹⁴ McKeague and Voroney, *op. cit.*, footnote 17, r. 191(3)(d) (Saskatchewan).

¹¹⁵ *Rimer v. Rimer*, [1981] 2 W.W.R. 323, at pp. 347-348 (Alta. Q.B.).

all communications are confidential. This gives rise to a new relationship based on the expectation of confidence. The confidence exists to encourage full and frank disclosure which will aid in a settlement of some or all issues. It is this new relationship to which the second part applies.

*R. v. Littlechild*¹¹⁶ provides some guidance on the question of determining whether confidence is essential to the full and satisfactory maintenance of the relationship. In *Littlechild* it was alleged that the accused had written cheques that he knew to be valueless. The Crown tried to use the accused's legal aid financial eligibility statement to show his previous knowledge of the status of his bank account. In discussing Wigmore's second criteria the court said:¹¹⁷

The element of confidentiality is, moreover, essential to the operation of a scheme for legal aid. When the State decides to assist its citizens who are not able to pay for their own defence in a criminal case, it is essential that the approach to the official assigned to that duty not be hampered by fear of exposure to some other action. To obtain counsel, an accused person must deal with the person assigned. If he is hampered in this approach by fear of the result of disclosure the legal aid system cannot function or will do so only imperfectly.

The judges in both *Penteluk*¹¹⁸ and *Condessa 2*¹¹⁹ felt confidentiality was essential to the operation of pretrials. Further, if the state, through its delegation of power to judicial rules committees,¹²⁰ decides to assist in dispute resolution under a promise of confidence the promise must be respected. To obtain access to a civil court a party must attend a pretrial in the majority of cases¹²¹ and he must deal with the judge assigned.¹²² If the litigant is hampered by a fear that some of his comments may be used against him the pretrial system will not function properly. Therefore the element of confidentiality is essential to the full and satisfactory maintenance of the tripartite pretrial relationship.¹²³

It is the third Wigmore condition, that in the opinion of the community the relationship should be seriously fostered, that appears to be unattainable. Pretrial conferences and the relationships arising from them are a judicial creation. The merits of the conference have not been fully explored by the legislature nor has it withstood the test of time (though clearly the trend indicates an increased use of both traditional¹²⁴ and case management pretrials¹²⁵). Unless the reasons for holding pretrials are weighty and the mechanism is proven

¹¹⁶ (1979), 108 D.L.R. (3d) 340, at p. 345, [1980] 1 W.W.R. 742, at p. 748 (Alta. C.A.).

¹¹⁷ *Ibid.*

¹¹⁸ *Supra*, footnote 1, at p. 187 (Q.B.).

¹¹⁹ *Supra*, footnote 13, at p. 79.

¹²⁰ Saskatchewan Evidence Act, *supra*, footnote 44, s. 55.

¹²¹ Epp, *loc. cit.*, footnote 2, at p. 54; see also *Murch v. Murch* (1981), 24 R.F.L. (2d) 1 (Ont. H.C.), and *supra*, footnotes 97, 98.

¹²² Some judges use heavy persuasion to get participants to reveal confidential information; see Epp, *ibid.*, at p. 61; T. Church Jr, *Justice Delayed* (1978), p. 76, n. 17.

¹²³ As we will see the other sources of privilege do not provide adequate protection.

¹²⁴ Epp, *loc. cit.*, footnote 2, at pp. 47 *et seq.*

¹²⁵ For example, British Columbia Rule 39(15) requires the parties to file an agreed case management program if the trial day requirement is ten or more; see Bouck, *op. cit.*, footnote 3, p. 200.

effective the pretrial conference and its inherent relationship need not be diligently fostered.

The reasons given in favour of pretrials are numerous and well documented.¹²⁶ It is said that a traditional pretrial hones the issues, forces counsel to prepare and facilitates a meeting to discuss settlement,¹²⁷ thereby increasing the number of cases that settle and greatly increasing the efficiency of the whole judicial system.¹²⁸ Case management conferences are justified on the basis that they decrease delay, increase dispositions and reduce litigation costs,¹²⁹ especially in complex litigation.¹³⁰ Further, many pretrial models allow the client to hear the views of a judge, to participate in the problem-solving process and to have his day in court,¹³¹ while it enables the judge to balance differences in power (resources, skills, risk aversion) between the parties.¹³²

Though space precludes a full review of this complex subject it appears that the criticisms of pretrial conferences, which are also well documented,¹³³ significantly outweigh the justifications given for their use. Some of these include the fact that pretrials consume judicial time, the most expensive resource in the court system.¹³⁴ They certainly reduce the number of trial days available. The vast amount of judicial preparation now required may cause frustration among the Bench, and in some cases it may lead to embarrassing conduct if the parties do not settle many, if not all of the issues.¹³⁵

There is danger in the fact that pretrials are conducted behind closed doors, off the record and, for the most part, beyond appellate review. There are no evidentiary rules to protect the most influential participant, the judge, from extraneous and unreliable information,¹³⁶ and the relationship may be tarnished by the fact that the judge may exacerbate the power differences rather than balance them.¹³⁷ The temptation to continue to push the weaker or less prepared party, rather than the party that should be retreating, may be irresistible. Certainly judicial case management appears "to elevate speed over deliberation, impartiality, and fairness".¹³⁸

¹²⁶ Epp, *loc. cit.*, footnote 2, at pp. 64 *et seq.*

¹²⁷ *Ibid.*, at p. 64.

¹²⁸ R.J. Aldisert, *A Metropolitan Court Conquers Its Backlog* (1968), 51 *Judicature* 247, at pp. 251-252.

¹²⁹ Resnik, *loc. cit.*, footnote 106, at p. 417.

¹³⁰ Holland, *loc. cit.*, footnote 5, at p. 429.

¹³¹ W.K. Thomas, *The Story of Pre-trial in the Common Pleas Court of Cuyahoga County* (1956), 7 *W. Res. L. Rev.* 368, at p. 381.

¹³² O.M. Fiss, *Against Settlement* (1983-84), 93 *Yale L.J.* 1073, at p. 1077.

¹³³ Epp, *loc. cit.*, footnote 2, at pp. 66 *et seq.*

¹³⁴ Resnik, *loc. cit.*, footnote 106, at p. 425.

¹³⁵ Church, *op. cit.*, footnote 122.

¹³⁶ Resnik, *loc. cit.* footnote 106, at p. 408.

¹³⁷ L.J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry* (1989), 25 *Williamette L. Rev.* 743, at p. 753.

¹³⁸ Resnik, *loc. cit.*, footnote 106, at p. 425.

The pretrial and its relationship often take the decision out of the trial court's hands, and the public's eyes. As a result, the court does not have the opportunity to declare rights, define minimum standards of acceptable conduct, and change or give substance to bare bones law. The court is denied its opportunity to test the result for fairness.¹³⁹ Without the case being heard in open court the offender and the offence are not exposed to publicity, other potential offenders are not warned, and a catalyst for reform is gone.¹⁴⁰ Potential precedent is lost, disputed ground must be won over and over again, predictability and consistency are sacrificed¹⁴¹ and third party rights may be forgotten.

The pretrial with its mediated style fuels the trend to mediated bargaining.¹⁴² Often lawyers fail even to discuss the admission of facts, let alone broach the subject of settlement before a pretrial.¹⁴³

Even though some commentators and researchers argue that pretrial conferences increase the percentage of cases that settle,¹⁴⁴ there is significant evidence to the contrary. Rosenberg, in examining pretrials that were not settlement-oriented, found that there was no evidence to suggest that pretrial conferences increased the percentage of cases that settle.¹⁴⁵ Church studied settlement-oriented pretrials and came to the same conclusion.¹⁴⁶ The final results of an Ontario study on this point concluded that the use of the pretrial conferences increased the rate of disposition by settlement by approximately ten per cent¹⁴⁷ (certainly a dramatic drop from the widely quoted interim result of twenty-five per cent¹⁴⁸). However, another interpretation of the Ontario data suggests that "the range of overall effect in terms of additional cases settled ... is only zero point eighty-five to one point seven per cent [sic]".¹⁴⁹ The empirical

¹³⁹ Fiss, *loc. cit.*, footnote 132, at pp. 1073-1085.

¹⁴⁰ M. Galanter, *The Day After the Litigation Explosion* (1986-87), 46 Md. L. Rev. 3, at pp. 32-34.

¹⁴¹ R.M.J. Werbicki, *The Pretrial Conference in the Supreme Court of Ontario* (1981), 59 Can. Bar Rev. 485, at p. 501.

¹⁴² M. Galanter, *The Emergence of the Judge as a Mediator in Civil Cases* (1985-86), 69 *Judicature* 257, at p. 262.

¹⁴³ E.J. Spencer, *Congestion in the Courts, Trial and Error, The British Columbia Experience*, in *Annual Meeting Papers of the Canadian Bar Association 1989* (1989), C.1.01, at p. C.1.05. In an attempt to correct this pattern the Saskatchewan added subrule 191(2)(a) which provides that a joint request for a pretrial conference must contain a confirmation that settlement efforts have been made; see McKeague and Voroney, *op. cit.*, footnote 17.

¹⁴⁴ Holland, *loc. cit.*, footnote 5, at p. 417.

¹⁴⁵ M. Rosenberg, *The Pretrial Conference and Effective Justice* (1964), p. 118.

¹⁴⁶ Church, *op. cit.*, footnote 122, p. 75.

¹⁴⁷ G.D. Watson, *Judicial Mediation: The Results of a Controlled Experiment in the Use of Settlement-Oriented Pre-trial Conferences* (delivered at the annual meeting of the Law and Society Association, Boston, June 7-10, 1984) (unpublished), quoted in Holland, *loc. cit.*, footnote 5, at p. 417, n. 2.

¹⁴⁸ M. Stevenson, G.D. Watson and E. Weissman, *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment* (1977), 15 *Osgoode Hall L.J.* 591, at p. 601.

¹⁴⁹ Werbicki, *loc. cit.*, footnote 141, at p. 508.

evidence also challenges the claims that the allocation of judicial resources to settlement discussions speeds case disposition¹⁵⁰ and saves judicial time.¹⁵¹

It appears that, on balance, the reasons for conducting pretrial conferences and the way that they are conducted lead to the conclusion that the conference and its inherent relationship need not be diligently fostered. Having found that the pretrial and its relationships are not worthy of being diligently fostered there is little reason to consider the fourth Wigmore condition in any depth.¹⁵² Suffice it to say that if the relationship is not worthy of being diligently fostered any injury to it by disclosure of confidential communications would be of less consequence than the benefit gained by correct disposition of the litigation.¹⁵³

It is suggested therefore that the common law would not recognize a privilege for the confidential pretrial communications. With the defect appearing at the third criteria of Wigmore, the conclusion that confidential pretrial communications are not protected by a case-by-case privilege arguably will be the same in every case.

4. Settlement Discussions

The common law's protection for "without prejudice" communications for the purpose of settlement does provide some protection for pretrial communications, though the protection is far from ideal in any context.¹⁵⁴ This exclusionary rule of evidence is designed to keep offers of settlement on any issue confidential, thereby preventing a party from using them to attack a cause of action, or prove liability or damages.¹⁵⁵ It is firmly settled, however, that if without prejudice discussions conclude in a settlement which is subsequently denied or repudiated, any privilege originally attached to the communications ceases to exist and the communications can be used to prove the agreement.¹⁵⁶

A narrow extension to this privilege has emerged in matrimonial cases over the last half century justified by the principle that the law favours settlement of

¹⁵⁰ Church, *op. cit.*, footnote 122, p. 33. See also S. Flanders, Case Management and Court Management in United States District Courts (1977), pp. 37-39; J.A. Wall Jr. and L.F. Schiller, Judicial Involvement in Pre-Trial Settlement: A Judge is not a Bump on a Log (1982), 6 Am. J. Trial Advoc. 27, at p. 37.

¹⁵¹ Flanders, *ibid.*, p. 37: "Judicial participation in settlement produces mixed results. A limited role may be valuable, but data suggest that a large expenditure of judicial time is fruitless."

¹⁵² A privilege is recognized only when all four conditions are present; see Wigmore, *op. cit.*, footnote 93, para. 2285.

¹⁵³ Only if it was conceded that the interest in the proper operation of a useful procedure for preparing a case for trial and canvassing settlement was as important as the interest in finding the truth, does one come to the point where equity, based on the court's assertion or indication that the communications were privileged, would tip the balance in favour of privilege; see Spence J. in *Slavutych v. Baker*, *supra*, footnote 11, at pp. 261 (S.C.R.), 229 (D.L.R.), 626 (W.W.R.).

¹⁵⁴ See P.M. Perell, The Problem of Without Prejudice (1992), 71 Can. Bar Rev. 223.

¹⁵⁵ Sopinka, *op. cit.*, footnote 9, p. 728.

¹⁵⁶ *Cameron Packaging Ltd. v. Ruddy*, *supra*, footnote 75. See Sopinka, *op. cit.*, footnote 9, p. 730.

disputes. Based on a line of English¹⁵⁷ and Canadian cases,¹⁵⁸ communications made by spouses to a third party who is acting as a mediator or conciliator in a marital dispute are privileged if the discussions were carried out on a without prejudice basis. Though the privilege in section 10 of the Divorce Act¹⁵⁹ replaces these authorities when the criteria of the Act are met they still remain relevant to many third party assisted settlement negotiations.¹⁶⁰

It is a small step from mediation privilege to a privilege for settlement discussions held in the presence of a judge at a pretrial in light of *Theodoropoulos v. Theodoropoulos*.¹⁶¹ In that case a privilege was extended to the parties even though the communications were overheard by a third party.¹⁶² *Begg v. East Hants*¹⁶³ lends some authority to the proposition that *bonafide* without prejudice settlement discussions in the presence of a pretrial judge are protected by privilege.

If the privilege questions in *Penteluk*¹⁶⁴ and *Condessa 2*¹⁶⁵ had been decided strictly on the basis of without prejudice communication privilege the results would differ from those which were actually reached under the Saskatchewan Rules. In both cases the court could have considered the communications made during the pretrial to determine if there was a settlement on any or all the issues in accordance with the exception to without prejudice communication privilege.¹⁶⁶

This approach has merit. The exception from privilege for a specific purpose often will allow justice to be done. This is especially true in *Penteluk* given that the result of the trial on the merits went as far as a leave application at the Supreme Court.¹⁶⁷

With respect to the other confidential communications at a pretrial this privilege excludes all communications made by any participant (including the judge) which contain admissions or overtures which propose settlement of an issue. The privilege does not prevent the use of non-confidential communications, irrelevant communications nor does it protect a communication when there is a duty to report. However it still remains to be seen whether statements,

¹⁵⁷ *McTaggart v. McTaggart*, [1949] P. 94, [1948] 2 All E.R. 754 (C.A.); *Mole v. Mole*, [1951] P. 21, [1950] 2 All E.R. 328 (C.A.); *Henley v. Henley*, [1955] P. 202, [1955] 1 All E.R. 590n (P.D.A.); *Theodoropoulos v. Theodoropoulos*, [1964] P.311, [1963] 2 All E.R. 772 (Assizes).

¹⁵⁸ *Dembie v. Dembie* (1963), 21 R.F.L. 46 (Ont. H.C.); *G. v. G.*, [1964] 1 O.R. 361 (H.C.); *Conkwright v. Conkwright* (1970), 14 D.L.R. (3d) 168 (Ont. H.C.); *Porter v. Porter* (1983), 40 O.R. (2d) 417, 32 R.F.L. (2d) 412 (Ont. Fam. Ct.).

¹⁵⁹ *Supra*, footnote 79.

¹⁶⁰ *Sinclair v. Roy* (1985), 20 D.L.R. (4th) 748, at pp. 753-754, (1985), 65 B.C.L.R. 219, at pp. 224-225, 47 R.F.L. (2d) 15, at p. 21 (B.C.S.C.).

¹⁶¹ *Supra*, footnote 157.

¹⁶² *Ibid.*, at pp. 313 (P.), 774 (All E.R.).

¹⁶³ *Supra*, footnote 38, at p. 233 (T.D.).

¹⁶⁴ *Supra*, footnote 1.

¹⁶⁵ *Supra*, footnote 13.

¹⁶⁶ *Cameron Packaging Ltd. v. Ruddy*, *supra*, footnote 75. See also Sopinka, *op. cit.*, footnote 9, p. 730.

¹⁶⁷ *Supra*, footnote 15.

though privileged as between the parties, are protected from use by strangers to the litigation.

Clearly there are many gaps in the protection offered by the sources of common law privilege that have been examined to this point. A portion of that gap is filled by the equitable rules of breach of confidence which stand as a complement to the law of privilege.

5. *Equitable Rules of Breach of Confidence*

The equitable rules of breach of confidence, as expounded in the Supreme Court of Canada's decision in *Slavutych v. Baker*,¹⁶⁸ will provide protection for certain confidential pretrial communications in certain circumstances. In this case Professor Slavutych was asked in 1970 by his department head to complete a tenure assessment sheet regarding a colleague. The form was labelled confidential. The report was eventually used as evidence to show that Slavutych was unfit to continue as a member of staff. The Supreme Court of Canada decided the report could not be used against Slavutych. In his judgment for the court Spence J. took two different approaches. The first approach, which is properly categorized as *obiter dicta*,¹⁶⁹ examined the problem from an "evidentiary" perspective, and decided that the report was not admissible in evidence. The second approach attacked the problem from the "equitable" perspective. Spence J. held that no discipline charges could be based on the report because it was used in breach of a confidence.

As Peter Sims¹⁷⁰ explains "the equitable approach is based on the principle of equity that a person who requests and receives a confidential communication from another may not make use of the communication without the giver's consent". This equitable principle, which can have the effect of a privilege, can be stated as follows: communications requested and responded to in confidence cannot be used by the requester against the responder.

The elements of the operation in the equitable rules of breach of confidence are stated in *Coco v. A.N. Clarke (Engineers) Ltd.*¹⁷¹ First, the circumstances must show an obligation of confidence between the parties. Second, the information must contain the requisite quality of confidence. Third, the information must be used without authorization to the communicating party's detriment. To this inventory must be added the point that the contents of the communication must be made in good faith or without malice.¹⁷² Potentially a communication at a pretrial conference could satisfy these criteria.

¹⁶⁸ *Supra*, footnote 11.

¹⁶⁹ Killeen L.J.S.C. in *Pryslak v. Anderson* (1987), 57 O.R. (2d) 788, at p. 792, 15 C.P.C. (2d) 79, at p. 84 (Ont. H.C.).

¹⁷⁰ P. Sim, *Privilege and Confidentiality: The Impact of Slavutych v. Baker on the Canadian Law of Evidence* (1984-85), 5 Adv. Q. 357, at p. 359.

¹⁷¹ [1968] F.S.R. 415, [1969] R.P.C. 41, at pp. 47-48 (Ch.D.), foll'd in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, at pp. 635-636, (1989), 61 D.L.R. (4th) 14, at p. 20.

¹⁷² *Slavutych v. Baker*, *supra*, footnote 11, at pp. 264 (S.C.R.), 231 (D.L.R.), 630 (W.W.R.).

John Judge¹⁷³ notes that the equitable doctrine includes a defence: "Simply stated, the defence provides that a confidence may be broken if there is a just cause or excuse [in the public interest] for so doing." Lord Denning M.R. said: "The exception should extend to crimes, frauds, and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest."¹⁷⁴ Ungood-Thomas J., in *Beloff v. Pressdram Ltd.*,¹⁷⁵ added:

The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure ... justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of the law ... including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.

The terms "misdeeds" has been given a very liberal interpretation greatly enhancing the importance of the defence and narrowing the scope of the protection offered by the doctrine.¹⁷⁶ Judge suggests that this liberal trend may lead the courts to "justify disclosure on the basis of a public interest in the administration of justice and the judicial search for truth".¹⁷⁷

If Judge's projection is accurate then the protection available is negligible. Even if one assumes that his projection is too bleak¹⁷⁸ and that *Woodward v. Hutchins*¹⁷⁹ represents the high water mark of disclosure the doctrine's scope is still so restricted that this contribution to the protection of confidential communications is limited.

The protection is further complicated by the presence of the pretrial judge. Given that his presence does not end the confidence,¹⁸⁰ he still may be the person who asks the question. Unless the judge is deemed to be the adverse party's agent in asking the question, and such a proposition does not fit well within the judicial function, the answer to that question is left unprotected. The judge is not the party likely to use the information to the responder's detriment.

Other collateral problems arise, one of the most important being that this doctrine does not prevent the court from ordering disclosure of confidential communications at the behest of a stranger to the litigation. Privilege, on the other hand, protects it from strangers and third parties alike.¹⁸¹

¹⁷³ John A.M. Judge, Confidentiality: Evidentiary and Procedural Developments, in Eric Gertner (ed.), *Studies in Civil Procedure* (1979), p. 126, at p. 144.

¹⁷⁴ *Initial Services, Ltd. v. Putterill*, [1968] 1 Q.B. 396, at p. 405, [1967] 3 All E.R. 145, at p. 148 (C.A.) (where the plaintiff's former employee provided evidence to a newspaper which showed the plaintiff was involved in an illegal price fixing scheme).

¹⁷⁵ [1973] 1 All E.R. 241, at p. 260 (Ch. D.).

¹⁷⁶ See *Woodward v. Hutchins*, [1977] 1 W.L.R. 760, [1977] 2 All E.R. 751, (C.A.) (where the court ruled that a former talent manager acted properly in disclosing facts which showed that the entertainers' public images were unduly high).

¹⁷⁷ *Op. cit.*, footnote 173, p. 160.

¹⁷⁸ The decisions in *Stephens v. Avery*, [1988] 2 All E.R. 477, 2 W.L.R. 1280 (Ch. D.), and *Ott v. Fleishman*, [1983] 5 W.W.R. 721 (B.C.S.C.), are more moderate.

¹⁷⁹ *Supra*, footnote 176.

¹⁸⁰ See the discussion in the text *supra*, at footnote 163.

¹⁸¹ *Sim, loc. cit.*, footnote 170, at p. 360.

The practical effect of this doctrine is that it will be of limited use in protecting confidential communications at a pretrial conference. It does not protect any communication that was not made in confidence. It appears that information, whether relevant or not, volunteered rather than given in response to the adverse party's question would not be protected. Further answers given in response to a judge's question are not protected nor is any information if its disclosure protects the public interest.

If the issues of the *Penteluk*¹⁸² and *Condessa*¹⁸³ cases were decided on the basis of the equitable rules of breach of confidence, again the results would be different. In both cases the court would have had to consider the details of the communications (both questions and answers) to determine if there was a settlement on any or all of the issues or whether an apparent agreement was subject to confidence, and therefore not available to be used against the replier.

6. Discretion

The final potential source of protection for confidential pretrial communications is found in the judiciary's common law discretion to exclude relevant confidential communications. However this potential may not be realized for two reasons. First, the doctrine in its glory period was directed at protecting a witness who refuses to answer on the ground that he would thereby breach a confidence he undertook to protect,¹⁸⁴ and therefore it does not address the situation where one party wants to reveal a confidence he gained in a pretrial.

Second, the discretion that did exist and which arguably might have been expanded to address this point was dramatically reduced by the Supreme Court of Canada in *R. v. Wray*¹⁸⁵ and the House of Lords in *D. v. National Society for the Prevention of Cruelty to Children*.¹⁸⁶ Judges do not have a general discretion to exclude probative and relevant evidence, though they have a discretion with regard to whether they will impose a penalty on a witness who refuses to breach a confidence by answering.¹⁸⁷

IV. Draft Rule

To have a successful pretrial conference the parties must be free to engage in frank discussions. To foster such discussions the court should be in position to assure the parties that their discussions of relevant topics will be privileged. The interests of justice, however, require that the privilege be subject to some well defined exceptions.

¹⁸² *Supra*, footnote 1.

¹⁸³ *Supra*, footnote 13.

¹⁸⁴ *A.G. v. Mulholland*, [1963] 2 Q.B. 477, [1963] 1 All E.R. 420 (C.A.); *A.G. v. Clough*, [1963] 1 Q.B. 773, [1963] 1 All E.R. 420 (C.A.).

¹⁸⁵ [1971] S.C.R. 272, (1970), 11 D.L.R. (3d) 673.

¹⁸⁶ [1978] A.C. 171, [1977] 1 All E.R. 589 (H.L.).

¹⁸⁷ *D. v. National Society for the Prevention of Cruelty to Children*, *ibid.*, at pp. 239 (A.C.), 613 (All E.R.). See also *Ref. re Legislative Privilege* (1978), 83 D.L.R. (3d) 161, 18 O.R. (2d) 529 (Ont. C.A.), at pp. 173 (D.L.R.), 541 (O.R.), per Lacourciere J.A., 175 (D.L.R.), 543 (O.R.), per Weatherston J.A.

Some of the rules examined earlier address the issues of privilege. Excepting Saskatchewan, which errs in taking the protection to extremes, for the most part the protection offered is inadequate. One half of the civil jurisdictions do not address the issue at all. Any protection for pretrial communications must be found in statute or common law. The common law as expressed in *R. v. Gruenke*¹⁸⁸ does not recognize a blanket privilege for pretrial communications nor does it appear ready to recognize a case-by-case privilege. Even if the courts were prepared to extend a privilege on a case-by-case basis it would be inadequate. The parties would never know when the privilege would attach, thereby thwarting the long term policy goals.¹⁸⁹ Though the protection found in some specific statutes, as well as the protection recognized in settlement discussions and breach of confidence, add somewhat to the protection, large gaps remain in the protection offered to confidential pretrial communications. Therefore amendment of the various pretrial rules appears to be the logical next step.¹⁹⁰

Fortunately the question of the implementation of privilege for various communications had been explored recently in many contexts. In addition to the rules already discussed, guidance may be obtained from the Federal Rules of Evidence of the United States,¹⁹¹ the Alternate Methods of Dispute Resolution Act of Texas¹⁹² and the Netherlands draft bill on journalistic privilege.¹⁹³

With these sources in mind it is time to begin a detailed discussion of a provision for Canadian jurisdictions that do not have a subrule on this point. Further, those jurisdictions who already have provisions on point would be well advised to consider amendments so that an appropriate level of protection is achieved. Though I cannot claim the skill of a draftsman the following draft subrules and comments are offered for discussion purposes.

Subrule X

1. A judge who conducts a pretrial conference shall not preside at the trial unless all parties consent in writing. This subrule shall not prevent or disqualify the trial judge from holding trial meetings (subsequent to the pretrial conference), before or during the trial, to consider any matter that may assist in the just, most expeditious, or least expensive disposition of the proceeding.

¹⁸⁸ *Supra*, footnote 14.

¹⁸⁹ Per L'Heureux-Dubé J., *ibid.*, at pp. 310-311 (S.C.R.), 705 (W.W.R.), 321 (C.C.C.).

¹⁹⁰ It is assumed that each province's Rules Committee has been granted the jurisdiction to enact rules which can alter the substantive law. For example, see the Courts of Justice Act, R.S.O. 1990, c.43, s. 66(2), or the Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 89, and Saskatchewan Evidence Act, *supra*, footnote 44, s. 55.

¹⁹¹ Fed. R. Evid. 408.

¹⁹² Tex. Civ. Prac. Rem. Code Ann. Sec. 154.073 (Vernon supp. 1990).

¹⁹³ Mediaforum Bijlage(2) 1991, quoted in W.F. Korthals Altes, *The Journalistic Privilege: A Dutch Proposal for Legislation* (Spring 1992), Public Law 73, p. 90.

Comments

This is Saskatchewan subrule 191(13).¹⁹⁴ The presumption is that the pretrial judge will not preside at the trial. The appearance of a possibility that the action may be prejudged or that inadmissible information may be considered renders this practice unacceptable.¹⁹⁵ In certain cases the parties may wish the pretrial judge to preside at trial. For example, if no serious settlement negotiations took place in the judge's presence and she is uniquely qualified in that area of law, or the litigation is complex and the pretrial provided important background information, the parties may wish her to preside. The rule also allows the trial judge to hold a management style conference before or during the trial. A common usage of this power is the organization of the logistics of a jury trial in the days before it begins.

Subrule Y

2. Except as provided in subsections (2), (3) and (4) herein all communications and records made or produced in the course of the pretrial conference relating to the subject matter of the action are privileged and shall not be admitted as evidence in this or any other proceedings.

Comments

The choice of the word "communication" is significant. Used by both the Divorce Act¹⁹⁶ and Saskatchewan Rule 191(15)¹⁹⁷ it conveys a wider protection than the term "statement" or "discussion". There is no logical reason to offer protection for only a portion of the methods of communicating. The addition of the term "records" addresses the following concerns. All notes created by the litigant to either chart the progress of the negotiations or the strengths or weaknesses of his own case, or that of his opponent, would be protected. As well all draft agreements and final agreements, though not executed, would be protected. Finally, in an early article I suggested that pretrial conferences should be tape recorded.¹⁹⁸ "Records" would encompass any such recording.

The use of the phrase "in the course" widens the window of time to cover submissions and proposals that might be contained in the pretrial briefs which are required by some jurisdictions.¹⁹⁹

¹⁹⁴ McKeague and Voroney, *op. cit.*, footnote 17.

¹⁹⁵ Werbicki, *loc. cit.*, footnote 141, at p. 498. See also *Sandboe v. Coseka Resources Ltd.*, *supra*, footnote 6.

¹⁹⁶ *Supra*, footnote 79, s. 10.

¹⁹⁷ McKeague and Voroney, *op. cit.*, footnote 17.

¹⁹⁸ Epp, *loc. cit.*, footnote 2, at p. 79. The technology is readily available. The recording would be the best evidence of the discussions leading up to any agreement and the agreement itself. If there is any undue influence, fraud or mistake, then the evidence is readily available. The recording would be the property of the parties.

¹⁹⁹ McKeague and Voroney, *op. cit.*, footnote 17, r. 191(3) (Saskatchewan); Chief Justice W.D. Parker, Practice Direction, June 6, 1988, in J.J. Carthy *et al.*, Ontario Annual Practice 1990-91 (1990), p. 317; Fainstein, *op. cit.*, footnote 3, r. 50.01(3) (Manitoba); Rules of Court P.E.I., *op. cit.*, footnote 30, r. 50.01(3).

The phrase "any other proceeding" extends to protection beyond the trial of the action which gave rise to the pretrial. The protection of relevant communications must be assured to ensure full and frank discussions, subject to the limits in subsections (2), (3) and (4).

A document that is otherwise privileged may be an important factor in the opposing party's decision regarding settlement. To promote settlement that document should be produced. To facilitate its production in the pretrial the original privilege which arguably is lost upon its production²⁰⁰ is replaced by the limited pretrial privilege.

By implication pretrials should be held in camera. Even though the communications are deemed to be privileged, and therefore the usual element of confidentiality is not strictly required, full and frank discussions are more readily forthcoming in private meetings.

Since any privilege may inhibit the court in its attempt to ascertain the truth the privilege suggested for pretrial communications must be as narrow as practicable. Therefore the privilege in this rule should be limited to the "subject matter of the action". The pretrial's need for full and frank discussions is satisfied by discussions of relevant topics. Other pieces of truth communicated at a pretrial should be available as evidence in any proceeding.

2. Any communication made in the course of the pretrial conference which is discoverable or otherwise lawfully obtainable is admissible as evidence.

Comments

In giving his reasons in *Slavutych v. Baker*²⁰¹ Spence J. adopted the statement of Roxburgh J. in *Terrapin Ltd. v. Builder's Supply Co. (Hayes) Ltd.*²⁰² which states:

As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

Arguably Spence J. adopted more than he may have intended by quoting the springboard doctrine.²⁰³ According to the English Law Commission²⁰⁴ the doctrine is limited to trade secrets. If the springboard doctrine is widely applied "the imparting of one item of confidential information could taint a large amount of otherwise admissible evidence".²⁰⁵

This provision will counteract any suggestion that the springboard doctrine unwittingly adopted by Spence J. acts to taint any piece of evidence discussed at a pretrial. Though the pretrial is not an examination for discovery any

²⁰⁰ Sopinka, *op. cit.*, footnote 9, p. 669.

²⁰¹ *Supra*, footnote 11, at pp. 262 (S.C.R.), 230 (D.L.R.), 627 (W.W.R.).

²⁰² [1960] R.P.C. 128, at p. 130 (Ch. D.).

²⁰³ Judge, *op. cit.*, footnote 173, p. 156.

²⁰⁴ Working Paper No. 58, Breach of Confidence (1974), p. 21.

²⁰⁵ Judge, *op. cit.*, footnote 173, p. 156.

evidence properly discoverable which is acquired at the conference should be admissible.²⁰⁶

3. Communications or records made in the course of pretrial conference are not excluded from evidence by reason of subrule (1) if they are tendered to prove:
 - (a) a breach of, or compliance with, an obligation other than one upon which the action is based;
 - (b) an agreement on one or more of the issues;
 - (c) fraud, mistake, bias, duress or infringement of third party rights.

Comments

The privilege which was initially defined quite widely in subsection (1) is narrowed to address various concerns. Just as solicitor-client privilege has its limits so too must pretrial communication privilege. If a litigant alleges that his lawyer breached her contractual or tort duty to him by her actions at the pretrial, pretrial communications should be available to prove or defend the allegation just as they should be if a lawyer is suing her client for fees earned in the course of a pretrial. Further, if one party fails in his duty to bargain in good faith or to keep the peace the otherwise protected communication would be exempted. And of course if the judge oversteps the bounds of good conduct the evidence would be available to pursue appropriate remedies.²⁰⁷

At common law one of the important exceptions to without prejudice settlement discussion privilege is the right to call evidence of the discussions to prove that a settlement was reached.²⁰⁸ There is no point in having a pretrial unless any agreements made bind the parties. Some rules provide the mechanism of a pretrial closing memorandum²⁰⁹ but that approach is unnecessarily narrow.

It appears reasonable to include amongst the exceptions the main defences to an allegation of an agreement. Parties reaching agreements in a pretrial are no less susceptible to fraud, mistake or duress.

With pretrials being held behind closed doors and beyond appellate review the protection of third party rights is very difficult. These rights may encompass a variety of concerns from access to money to personal liberty. It is not inconceivable that a person's freedom may be restricted or denied under a penal provision or a mental health statute, while evidence wrongfully withheld comes to light and is in fact relevant in another proceeding, like an action in tortious battery, for example. This evidence, though relevant (and thus *prima facie* privileged) in the current action must not be excluded in the current or related proceedings.

²⁰⁶ For example, the date that a personal injury plaintiff will start his new job.

²⁰⁷ Epp, *loc. cit.*, footnote 2, at p. 76.

²⁰⁸ *Cameron Packaging Ltd., v. Ruddy*, *supra*, footnote 75; see also Sopinka, *op. cit.*, footnote 9, p. 730.

²⁰⁹ For example, McKeague and Voroney, *op. cit.*, footnote 17, r. 191(14) (Saskatchewan); Watson and McGowan, *op. cit.*, footnote 30, r. 50.02 (Ontario).

4. If this section conflicts with other legal requirements for disclosure of communications or records the issue of the paramountcy of the conflicting provisions should be determined *in camera*, and the court may determine whether the communication or records warrant a protective order or whether the communications or records should be subject to disclosure.

Comments

If there is a conflicting provision which does not have the support of a paramountcy clause the matter of disclosure should be determined in private. If the discussions are to be protected it is senseless to debate them in open court.

Conclusion

It is the function of a court to ascertain the truth. To accomplish this goal the court needs to consider all relevant evidence. However, for policy reasons, some evidence found in various communications are kept from the court.

In pretrial conferences parties are encouraged by the court to engage in frank discussions. Those communications often contain very probative information. Yet in some provinces that evidence is excluded by a rule based privilege, while in other provinces, a privilege exists only in certain situations. Statute and common law supplement the protection offered by certain rules of court. However, the protection is less than ideal. In some provinces situations which appear to deserve the protection of a basic privilege are left unprotected.

Irrespective of the source, pretrial conference privilege should not be "the judicial equivalent of a cosmic black hole".²¹⁰ The desire for truth outweighs an absolute privilege. Therefore a balance must be struck. Relevant confidential communications should be protected by a privilege in the original action and all subsequent proceedings. However, because pretrials are held behind closed doors and are equally susceptible to the problem associated with negotiations in any environment, exemptions to the privilege must be incorporated into any statutory provision. Through further discussions and revision it is hoped that an appropriate balance can be struck in the privilege given to pretrial conference communications.

²¹⁰ McLeod J. in *Penteluk*, *supra*, footnote 1, at p. 187 (Q.B.).