THE PRE-TRIAL CONFERENCE

Jeff N. Grubb, Q. C. and Peter T. Bergbusch
Balfour Moss
#700, 2103 - 11th Avenue
Regina, SK  S4P 4G1
TABLE OF CONTENTS

I. INTRODUCTION ...............................................................................................................1

II. HISTORY OF THE PRE-TRIAL CONFERENCE IN SASKATCHEWAN .......................2

III. FUNCTION OF THE PRE-TRIAL CONFERENCE .....................................................5

IV. MATERIALS ...................................................................................................................6

V. THE PLAYERS .................................................................................................................8
   A. THE JUDGE .................................................................................................................8
   B. LEGAL COUNSEL ....................................................................................................9
   C. THE PARTIES .........................................................................................................10

VI. ASSOCIATED RULES OF COURT .............................................................................11

VII. SELECT ISSUES ........................................................................................................14

VIII. THE FUTURE OF PRE-TRIAL CONFERENCES .....................................................17

X. SUGGESTIONS FOR FURTHER READING .................................................................19
I. INTRODUCTION

Pre-trial conferences have had a significant impact upon the course of civil litigation since they were first introduced in Saskatchewan in 1978. Precisely how significant their effect has been is itself a matter of debate. Whatever the answer, what is clear is that, in comparison with the other stages in an action, the pre-trial conference has been neglected as a topic of discussion and analysis. Given the relative newness of pre-trials in Saskatchewan and the sheer number of conferences which take place every year, it is perhaps surprising that pre-trial conferences have attracted so little attention. Symbolic of the lowly status of pre-trial conferences is the place they occupy in the Saskatchewan Queen's Bench Rules themselves. Rule 191, the principal rule governing pre-trial conferences, is located inconspicuously in Part Seventeen, which is deceptively entitled "Setting Down for Trial". However, as this paper will demonstrate, pre-trial conferences have become an integral stage in the conduct of a case and involve a great deal more than simply setting actions down for trial.

Indeed, pre-trial conferences raise many interesting theoretical and practical issues. This paper will briefly survey the nature and history of these conferences, the respective roles of the players involved, certain related Rules of Court, and some judicial pronouncements on the subject. Finally, the paper will consider the future for pre-trial conferences in Saskatchewan.

---

1 This paper will not address criminal pre-hearing conferences, sometimes referred to as pre-trial conferences: see s. 625.1 of the Criminal Code, R.S.C. 1985, c.27 (1st supp.). It will also omit any discussion of pre-hearing conferences in the Court of Appeal: see Rule 41 of the Court of Appeal Rules.

2 Mr. Justice J.D. Milliken and K.W. Noble suggest in "Pre-Trial Conferences", Civil Procedure: 1996-1997 Bar Admission Course, that 60% of cases in which the Request for Trial had been served were settled, "as a direct or indirect result of the Pre-Trial Conference concept." Other studies have been unable to find any evidence to conclude that pre-trial conferences increase the number of cases that settle, and one Ontario study found an increase in settlements of only 10%: see J.A. Epp, "Civil Pre-Trial Conference Privilege: 'A Cosmic Black Hole'?” (1993), 72 Can. Bar Rev. 337 at 355.
II. HISTORY OF THE PRE-TRIAL CONFERENCE IN SASKATCHEWAN

Formal rules for pre-trial conferences were not adopted in Saskatchewan until 1978, the year in which Ontario brought in similar reforms, although both provinces had considered instituting such a procedure as early as 1961. Saskatchewan's early rule was considerably different than the present Rule 191, and was directed toward the goal of managing cases. The introduction of the Rule became necessary, apparently, in order to alleviate the weight of a large backlog which then existed. During the first few years following the Rule's introduction, judges were discouraged, most notably by former Queen's Bench Chief Justice Johnson, from inviting or participating in settlement negotiations at pre-trial conferences. As well, the decision whether to hold a pre-trial conference was in the court's discretion, exercisable upon application of one of the parties or on the court's own motion.

Much has changed since then. In 1984, the Rules were amended to make pre-trial conferences mandatory in all cases where the time required for the trial was estimated at more than one day. And, despite former Chief Justice Johnson's admonition, by the mid-1980s some Saskatchewan judges were actively promoting negotiation and settlement during pre-trial conferences. A further amendment in 1987 expanded the list of topics which might be considered at the pre-trial, required that the parties make available to the pre-trial judge all relevant documents in the case, empowered the court to order a pre-trial conference at any stage in proceedings, and prohibited the pre-trial judge from presiding over the trial without all parties' consent. Parties were also required to file a brief of law ten days before the pre-trial conference was to be held.

---


4 Ibid. at 48.

With the court's adoption on January 1, 1989, of a practice directive relating to pre-trial conferences, the gradual shift in the focus of pre-trial conferences from management of the trial to settlement of the action continued. John Epp has identified nine important changes wrought by the practice directive. First, in its preamble, the practice directive emphasizes that the main purpose of pre-trial conferences is to facilitate a settlement. Second, the Chief Justice could now order pre-trial conferences in cases where the time required for trial was estimated at one day or less. Third, in matrimonial cases which involved issues of custody, access, maintenance or the division of property, pre-trials were always to be held. Fourth, two pre-trial conferences would be held in cases where request had been made for a civil jury trial: the first to explore the prospects for settlement; the second, over which the trial judge would preside, to manage the trial and, in particular, to formulate the questions for the jury. Fifth, a settlement pre-trial could be arranged by request of both parties to the Local Registrar or by direction of a judge. Sixth, the parties themselves were obliged to be present at pre-trial conferences unless the court had excused them. Seventh, judges were directed to prepare for all pre-trial conferences by reading the pleadings, the parties' briefs of law and any other materials filed by the parties. If it was to be a settlement pre-trial conference, the judge was required also to read the examinations for discovery. Eighth, the directive provided for the appointment of a management pre-trial judge in complex cases. Ninth, all communications during pre-trial conferences were deemed to be confidential. This included any notes made by the pre-trial judge which, while available to counsel, were not to be disclosed to the public or to the trial judge. Virtually all of these changes were retained when the Rules were reorganized in their present form in 1991.

Finally, in 1991, Rules 191, 192 and 193 were adopted. These, with minor modification in 1995, 1996, 1998, 2000, 2001 and 2003, are the Rules which presently govern pre-trial conferences in Saskatchewan. While these changes were certainly significant, perhaps their greatest

---

6 Supra, note 3, at 52-3.

7 Rules 191, 192 and 193, including the most recent amendments, and Practice Directive No. 4 are available from the Queen's Printer website www.qp.gov.sk.ca
contribution was in sanctioning and elaborating a practice which by that time was widely followed in Saskatchewan. As Mr. Justice Vancise noted for the majority in *Condessa Z Holdings Ltd. v. Brown's Plymouth Chrysler Ltd. et al* (1993), 109 Sask. R. 170 at 176-177 (Sask. C.A.):

... The rules [Sask. Gaz. 1991.I.111] and the practice directive [Practice Directive No. 4 - *Prettrial Conference Directive (Civil)* effective Feb. 1, 1991] were amended again in 1991. An examination of the terms of the practice directive makes it abundantly clear that, notwithstanding the availability of judges and court rooms, the focus of the pretrial conference (other than management pretrial conferences) was to settle the lawsuit. With few exceptions, all trials must be pretried. The goals of the pretrial conference are spelled out and prominent among them are paragraphs (3) and (6):

"(3) (a) to allow the parties to participate in the problem-solving process.
"(b) to allow the parties to receive the view of a trial judge as to the issues (both facts and law) in dispute, as far as the material before the pretrial judge allows.
"(c) to allow settlement options to be presented which would not necessarily be available at trial.
"(d) to seek settlement of the dispute so as to improve the efficiency of the court system and to save time and costs for all parties and witnesses.

"(6) If a settlement is reached at a pre-trial conference, the judge may have it reduced to writing and signed by the parties and counsel and/or grant a consent order." [Ibid.]

While these changes came into effect after the pretrial conference in this case, and Practice Directive No. 1 effective January 1, 1989 was cancelled, the new practice directive and the rules simply formalized what the pre-trial practice had become. Whether one uses the pre 1991 pretrial rules and practice directives or the 1991 practice directives and rules, the pretrial judge was and is now an active participant in the dispute resolution process, a process designed to accelerate the litigation process and to resolve disputes between litigants speedily and at less cost.

Thus, in their short history pre-trial conferences in Saskatchewan have undergone dramatic change.

Effective January 1, 1998, the *Queen’s Bench Rules* were amended to include Part Forty - Simplified Procedure. This Part provides an abbreviated procedure for most claims for amounts less than $50,000. Rule 485 permits a party to apply with supporting affidavit material for summary judgment or summary trial, after the close of pleadings. Rule 191(1) was concurrently amended to read:

191. (1) Subject to Part Forty, no proceeding shall, unless otherwise ordered, be set down for trial unless a pre-trial conference is held.
The combined effect of these changes is to eliminate pre-trials in actions brought under the Simplified Procedure. The only exception will be cases in which a court is satisfied that special circumstances exist to hold the trial (and, presumably, other procedures) in accordance with the general rules of practice and procedure: Rule 485(4).

III. FUNCTION OF THE PRE-TRIAL CONFERENCE

As is evident in the portions of Practice Directive No. 4 cited by Mr. Justice Vancise, the primary purpose of Saskatchewan pre-trial conferences is the settlement of actions. Trial management, the goal which first prompted the introduction of pre-trial conferences in Saskatchewan, is now of secondary importance. This is reflected in the wording of Rule 191(8), which reads in relevant part:

A pre-trial conference shall be for the purpose of attempting to settle the proceeding, and if that is not possible, to consider . . .

In *Penteluk Estate v. Penteluk* (1990), 82 Sask. R. 184 at 186 (Q.B.); affirmed (1990), 85 Sask. R. 302 (C.A.), Mr. Justice MacLeod explored the way in which the emphasis of an individual pre-trial conference may shift from settlement to management:

A pretrial conference is, as the name implies, a conference before the trial. It has one of two objectives. It has a management concept in that it attempts to obtain such agreements as may shorten or simplify the trial. A settlement feature is that under the independent guidance of the presiding judge, a settlement may be achieved, thus entirely obviating the need for and expense of a trial. Typically, if a settlement is not achieved, a settlement pretrial conference becomes a management pretrial conference.

Clearly, all pre-trial conferences begin as settlement conferences, at least in principle. In practice, of course, parties may have no desire to settle by the time they reach pre-trial and in such cases their efforts at negotiation are often merely perfunctory.

Two other lesser functions of pre-trial conferences can also be discerned. To good counsel, the pre-trial conference is also about trial readiness. This third function is, at least in part, a corollary of the other two. In requesting a pre-trial, the parties certify that they are ready for trial. More
important than this technical requirement, however, is that the parties' preparation for the pre-trial forces them, perhaps for the first time since pleadings were drafted, to consider seriously the legal merits of their case and its practical strengths and weaknesses. The parties must prepare and file a brief of fact, law and argument which will set out their position in the best light. Competent counsel will never participate in settlement negotiations at a pre-trial conference without having first carefully assessed the strengths and weaknesses of their case. Even if the pre-trial focuses solely on trial management, counsel must still evaluate their case in order to determine whether, for example, the issues for trial may be narrowed, the testimony or reports of experts will be necessary, the case should be heard by a jury, and so on. Accordingly, an indirect result of pre-trials is that they compel a certain degree of trial readiness.

A fourth function of the pre-trial conference relates to discovery. With the requirement that parties file briefs setting forth their legal position and that parties serve their Notice of Expert Witness ten days prior to pre-trial (a requirement which is often violated), the pre-trial permits each party to learn what legal arguments the other side relies upon to support its position. Apart from this, the pre-trial provides a genuine opportunity for each side to observe how the parties are likely to perform in a courtroom setting, with a judge present. The judge's verbal responses, and physical reactions, to each party's comments may suggest how believable the judge finds each of them. As part of the give-and-take of the discussions, the parties and their counsel may reveal facts which are relevant to the case. In this respect the pre-trial conference can operate a little like a true discovery.

IV. MATERIALS

At any time after the close of pleadings the parties may make a joint request for a pre-trial conference (Rule 191(2)). They do so by filing with the Local Registrar a joint request, which contains:

(a) a certificate of readiness for trial;
(b) confirmation that the parties have attempted to settle;
(c) an estimate of the time required for the pre-trial conference and for trial; and
(d) an estimate of the number of witnesses to be called at trial.
They must also file a certified copy of the pleadings, except in family law proceedings commenced by petition and answer. The court considers the certificate of readiness a "critical step" in the litigation process and will refuse to vacate the certificate unless the applicant can "establish a significant and unexpected change in circumstances such that the order refusing the vacating of the certificate of readiness would result in a manifest injustice": *Hesje v. Zurich Life Insurance Co. of Canada*, [1997] S.J. No. 594 (Q.B.) (QL). For an explanation of what a certified copy of pleadings should contain, see *Saskatchewan Crop Insurance Corp. v. Groha*, [1997] S.J. No. 120 (Q.B.) (QL).

In at least one judicial centre, Regina, pre-trial scheduling meetings were recently adopted as a means of setting dates for pre-trials which are agreeable to all counsel. In Regina, such meetings take place at 9:00 a.m. on the second and fourth Monday of every month in Chambers. The local registrar or a deputy presides over these meetings, which have proven extremely effective.

Upon the written request of all parties, a judge may order a pre-trial conference and dispense with the requirements of Rule 191(2) (Rule 191(10)). There are also provisions for obtaining a pre-trial conference date in cases where one party refuses or neglects to join in a request for pre-trial (Rules 191(9) and (9A)), and the filing requirements are modified accordingly. A trial judge or a chambers judge may in addition order a pre-trial conference on his or her own initiative (Rule 191(11)). For a case in which the judge declined to order a pre-trial pursuant to Rule 191(9) because there had been no misconduct on the part of any party, but was prepared to order a pre-trial on his own initiative, see *International Minerals & Chemical Corp. (Canada) Ltd. et al v. Commonwealth Insurance Co. et al* (1992), 103 Sask. R. 234 (Q.B.).

Not later than ten days before the pre-trial, the parties must file and exchange pre-trial briefs. Rule 191(3) sets out the requirements of the brief. The brief must include a short summary of the evidence to be led at trial, a statement of the issues in dispute and the related law, along with a list of authorities relied on and legible copies of pertinent portions of these authorities with appropriate highlighting, and copies of all documents intended to be used at trial which may be of assistance to the pre-trial judge. If requested, the documents are to be returned to the party.
producing them at the conclusion of the pre-trial conference. Finally, the brief may contain a settlement proposal, which must be returned to the offering party if, at the end of the pre-trial, the matter is set to proceed to trial. It is important to note that, where a matter proceeds to trial, the pre-trial brief will remain on the file for the reference of the trial judge, absent certain documents and any settlement proposals.

By Rule 191(17), which was new in 1996, the party having carriage of a proceeding must pay forthwith the required fee for setting the matter down for trial once a pre-trial date has been assigned.

V. THE PLAYERS

A. THE JUDGE

The pre-trial judge has been called a "facilitator": *Harder v. Harder* (1992), 101 Sask. R. 27 (Q.B.). The role which the pre-trial judge will assume during the conference will vary from judge to judge and case to case. Some judges are typically very interventionist and will push the parties hard to reach a settlement. Others appear aloof and seem content to let the parties make what they will of the proceeding without offering much active encouragement. John Epp notes the dangers which accompany the participation of judges in formal negotiations at pre-trial conferences. Some of these are:

(a) The judge may create real or implied coercion to settle.

(b) The judge may exacerbate power differences rather than balance them. The temptation to continue to push the weaker or less prepared party, rather than the party that should be retreating, may be irresistible.

(c) The judge may be active in settlement without having taken or been given the time to properly prepare.

(d) The judge may forget about precedent, predictability or consistency, or third party rights.

(e) Increased intimate contact with members of the trial bar, especially in smaller centres, may promote intense feelings by the judge including admiration, friendship or dislike. The possibility of bias will be real. . . .

---

8 *Supra*, note 3, at 72 - 79.

9 *Ibid.* at 75.
The pre-trial judge will often provide useful comments about the merits of each party's case, and may set out how he or she would decide particular issues as the trial judge. The judge will often "caucus" with each of the parties. These private consultations give each party an opportunity to discuss frankly the shortcomings and strengths of its case with the judge.

The formal powers of a pre-trial judge are narrow and are set out in Rule 191(16). The pre-trial judge may make any order by consent of the parties. The judge may order the preparation of a custody and/or access report without the consent of the parties. This power was added in 1995, probably in answer to the Saskatchewan Court of Appeal's decision in *Tremblay v. Tremblay* (1993), 113 Sask. R. 21. Some judges have shown a lamentable tendency to refuse to order custody/access reports before the pre-trial, on the basis that the cost of these is prohibitive and will be thrown away if settlement is reached. Since such reports usually take at least six months to obtain, the effect of ordering a report at the pre-trial is to delay greatly trials in family law cases involving children.

Finally, the pre-trial judge may make an order for costs of the pre-trial conference, but if no order is made, costs are in the cause. For two interesting examples of cases in which costs were awarded, see *Thole v. McKenna*, [1992] S.J. No. 237 (Q.B.) (QL) and *Jabour et al v. Friesen et al* (1995), 130 Sask. R. 300 (Q.B.).

**B. LEGAL COUNSEL**

Counsel's role in the pre-trial process begins well in advance of the conference itself. As noted earlier, the parties must file several documents with the court before the pre-trial takes place. In preparing these materials, the lawyer will evaluate the strengths and weaknesses of his or her case, the nature and volume of evidence to be called, and so on. As with any stage during the course of an action, strong preparation is essential for effective advocacy. At the pre-trial stage, the counsel who has prepared more thoroughly will be at a distinct advantage during negotiations.
Apart from the preparatory duties of legal counsel already discussed, the lawyer should take some time with his or her client to explain the purpose and operation of the pre-trial conference. Many clients operate under a misconception of the judge's role and powers at the pre-trial stage. Some may find the process intimidating. Although the pre-trial discussions are privileged, the client should be warned that the other side will be eager to learn additional information which it may use to advantage.

The most advantageous strategy for legal counsel to adopt for the pre-trial conference itself will vary from lawyer to lawyer and from case to case. It is trite to say that there are as many negotiation styles as there are negotiators. Some counsel prefer to minimize their involvement and let their client participate actively in the negotiations. Other lawyers seek to take charge of the process and rarely let their clients get a word in edge-wise. The judge's own style and the client's level of self-confidence will often suggest the approach to be followed by the lawyer.

Rule 191(7) requires that the counsel who will represent the party at trial also be the counsel representing that party at the pre-trial, unless the court orders otherwise.

C. THE PARTIES

Rule 191(6) requires that parties attend with their counsel at the pre-trial conference, unless otherwise ordered. A corporate party must have a representative present at the pre-trial. Certainly the presence of parties greatly facilitates the negotiation process and enhances the prospect of settlement.

Where a party named in a lawsuit is an insured and is not the party that has authority to make decisions regarding a lawsuit, a judge will generally dispense with the requirement of personal attendance at the pre-trial conference by that party. At the same time, however, the court will generally require the attendance of a representative of an insurer involved in a lawsuit, although the court will generally allow such participation by telephone.  

---

As with the other players, the role adopted by the parties will vary in accordance with a variety of factors, including personality, complexity of the case, conduct of other players, and so on. The parties may be ill at ease speaking in the others' presence but may talk more readily when "caucusing" privately with the judge.

VI. ASSOCIATED RULES OF COURT

Several Rules of Court are specifically associated in some way with Rule 191 and the pre-trial conference. The most obvious of these are the other Rules found in Part Seventeen which address various aspects of setting down for trial. Rule 190 deals with the trial venue (Rule 513, in dependent adult proceedings; Rule 593, in family law proceedings). Rule 192 mandates that the pre-trial conference judge direct the local registrar to assign a trial date when a matter is to proceed to trial. Rule 193 provides that a trial which has been assigned to a particular trial date can only be adjourned on the order of a judge upon application by a party which is supported by affidavit. Rule 194, new in 1996, requires that the party having carriage of a proceeding pay forthwith the fee for setting the matter down for trial where the trial date was assigned by order pursuant to Rule 191(1).

Part Forty-Eight contains a couple specialized rules relating to pre-trial conferences and setting down for trial in family law proceedings. Rule 593 is noted above. Rule 604 mandates a pre-trial conference in all cases where an Answer has been delivered.

A number of Rules refer to the timing of the pre-trial conference. Rule 196 permits a party to make a demand for a jury trial if the action meets the criteria provided for in the Jury Act, 1998, S.S. 1998, c. J-4.2, at any time before the local registrar has assigned a date for trial. The court may relieve against the party's failure to make a jury demand in time. Courts are prepared to do so provided that there has been no prejudice to the opposing party: Quintal v. Datta, [1986] S.J. No. 113 (C.A.) (QL). Practically speaking, there will have been no prejudice if the opposing
party was aware at the time of the pre-trial conference of the party's intention to request a jury: *Mikolayczyk v. Reid and Canada Truck Lease Ltd.* (1995), 132 Sask. R. 161 (Q.B.). However, Mr. Justice Laing determined, in *Turner et al v. Co-operators Life Ins. Co. et al* (1995), 132 Sask. R. 316 at 317-8 (Q.B.), that a party will have been prejudiced in its negotiations at a pre-trial conference if it was not informed of the opposing party's intention to request a jury trial:

The pretrial conference rules, and the case law that has developed around them, emphasize that by the time the pretrial conference takes place, all relevant information with respect to each party's case should be disclosed. The reason is, that all civil pretrial conferences in this Province are settlement pretrial conferences. It is intended that each party has all of the information necessary to assess the relative strengths and weaknesses of the client's case, and with this realistic assessment the possibilities of settlement are enhanced. It seems to me, and counsel for the respondent in this matter has made the point, that the mode of trial is a rather significant factor that most counsel would wish to take into account.

The fact is that a jury trial does present different dynamics than does trial before judge alone. The skills required of counsel appearing before a jury can have a different emphasis. Experience in appearing before juries is very helpful. Not every counsel who appears on a civil litigation matter is comfortable in appearing before a jury, and many such persons would wish to engage co-counsel if they knew in advance that the mode of trial would be by jury.

The practice in this jurisdiction is that if settlement is not achieved at the pretrial conference, trial dates are set immediately thereafter. In the absence of notice prior to the pretrial conference, counsel are entitled to assume that the trial will proceed by judge alone. For one side to be faced with the request for a jury trial after the pretrial conference stage has the potential to be prejudicial in three respects:

(1) Had the party known that a jury trial would take place that party's position might have been different at the pretrial conference with respect to the issue of settlement.

(2) If the lawyer appearing on the case is not comfortable with conducting a jury trial, the person who is to conduct the trial should be present at the pretrial conference. Rule 191(7) states that counsel representing a party at the pretrial conference shall be the same counsel who will represent that party at trial, unless otherwise ordered.

(3) There will inevitably be "late" preparation and some duplication of effort by the person who is to conduct the jury trial.

The respondent states all three of the foregoing factors are operational in this case if this application is successful.

I find that the points made by counsel for the respondent have merit on the facts of this matter. I do not say that the points of "prejudice" identified in the foregoing are conclusive in any one case. Rather as in most cases, it is a question of balancing the merits of the application with any "prejudice" that is established by the opposing side.

If counsel prepares thoroughly prior to the pre-trial conference, this situation need never arise.
A similar problem frequently arises in relation to expert evidence. Rule 284C(3) requires that a party wishing to submit at trial the report of a duly qualified medical or chiropractic practitioner or dental surgeon must provide a copy of the report and a summary of the expert's qualifications to all other parties not less than ten days prior to the pre-trial conference. The requirements of this Rule are fully canvassed in *Haines v. Riou* (1994), 121 Sask. R. 11 (Q.B.). Likewise, Rule 284D(1) requires notice ten days before the pre-trial of a party's intention to call an expert witness at trial. The party must serve on every other party to the action a report setting out the name, address and qualifications of the expert, the substance of the proposed testimony, and a copy of any written report to be used in evidence. The court may relieve against a party's failure to comply with Rule 284C(3) and 284D(1).

The Notice of Expert Witness Rules are, it seems, honoured more in the breach than in the observance. One reason commonly given for this is that the expense of obtaining an expert report cannot be justified when the action may be settled at pre-trial. This is a clear situation in which the pre-trial goals of settlement and trial management are in conflict. In light of the emphasis on negotiating settlements, perhaps it should not be surprising that compliance with Rule 284C(3) and Rule 284D(1) is sporadic. As an inducement for parties to comply with the expert notice provisions, however, Rule 284D(4) was introduced in 2003. Pursuant to this Rule a party that does not file the requisite expert notice and report within the times prescribed "shall not" be entitled to any costs or disbursements relative to the testimony of the expert.

The rules governing Third Party Claims are also tied to the timing of the pre-trial conference. A Third Party Claim may only be made with leave of the court after a joint request for pre-trial has been filed or after ten days following service of a notice of motion for an order that a pre-trial conference be held (Rule 107A). In *Armusch v. Regina School Division No. 4*, [1996] S.J. No. 882 (Q.B.) (QL), leave to add certain third parties after the pre-trial had taken place was refused because of the prejudice which the plaintiff would suffer as a result of further delay.
Finally, it should be noted that Rule 536, which addresses the notice which one party must
provide to another before taking further steps in an action in which no proceeding has been taken
for over a year, deems a request for pretrial to be a “proceeding” for the purposes of this Rule.
Those contemplating an application to dismiss for want of prosecution should take note.

VII. SELECT ISSUES

An interesting problem has arisen on numerous occasions when a party has attempted to enforce
an ambiguous or incomplete agreement ostensibly reached during the pre-trial conference. In
_Penteluk, supra_ the judge who presided over the pre-trial conference endorsed on his report of
the proceeding that the matter had been settled. Subsequently, however, the parties were unable
to agree to the terms of the consent order. One party then applied to enforce its version of what
had been agreed. Mr. Justice MacLeod commented on the privileged nature of pre-trial
communications:

> A settlement is desirable, but if it is not achieved, the pretrial conference is the judicial equivalent
of a cosmic black hole from which no light is allowed to escape. Neither the judge, counsel nor
the parties can testify by affidavit or viva voce on anything related to the pretrial conference. If
the conference is successful, either at its conclusion or at some later time, that success will be
evidenced by a written agreement executed by the parties or their counsel, or preferably both... Either party is then in a position to sue on that agreement in the event the other fails to fulfill its

It is important to note that, in addition to the actual discussions at the pre-trial conference, the
contents of pre-trial briefs are similarly privileged and cannot be disclosed to the third parties
Q.B. [unreported] the applicant widow sought disclosure of documents relating to her son’s
matrimonial dispute in connection with her own action against her husband’s estate. All
documents on the file were disclosed to the applicant, but the court refused to disclose the pre-
trial briefs in order to “preserve the integrity of the pretrial conference procedure”.

---

11 See Epp's discussion of this case, _supra_, note 2.
In *Condessa, supra* Mr. Justice Cameron wrote a separate, concurring judgment in which he pointed out some potential difficulties in determining the existence and nature of agreements purportedly reached during pre-trial negotiations. After commenting that the new Rules adopted in 1991 were likely to give rise to controversy, he continued:

This is especially so if, as suggested by my colleague, the current Rules are to be taken in the first instance as mandating obligatory mediation to be conducted by judges, as judicial-mediators, empowered to take a leading, active, and even decisive part in settling the action if possible, but who are immune, should a dispute ever arise over what occurred, from being called upon to testify about what was said or done. If that be so, and since these conferences are to be conducted off the record, the present Rules are likely to give rise to some vexing questions.

For example, if such mediation is to result in contracts of settlement, but the discussions preceding their making are inadmissible in all subsequent proceedings, as the current Rules provide, and no record is maintained and the judges are so immune, then how is the Court of Queen's Bench to handle actions on such contracts? Actions, for example, to enforce them in the face of ambiguity or to rectify them in the case of alleged mistake, where extrinsic evidence, including parole evidence, of the circumstances giving rise to the contract must often be adduced. Or actions to rescind them on the basis, let us say, of alleged misrepresentation or duress or undue influence, as in the case, to use an obvious example, of matrimonial property settlements, where the same evidentiary considerations apply. And how is the exercise of the powers afforded the judges, including for instance the power to impose sanctions by way of costs, to be reviewed on appeal in the absence of a record or other effective means of determining what occurred? [at 184-185]

Cameron J.A. then speculated that the special immunity from testifying enjoyed by judges with respect to their decisions might not extend to mediations which they had conducted. Vancise J.A., by contrast, writing for the majority, concluded that judges' common law immunity extended to the fulfillment of their judicial duties, which would encompass presiding over pre-trial conferences. As a result, the judge could not be subpoenaed to testify concerning the events at the pre-trial.

In *Zimmerman v. Zimmerman* (1992), 104 Sask. R. 150 (Q.B.), Mr. Justice Dickson had to consider an application for leave to enter judgment in the terms set forth on the fly-leaf of the court file. The notes had been written by Madam Justice Carter at the conclusion of the pre-trial conference and she, but not the parties, had signed them. The husband opposed the application on the footing that their agreement was not complete until the parties had executed a consent order which had then issued, and that Carter J.'s note was inadmissible because the pre-trial
judge's notes were confidential. Dickson J. disagreed, holding that Carter J. had been merely the scribe of the parties' agreement, and that the "cosmic black hole" metaphor would only apply where no agreement had been reached. In like manner the court in Ludwar v. Ludwar (1995), 130 Sask. R. 208 (Q.B.) concluded that it could look into what occurred at the pre-trial conference and that the parties could testify to the same, in order to determine whether or not an agreement was reached. With respect, the reasoning in these cases is circular: the notes and testimony had to be admitted to prove the existence of an agreement; the existence of an agreement made the notes and testimony admissible. These decisions and the reasons of Cameron J.A. in Condessa, supra suggests that the all-encompassing privilege envisioned by MacLeod J. in Penteluk, supra may warrant reconsideration.

One solution might be for the pre-trial judge to provide his or her version of what took place at the pre-trial by way of a certificate, the contents of which would speak for itself. Alternately, pre-trial conferences could be recorded. If no settlement were reached, the tapes would, so to speak, disappear into the "cosmic black hole." If the parties reached an agreement and followed through on its terms without further controversy, the recording would serve no purpose. However, if the parties disagreed over the outcome of the negotiations, the tapes would be available for transcription and introduction into evidence in a subsequent proceeding to determine whether or not an agreement was reached.

Another issue of practical importance is the method by which one party may apply to enforce a settlement agreement reached at the pre-trial conference. In several cases, applicants have relied on Rule 184A for support of their request for an order granting judgment in the terms set out in the agreement. However, the Saskatchewan Court of Appeal has held that the Offer to Settle Rules found in Part Fourteen A contemplate formal, written offers to settle and acceptances. The proper course to apply to enforce a settlement negotiated at pre-trial is to apply of section 29 of the Queen's Bench Act, 1998, S.S.1998, c. Q-1.01, as amended.
VIII. THE FUTURE OF PRE-TRIAL CONFERENCES

With the public's growing acceptance and desire for alternative dispute resolution mechanisms, like mediation, combined with the evolution of pre-trials from primarily trial management to case settlement, it is likely that pre-trials, in one form or another, will continue to play a vital role in the Saskatchewan litigation process. If, however, the pre-trial is to continue to be a useful tool for the resolution of disputes a couple of concerns must be addressed. First, the current pre-trial process is too costly and, second, the conference does not take place soon enough in the litigation process.

With the cost of litigation becoming increasingly prohibitive, most litigants are looking for alternatives that will resolve their disputes less expensively and in a more timely manner. Pre-trial conferences in Saskatchewan are essentially mediations with the judge as the mediator. The objective is not for the judge to impose upon the parties a resolution, but rather for the parties to come to their own agreement. It is the presence of a judge at a pre-trial, however, that gives a pre-trial an advantage over most other alternative dispute resolution methods. In order for most parties to successfully negotiate a resolution to their dispute, they require the guidance and assistance of a neutral, authoritative and respected figure. With a judge as the mediator, the process takes on instant credibility. Not only does a judge bring to the table knowledge of the law, he or she brings the independence and respect the public has come to expect from the courts. The judge's comments and views about a particular dispute can, in most cases, be very persuasive to the parties. The problem with the current pre-trial process, however, is that it typically only takes place as the final step before proceeding to trial and along with it comes a significant expense to the parties.

For any negotiation to be successful, there must be frank disclosure from all parties so as to create an environment in which each party can attain a "comfort level" as to the facts and issues in dispute. This does not always mean, however, that each litigant must exhaust every step in the litigation process, except for trial, before they can have a successful pre-trial conference.
does it always mean that the parties have to incur the expense of retaining experts and having reports and briefs prepared before a meaningful pre-trial conference can take place. In many instances sufficient facts are known and information available to all parties following the close of pleadings, or shortly thereafter, to make a pre-trial conference at that point in time a worthwhile exercise. Affording the parties an opportunity at that time to sit down with each other along with a judge may very well result in a settlement before the parties have gone through the effort, expense and time preparing for trial. Rather than waiting for all disclosure and trial preparation work to be completed before proceeding to a pre-trial, it is possible to have a post-pleadings pre-trial conference. In fact, in 2001 the Rules were specifically amended (see Rule 191(11A)) to allow the parties to apply for a "post-pleadings conference". While it will not be practical in all cases it may be worth considering in those instances where disclosure of the facts is not a barrier to the possibility of reaching a settlement.

In 1994 amendments were made to the Queen's Bench Act that made it mandatory for parties to all non-family law civil actions to attend a mediation session following the close of pleadings and before the litigation progressed further. This requirement was carried forward in section 42 of the Queen’s Bench Act, 1998, supra. Although the formal introduction of mediation into the litigation process has not been a panacea and there are areas where improvements can be made, the project has been a success. From September 1995 through to the summer of 1996 Mediation Service's tracking of the cases indicates that between 60% and 70% of the mandatory mediations it handled fell into the categories of either agreement reached, agreement likely to occur or negotiations ongoing. In 25% to 35% of the cases there was some useful interaction but the parties were still going to proceed with litigation, and in 5% of the cases the mediation session was completely unproductive 12.

---

12 Report prepared by Mediation Services in the summer of 1996 for presentation at the Bar Admission Course at the University of Saskatchewan.
One of the problems with the mandatory mediation is that there is often a credibility gap. The mediators, for the most part, do not have a legal background and often spend much of their time trying to persuade the parties that they are familiar with and understand the business or industry that is the subject of the dispute. As noted above, credibility is not typically a problem at a pre-trial conference, and by affording parties the opportunity to attend a pre-trial conference earlier, rather than later, in the litigation process, many parties would save the time, expense and aggravation associated with protracted litigation. While Rule 191(11A) was introduced to allow for earlier access to a pre-trial conference, it does not appear that many lawyers are recognizing and taking advantage of this opportunity.

X. SUGGESTIONS FOR FURTHER READING


Holland, R.E. "Pre-Trial Conferences in Canada" (1987), 7 Advocates Q. 416.

Loeschman, D.C. "'Time, Gentlemen, Time . . . ': Pre-Trial Conference Procedures in the Supreme Court of British Columbia" (1984), 18 U.B.C.L. Rev. 163.
