



EMPLOYMENT LAW CONFERENCE—2006

RULE 68: EXPEDITED LITIGATION PROJECT RULE

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I. Introduction

A large number of employment law actions are for damages of more than \$25,000 (the upper limit in Small Claims Court), but less than \$100,000. Therefore, it was with some interest to the employment law bar that the government introduced an “expedited litigation project” (Rule 68) for actions involving claims of \$100,000 or less. This paper outlines the more significant aspects of Rule 68, and explores the Rule’s potential impact on some of the tactical and procedural decisions faced by counsel generally and employment law counsel specifically.

A. What is Rule 68?

Rule 68 is a B.C. Supreme Court Rule that establishes an expedited litigation pilot project. The Rule, and therefore this project, were in effect as of September 1, 2005 and will remain in place until at least September 1, 2007.

In a nutshell, Rule 68 establishes an expedited process for civil litigants by streamlining procedures for cases under a certain monetary limit. The purpose of Rule 68 is “to reduce the time and cost required to dispose of these cases in court.”¹

B. Where is Rule 68 Available?

The four civil registries in B.C. that are participating in the Rule 68 pilot project are those located in Vancouver, Victoria, Prince George, and Nelson. These four locations together heard 59.1% of B.C.’s total Supreme Court caseload in 2004/2005.

C. When Does Rule 68 Apply?

I. \$100,000 or by Consent

Rule 68 applies to an action (other than a family law or class proceeding) commenced in one of the four enumerated registries after September 1, 2005, so long as the plaintiff anticipates that the claim or claims will total, or have a value of, no more than \$100,000, exclusive of interest and costs (subrule 68(2)). In other words, Rule 68 is mandatory for such cases. If an action includes one or more unliquidated claims, counsel should make his or her best estimate of the value of those claims when assessing whether Rule 68 applies. If the total amount of the claims in the action, including the estimated amounts for the unliquidated claims, is \$100,000 or less, Rule 68 applies.²

Despite the \$100,000 limit, the court has the ability to award an amount that exceeds this limit (subrule 68(4)).

Rule 68 also applies to an action (other than a family law or class proceeding) not described in subrule 68(2) “if the parties to the action consent” (subrule 68(3)). Consent to being governed by Rule 68 can be in a form acceptable to the parties and should be endorsed with a Rule 68 endorsement.³

1 Notice to the Profession from Chief Justice Brenner, dated March 30, 2005.

2 Practice Direction from Chief Justice Brenner, dated August 2, 2005.

3 Frequently Asked Questions regarding Rule 68 (Rule 68 FAQ) found at the civil courts’ website (www.courts.gov.bc.ca), #2.

2. Declarations

It appears that Rule 68 does not apply to “declarations.”⁴ For example, in a denied disability benefits case, it appears that the plaintiff would be unable to seek a declaration under Rule 68 that he or she was disabled during a particular time period.

3. Defendants

If a defendant is of the view that the action cannot be appropriately dealt with under Rule 68, the defendant may apply for an order that Rule 68 ceases to apply (subrule 68(7)).

The defendant cannot make any counterclaim (regardless of monetary value) under Rule 68 without the consent of the plaintiff. According to the Rule 68 FAQ, “[w]hether there is some scope for the defendant to seek an order from the court making a claim subject to Rule 68 is a matter that will have to be determined through judicial consideration.”⁵

II. Procedure

This section outlines the most significant procedural changes implemented by Rule 68.

A. Limitations on Pre-Trial Procedures and Evidence Called at Trial

I. Document Disclosure

Subrules 68(15) through (22) deal with document disclosure under Rule 68. Rule 26 (Discovery and Inspection of Documents) does not apply to Rule 68 matters (subrule 68(15)).

The scope of documents that each party is entitled to have produced as of right under Rule 68 is more limited than that contemplated by Rule 26. Under subrule 68(16), each party must prepare and deliver, within 15 days of the close of pleadings, a list *and copy of each document* (1) referred to in the party’s pleading, (2) to which the party intends to refer at trial, and (3) in the party’s control that could be used by any party at trial to prove or disprove a material fact. By contrast, Rule 26 requires the disclosure of documents that are or have been in the party’s possession or control relating to any matter in question in the action. The level of disclosure required by Rule 66 is the same as that under Rule 26.

One issue that has arisen under Rule 68 is its effect on the requirement to list and produce privileged documents. According to the Rule 68 FAQ, this issue will need to be addressed through judicial interpretation of the Rule.⁶

a. Close of Pleadings

The “close of pleadings” concept is defined in subrule 23(5). The definition applies to the document disclosure provisions in subrule 68(16)⁷ and provides:

Where no reply to a statement of defence, to a statement of defence to a counterclaim, or to a subsequent pleading is delivered within the time allowed, the pleadings are

4 Based on the author’s own experience at a Case Management Conference in January 2006.

5 Rule 68 FAQ, #7.

6 Rule 68 FAQ, #9.

7 Rule 68 FAQ, #8.

closed and material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

By contrast, Rule 66 requires that (1) the plaintiff serve its List of Documents on the defendant at the time the Writ and Statement of Claim is served, and (2) the defendant provide its List of Documents at the time the Statement of Defence is filed. See subrule 66(12) for a complete list of requirements relating to delivery of documents under that Rule.

b. Demand and Form for List of Documents

The demand for documents under Rule 68 can be made in any form, so long as it is in writing and identifies the documents or class of documents being sought.⁸

Subrule 26(1), which mandates the use of Form 93 to list documents, does not apply to Rule 68 actions (subrule 68(15)). However, counsel may use Form 93 and modify it as they deem appropriate.⁹

c. Photocopying Charges

Under Rule 68, photocopy costs relating to document disclosure are not to be charged to the opposing party before the conclusion of the case; furthermore, they will only be charged in the event costs are ultimately awarded.¹⁰ This differs from the current practice under Rule 26.

2. Examinations for Discovery

a. No Automatic Right to Discovery

Subrule 68(24) specifically excludes the operation of Rule 27 (Examination for Discovery). In other words, there is no automatic right to discover an adverse party under Rule 68. Rather, discoveries must be consented to by counsel, or ordered at a Case Management Conference (CMC, discussed later in this paper) (subrule 68(27)).

In determining whether discoveries should be ordered, the court will apply the proportionality test. The guiding principle for *all* court applications under Rule 68 is proportionality: when asked to make an order, the court must consider whether the proposed step or request is reasonable in relation to the amount at issue in the action (subrule 68(13)). For claims close to the Small Claims Court limit of \$25,000, it is anticipated that a court would be less likely to order discovery (as discovery is not a part of the Small Claims process). It is expected that parties involved in a claim for \$100,000 would most likely be granted discovery upon request.

When discovery is granted, the court will order two hours of discovery per party and if more is required, this can occur by consent or by court order at a subsequent CMC (subrules 68(28) and (29)).

b. Case Law

As of early April 2006, only one Rule 68 case had been tried and reasons for judgment issued. In this case, *Nesbitt v. James Western Star Sterling Ltd.*, [2006] B.C.J. No. 648 (S.C.), the plaintiff sued the defendant truck dealership for inducing him to purchase a used truck by fraudulently representing that the truck was in sound working condition. Mr. Bursinger, an agent of the defendant, had provided a "passing" inspection report for the truck in question.

8 Rule 68 FAQ, #10.

9 Rule 68 FAQ, # 9.

10 Chief Justice Brenner advised the author of this during a CMC in the fall of 2005.

No oral discoveries were conducted in the case prior to trial. In his reasons for judgment, Humphries J. questioned whether discovery would have unearthed certain facts that Mr. Bursinger testified to at trial so that the plaintiff could have been asked questions about those facts during his in-chief examination. At para. 32, Humphries J. stated:

Rule 68 does not provide for a right of discovery and, unfortunately, no discovery was done of a defendant's representative either by consent or by court order. The evidence may have gone in differently if Mr. Bursinger's evidence had been canvassed in a pre-trial procedure.

Interestingly, the evidentiary problems noted by Humphries J. do not appear to be the fault of Rule 68. While litigants proceeding outside of Rule 68 have a *right* to oral discoveries, such discoveries are not mandatory; in other words, even if *Nesbitt* had been conducted outside of Rule 68, there is no guarantee that the witness' evidence would have been "canvassed in a pre-trial procedure."

3. Interlocutory Applications

A party may not bring on a contested interlocutory application without first attending a CMC. During a CMC, a judge or master¹¹ may make a variety of orders aimed at narrowing the issues in dispute and readying the case for trial (subrules 68(10) to (12)). Uncontested applications may be brought before the court without the need to attend a CMC (subrule 68(11)(e)).¹²

Of note, Rule 68 allows orders to be made at a CMC and/or Trial Management Conference (TMC, discussed later in this paper) on the basis of oral submissions without the need to file affidavits (subrule 68(42)). For those matters that would normally require one or more chambers applications, the opportunity to seek an order without preparing supporting affidavits may mean a cost saving to litigants.

4. Experts

Under Rule 68, parties are limited to calling one expert witness at trial and may only call an additional expert to respond to the expert evidence of an opposing party where the first expert called does not have the expertise to provide the required response (subrule 68(33)). Parties may agree, or be ordered, to retain a jointly instructed expert (subrules 68(41)(j) and (43)).

The author is aware of one instance where the court has varied this "one expert" rule. During a personal injury CMC that the author observed, the plaintiff had three treating doctors, two of whom were specialists. Counsel for the plaintiff wished to call all three doctors as experts. The Court allowed the plaintiff two experts, and ruled that if the plaintiff determined he needed a third, he would need to book another CMC and make that argument.

B. Obligations to Exchange Information

I. Witness Lists

Parties are required to exchange lists of witnesses and a written summary of the evidence to be given by each witness at trial within 60 days after the pleadings are closed, or 60 days after the action becomes subject to Rule 68, whichever is later (subrules 68(31) and (32)). Unless the court orders

¹¹ In Vancouver, the person presiding over a CMC is in all cases a judge.

¹² Rule 68 FAQ, # 3.

otherwise, you may not call a person as a witness at trial unless the person's name and a summary of his or her evidence are disclosed under these provisions (subrule 68(32)).

In addition to sharing witness information with opposing counsel, you are required to disclose this information to the court in a trial brief filed at least seven days before the TMC (more on trial briefs below).

C. Case Management Conference (“CMC”)

I. General

The purpose of the CMC¹³ is to allow the parties to raise, and the court to make orders regarding, certain matters in advance of trial (subrule (41) sets out a list of these matters). CMCs are not mandatory under Rule 68, however, the practice in Vancouver is that counsel cannot set a trial date until a CMC has occurred. Either party may request a CMC under subrule 68(34) after certain requirements regarding document discovery and time periods have passed. A CMC is requested using Form 142.

In Vancouver, there are currently only two judges who hear CMCs: Chief Justice Brenner and Madam Justice Gerow. Based on the author's experience, it appears that Madam Justice Gerow presides over the majority of these.

2. Bring Your Client

The first rule to remember regarding a CMC is: *bring your client*. This is a mandatory requirement (subrule 68(38)). The underlying rationale is that the court wants the named parties to be present to see first hand the process of litigation and to be available for any settlement discussions.

It is possible to have your client appear at a CMC by phone; in order to do this, you will need to send a request to the court (through Trial Scheduling) asking for this privilege. It is important to submit this request sufficiently in advance of the CMC, to allow for enough time for Trial Scheduling to seek and obtain consent from the presiding judge.

In one instance, the author chose not to bring a representative of his client (the plaintiff) to a CMC (for reasons specific to that particular case). Opposing counsel brought this matter to the court's attention and objected to the representative's absence, and the Court ordered costs of \$250 “in the cause” in favour of the defendant. Afterwards (too late, unfortunately), the author remembered that one defence counsel had recently argued successfully to the presiding judge that, while counsel's client was not in attendance at the CMC, counsel had full authority to make decisions for his client concerning the action under subrule 68(38)(c)(i), which states:

(38) Unless a judge or master orders otherwise, if a case management conference is held, the following persons must attend for each party and must bring or cause to be brought to the case management conference all of the documents referred to in the most current list of documents delivered by the party under subrule (16) or (17):

...

- (c) if the party is not an individual, a person who has
 - (i) full authority to make decisions for that party concerning the action, or ...

It seems unlikely that subrule 68(38)(c)(i) was intended to catch a party's legal counsel, but until the court has ruled on this, counsel may wish to try it.

13 The provisions regarding CMCs are found in subrules 68(34) through (50), inclusive.

3. Trial Dates

In Vancouver, a Rule 68 trial date will not be set until a CMC occurs. Because the parties will often set the trial date during the CMC,¹⁴ counsel should be aware of their own and their clients' available dates in advance of the CMC. The CMC judge will typically have a discussion with counsel about the estimated length of the trial, and will then have the court clerk contact Trial Scheduling to book the trial date while the parties wait. Unless the court otherwise orders, when a trial date is set at a CMC, the plaintiff is deemed to have obtained the trial date for the purposes of Rule 39 (Trial) and is required to file a notice of trial within 30 days of the CMC.¹⁵

For plaintiff's counsel interested in obtaining the earliest trial date possible, the CMC can present various problems. First, there are times when CMC date availability is limited. This, combined with the challenges inherent in finding a date that fits into both counsels'—and parties'—schedules can result in a delay of a month or more. Counsel in this position may want to consider writing the Trial Coordinator in their jurisdiction to determine if any earlier CMC dates can be added.

Second, the trial dates offered at the CMC may not be the earliest dates available for your case. Counsel who are seeking early trial dates may wish to contact Trial Scheduling before the CMC to ascertain the earliest dates available so as to have this information in hand during the CMC should these dates not be offered by Trial Scheduling through the court clerk. In some instances, counsel may be able to convince Trial Scheduling to reserve the dates until the CMC.

4. 18A—Summary Trial

Rule 68 does not specifically prohibit counsel from bringing a Rule 18A application for final judgment before the CMC. However, at a CMC in the fall of 2005, Chief Justice Brenner advised the author that such a prohibition is part of the spirit of Rule 68. For this reason, counsel who wish to quickly commence an 18A action in a “without cause” wrongful dismissal case should consider bringing the action outside of Rule 68, so long as there is a case to be made that the damages sought are over \$100,000. Of course, it is still open to counsel to attempt to bring an 18A on for final judgment before the CMC and argue that Rule 68 does not specifically prohibit such a motion; the Chief Justice's comments should, however, be kept in mind.

D. Trial Management Conference (“TMC”)

I. General

Subrules 68(55) and (56) require that a TMC be held between 15 and 30 days before trial. During the TMC, the presiding judge may make a variety of orders aimed at streamlining the conduct of the trial. These orders include (subrule 68(56)):

- directing that some witnesses present evidence by affidavit;
- imposing time limits for the direct and cross-examination of witness as well as opening statements and final submissions;
- requiring parties to make admissions of facts and/or documents;

14 In the author's experience, Madam Justice Gerow will set the trial date during the CMC. She also follows and completes a multi-page list of questions related to the matter and attempts to create a time-line of when certain pre-trial matters will be completed.

15 Practice Direction from Chief Justice Brenner, dated August 2, 2005.

- requiring parties to prepare common books of documents and/or enter into document agreements; and
- requiring parties to present opening statements and final submissions in writing.

If a party to an expedited action intends to seek an order at a TMC, notice of the order to be sought should be provided to the court and to the opposing party at the same time that the trial brief is required to be exchanged and filed (more on trial briefs below). This notice can be provided by requisition similar in form to the Requisition for a Case Management Conference (Form 142).¹⁶

2. Trial Brief

Each party is required to prepare and exchange a comprehensive trial brief prior to trial that summarizes the party's position on the matters at issue and the evidence to be called at trial (see subrules 68(53) and (54)). The trial brief must also include the terms of the order that the party will seek at trial (subrule 68(54)(k)). These briefs must be filed and delivered to the opposing party at least seven days before the TMC.

The Practice Direction dated July 10, 2002 that requires the exchange and filing of witness lists before trial does not apply to an expedited action under Rule 68.

3. TMC Date

The onus is on the parties to secure a TMC date with the Trial Coordinator. Where possible, TMC dates will be set at the CMC.¹⁷

III. Other Considerations

A. Relationship Between Rules 68 and 66

Rule 66, which provides for "fast track" litigation, might be viewed as the "older sibling" of Rule 68. Rule 66 was introduced in 1998 as a project rule for a limited period of time in a small number of registries. It remains in operation today and has been expanded for use throughout B.C.

I. Conflict Between Rules

Theoretically, there is some uncertainty as to which of the two Rules (66 or 68) takes precedence over the other. Subrule 68(6) states:

The rules that apply to actions apply to an expedited action except that, in the event of a conflict between this rule and another rule, as those rules relate to an expedited action, this rule applies.

Subrule 66(4) states:

In the event of a conflict between this rule and another rule, this rule applies.

Thus, on the face of it, in the event there is a conflict between Rule 66 and 68, both Rules apply! To date, there has been no Practice Direction or FAQ issued to resolve this confusion. However, since

¹⁶ *Ibid.*

¹⁷ Practice Direction from Chief Justice Brenner, dated August 2, 2005.

Rule 68 is compulsory in the four pilot registries mentioned above, it seems that counsel may not bring an action under Rule 66 if the plaintiff's claim for damages is \$100,000 or less.

It appears that the civil registry in Vancouver is not currently monitoring whether claims are being filed under the correct Rule. Thus, at this point, if counsel in Vancouver brings an action under Rule 66 for a claim valued at \$100,000 or less, the only person likely to raise the issue of Rule 66 vs. Rule 68 will be opposing counsel.

There is reason to believe that it may be easier to obtain a trial date under Rule 68 than it is under Rule 66. This issue will be explored further during the oral presentation of this paper.

B. Converting to Rule 68

At the time Rule 68 came into effect, there was some question as to whether an action commenced before September 1, 2005 could be transferred into Rule 68. This question was addressed in part by Macaulay J. sitting in Chambers in *Servos v. Insurance Corp. of British Columbia*, [2005] B.C.J. No. 2210 (S.C.).¹⁸

In *Servos*, the plaintiff applied to transfer his personal injury proceeding to Rule 68 without the consent of the defendant. Macaulay J., considered two main issues:

1. Whether the court may override the lack of consent and direct that actions, other than defined within subrule 68(2), be governed by Rule 68 even where all parties do not consent.
2. Whether the order should have been granted in the particular circumstances of the case.

On the first issue, Macaulay J. stated at para. 11:

Once a statute covers a matter, it is well understood that inherent jurisdiction cannot be relied on except to fill a functional gap or vacuum: *Unity Brokers (Windsor) Ltd. v. Unity Realty & Insurance Co.*, [2005] O.J. No.1069 (Ont. Div. Ct.) [parallel cite omitted]. It represents the reserve or fund of powers which the court may draw on as necessary when it is just or equitable to do so, but it is not unlimited and cannot be exercised contrary to any statutory provision. See *Glover v. Glover (No. 1)* (1980), 29 O.R. (2d) 392 (C.A.) [parallel cite omitted], *aff'd* [1981] 2 S.C.R. 561.

On the second issue, he stated at paras. 12 through 14:

There is no gap in the present circumstances. Rule 68 expressly requires the consent of the defendant. It follows that my inherent jurisdiction does not extend to overriding the defendant's lack of consent and directing the transfer of the proceeding into the pilot project.

Even if I were entitled to override the lack of consent, I would not do so because it would greatly prejudice the defendant which has conducted the proceeding to date under the usual rules. It is too late to impose a dramatically different regime.

The proceeding is on the eve of trial with a jury. Counsel preparation for, and the conduct of, jury trials differs significantly from non-jury trials. The defendant has also retained a number of experts because of the peculiar features of the case. A significant number of witnesses is required. The defendant has not abused the court's process but has simply availed itself of the existing rules.

¹⁸ It appears that as of the date of this writing, *Servos*, *supra*, is the only Chambers decision under Rule 68 for which reasons for judgment have been issued.

As a result, Macaulay J. dismissed the plaintiff's application to transfer.

C. Rule 68 Statistics

From September 2005 to March 2006, of the total number of Supreme Civil New Files¹⁹ (general category), 7.9% were actions filed under Rule 68. Of the total number of motor vehicle files, 14.4% were actions filed under Rule 68. In actual numbers, this amounted to 1128 Rule 68 cases filed in the four enumerated registries between September 2005 and March 31, 2006.²⁰

D. Choosing the Appropriate Rule

There are a number of so-called "tactical considerations" to weigh when choosing whether to commence an action under Rule 68, Rule 66, or the non-expedited/fast track litigation process, or in Small Claims Court. (Because estimating the value of a claim is an inexact science, in some cases, counsel may have the opportunity to opt in or out of Rule 68.) This section sets out a number of advantages and disadvantages to choosing one litigation route over another, and summarizes many of the points discussed above.

"Route"	Advantages	Disadvantages
Rule 68	<ul style="list-style-type: none"> • Document Disclosure: Narrower requirements than under Rule 26 • CMC: Provides "roadmap" for litigation: opportunity to canvass many issues that might otherwise be dealt with in chambers, and therefore result in delay; opportunity to set dates for document and will-say exchange, TMC and trial date • TMC: Facilitates improved trial preparation (and risk assessment for settlement purposes) • Court: Actively involved in determining length of trial • Motions: Can be made without supporting affidavit material (time and cost saving) • Experts: Limit on number 	<ul style="list-style-type: none"> • CMC/TMC: Cost of preparation and attendance at two pre-trial conferences • CMC: Limited number of CMC dates can delay ability to obtain an early trial date; inability to bring 18A for final judgment before a CMC • Claim: Usually limited to \$100,000 or less • Damages Limit: If value of claim is close to \$100,000, defence counsel may apply to move the case out of Rule 68 (increasing costs)²¹ • Discoveries: Limited in length; court will typically order at least 2 hours of discovery on request (i.e., Rule 68 does not represent the end of oral discoveries) • Trial Date: Trial Scheduling is not required to offer counsel a trial date within four months of his / her request as under subrule 66(20) • Experts: Limit on number

19 Supreme Civil New Files are the number of new civil cases filed in the Supreme Court Registry including writs, petitions, appeals and files transferred in from other locations for disposition, not including family law proceedings, adoption, probate, caveat or bankruptcy files.

20 The assistance of Jill Leacock, Law Officer at the B.C. Supreme Court (Vancouver Registry), in obtaining these statistics is gratefully acknowledged.

21 Rule 68 FAQ #1 discusses the right of the plaintiff to abandon any part of his or her claim over \$100,000, but clarified that there is nothing in Rule 68 that prevents a court from awarding damages to a plaintiff in an expedited action for an amount in excess of \$100,000 (subrule 68(4)).

"Route"	Advantages	Disadvantages
Rule 66	<ul style="list-style-type: none"> • Trial Date: Trial Scheduling must offer counsel a date within four months of counsel's request • Trial Length: Limited to two days • Discoveries: Limited to two hours • Damages Limit: Claims are not limited to \$100,000 in damages • Costs: Awards are pre-determined • Mandatory Attendance: There are no mandated court attendances such as for a CMC or TMC (although counsel can always request/compel a pre-trial) 	<ul style="list-style-type: none"> • Trial Date: Trial Scheduling need only provide counsel with one possible trial date within the four month period; if this date does not fit with counsels' schedules, counsel may be forced to pick a date substantially outside of the four month period • Discoveries: Limited in length • Transferring Out: Opposing counsel can apply to move the case out of Rule 66 on the basis that the trial may take more than 2 days (increasing costs) • CMC / TMC: Do not exist
Non expedited/fast track, Supreme Court	<ul style="list-style-type: none"> • No Prescribed Limits: On amount of damage claim; discovery length, document disclosure, trial length, number of experts; timing of interlocutory applications or 18As, etc. 	<ul style="list-style-type: none"> • To be discussed during oral presentation.
Small Claims Court	<ul style="list-style-type: none"> • Discoveries: None permitted • Costs: Limited circumstances where costs will be awarded • Motions: Few pretrial motions sought by opposing counsel • Settlement: Settlement conference is very interactive and is run by a judge often leading to early settlement of the matter 	<ul style="list-style-type: none"> • Discoveries: None permitted • Costs: Awards usually limited if available at all • Damage Limits: \$25,000 upper limit for damages • Time: Usually a year between commencing the action and trial date