



Rule 68

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1. History of the Rule

On September 1, 2005, Rule 68 became a pilot project in four registries: Vancouver, Victoria, Prince George and Nelson. The stated goal of the pilot project was to streamline Supreme Court procedures for claims under \$100,000, except for class actions and family matters. Rule 68 identifies proportionality as its guiding principle. The idea behind proportionality is that the pursuit of a just determination on the merits should take into consideration the speed and expense of obtaining that determination. The underlying goal is to increase access to justice by making litigation less expensive and by ensuring that litigants use no more of the system's resources than their case requires. The pilot project was originally set for two years. The project was extended both in terms of duration and application, becoming available province wide. On January 1, 2008, Rule 68 became a part of our Rules of Court.

Rule 68 represents a significant departure from the traditional way of preparing and presenting a case. Instituting the Rule as a pilot project initially was beneficial to the profession as it allowed a period of adjustment to the Rule and as well allowed a period of time for assessing the problems or difficulties presented by the Rule. As Mr. Justice Macaulay highlighted in his decision in *Servos v. Insurance Corporation of British Columbia* 2005 BCSC 1423, the approach the Lieutenant Governor in Council took in phasing in Rule 68 as a pilot project initially is consistent with the approach that has been taken in the past when introducing significant procedural changes to the manner in which parties conduct litigation in the Supreme Court. Mr. Justice Macaulay explained the benefit of proceeding with rule changes by way of pilot project as follows:

The use of pilot projects for major changes allows for controlled experimentation, on the one hand, and, on the other, provides time for the parties and their lawyers to adjust to systemic change. The implementation of pilot projects also permits monitoring so that outcomes under different procedural regimes can be compared and evaluated. If difficulties become apparent during a pilot project, and associated disadvantages will usually be limited to a smaller group of litigants and lawyers than might otherwise be the case.

The shift to a focus on proportionality can be seen throughout Canada and England. Although it is arguable whether access to justice will be improved through legislative steps to make litigation proportional to the amount involved without depriving parties of a just determination of a matter on its merits, it is clear that the focus on proportionality is driving legislative change. The recent proposed full-scale changes to our Rules of Court have focused on proportionality and can be seen to be moving forward from Rule 68. Although each of us may have our own views on whether proportionality should be a



factor in our system or not, or a determinant of the remedies available to any particular party, the fact remains that in our system, proportionality has been identified as an important consideration.

As a trial lawyer, you have an obligation to understand the rules and to use the rules to the benefit of your client. In this paper, I aim to provide you with the tools to enable you to utilize the principles of proportionality found within Rule 68 to benefit your client. Used properly, in my view, Rule 68 can result in a speedier, less expensive trial for our clients and can protect them from the onerous, lengthy proceedings that parties often try to impose, and which threaten to make litigation impossible for clients to proceed.

2. Provisions of the Rule

Rule 68, in general, is directed at actions where the claims are for amounts less than \$100,000. The Rule provides expedited process for those actions. The guiding principle for the Rule can be found in Rule 68(13): proportionality. The Rule aims to achieve the objective of expedition through reducing or in some cases eliminating interlocutory process in the conduct of the action. For any order under the Rule, the court must consider whether the proposed step or request is reasonable in relation to the amount at issue in the action. There is no consideration of the importance or complexity of the issues; the only consideration is the amount at issue.

The fundamental differences between a proceeding under the regular Rules of Court versus one proceeding under Rule 68 include the following:

- More limited scope of documents that must be produced. Rule 68 provides a complete code governing document discovery;
- There is no jurisdiction for the court to order production of a document from a non-party;
- Interlocutory applications may not be brought until a Case Management or Trial Management Conference has been conducted in relation to the action, unless the application is for an order for certain remedies;
- An order can be obtained at a case management conference on the basis of oral submissions only, without the requirement for Affidavit evidence;
- Jury trials are not allowed.

Inherent throughout the Rules is discretion on the part of the Court to not apply the strict provisions of Rule 68, providing the court with the flexibility to determine the nature and extent of process in any particular case. For example subsection (4) provides that the court is not limited to awarding \$100,000, and subsection (12) provides for discretion on



the part of the court to allow interlocutory applications to be made prior to the Case Management Conference. The Rule also provides for Examination for Discovery, for extending the amount of time allowed for Examination for Discovery and the number of experts.

a. The Purpose of the Rule

The purpose of Rule 68 is to provide an expedited manner to resolve cases where the amount at issue is \$100,000 or less. The procedural steps that are taken are to be proportional to the amount at issue. The expedited steps include trial heard without a jury, limits on document disclosure, limits on Examination for Discovery, and limits on experts.

There are also provisions within the Rule requiring the parties to engage in an early and more comprehensive exchange of information. Arguably, these obligations have been imposed on the parties to foster settlements and encourage more focused trials. The provisions which serve this purpose include the requirement to exchange lists of witnesses and summaries of evidence, provision for jointly instructed experts, and exchange of comprehensive trial briefs.

Judges and Masters are given the power to streamline trials both at the Case Management Conference level and at the Trial Management Conference level. Judges are given broad powers to control and influence the manner in which a trial will proceed, including directing that witnesses provide evidence by affidavit, imposing time limits on direct and cross examination, requiring parties to make admissions of facts or documents, requiring parties to prepare common books of documents and enter into document agreements and requiring parties to present opening statements and final submissions in writing.

b. Applicability of the Rule

Rule 68(2) provides that the Rule “applies to any action commenced in the Vancouver, Victoria, Prince George or Nelson Registry after September 1, 2005 and in every action commenced in any registry after January 1, 2008, if ...the total of the following amounts is \$100,000 or less...”. The Rule may also apply to an action not specifically contemplated by the Rule if the parties consent (R. 68(3)). The Rule will not apply to either a family law proceeding or a class proceeding (R. 68(4)).

Although a party can unilaterally decide at the outset to have a matter included within the provisions of Rule 68, in an application to have the matter included within the Rule at some point later than commencement, when the rule was a pilot project, may require the consent of the parties. Arguably, this case law would still apply to any action that had been commenced prior to September 1, 2005 that you wanted included within the provisions of Rule 68, or if your action was commenced in one of the registries that did not have the pilot project, prior to January 1, 2008. (*Servos v. Insurance Corporation of*



British Columbia, 2005 CarswellBC 2348) The issues to be decided in the Plaintiff's application to have the matter included within the provisions of Rule 68 were described by Mr. Justice Macauley as follows:

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

Justice Macauley found that the court did not have jurisdiction to make the order sought. Mr. Justice Macauley referred to the court's inherent jurisdiction to craft procedural rules when necessary because the rules do not anticipate the particular problem. However, when a statute covers the matter, inherent jurisdiction cannot be relied on except to fill a functional gap or vacuum. Mr. Justice Macauley concluded that as Rule 68 expressly requires the consent of the Defendant, the court's inherent jurisdiction does not extend to overriding the Defendant's lack of consent and directing the transfer of the proceeding into the pilot project. This portion of the decision is likely limited in applicability to applications that are brought on cases that did not fit within the parameters of the initial pilot project.

Mr. Justice Macauley also indicated that, even if he were entitled to override the lack of consent, he would not do so because it would greatly prejudice the Defendant who had conducted the proceeding to date under the usual rules. The facts in *Servos* are unique. The trial of the matter was scheduled for two to three weeks with a jury. Oral and document discovery were largely, if not totally, complete at the time of the application. Each side had conducted the proceeding to the time of the plaintiff's application, including preparation for trial, under the Rules of Court ordinarily applicable to Supreme Court actions.

Although the decision will have limited application to cases that are commenced post January 1, 2008, being mindful of the factors that Mr. Justice Macauley pointed to as being persuasive to him with respect to the transfer application is important. If you are bringing an application to have a matter included within the provisions of Rule 68, I would suggest focusing on how the parties are not prejudiced in their preparation by the provisions of the Rule. As well, an important factor will be whether the case does fit within the confines envisaged by the Rule. Highlighting counsel's ongoing duty to assess their cases and the importance of responding to that assessment over time may be helpful. Referring to the decisions in which an application has been made to transfer to Small Claims would likely provide further insight into helpful arguments. An application to transfer may not be necessary if you still have available the ability to amend your pleadings. An amendment by adding that the matter is subject to Rule 68 should be sufficient to bring you within the provisions of the Rule.



c. Applications to be removed from the Rule

Applications to remove a proceeding from Rule 68 are not uncommon and typically will occur at the Case Management Conference. Most of these applications do not result in written reasons. In my experience, the defence has brought the application, arguing primarily that they are prejudiced by the limited discovery available, by the limits on expert evidence, and by the unavailability of a jury trial.

In *Ali v. Evans* 2007 BCSC 1318 the court held that, where discovery of documents and oral examination are necessary, the court will order that Rule 68 ceases to apply. This decision was rendered on August 31, 2007. The case concerned a claim of unjust enrichment. The unusual circumstance surrounding the case is that this was the second litigation between the parties. The first litigation concerned ownership of the home and resulted in a judgment in favour of the defendant in the *Ali v. Evans* case. Following this judgment, the Plaintiff sued for his time, money and materials invested in the house and thereby resulting in unjust enrichment to the Defendant. The Defendant sought to strike out the claim on the basis that those issues had already been adjudicated on or should have been brought in the first action. The decision dealt primarily with the argument relating to the res judicata issue but, at the conclusion of the reasons, Mr. Justice Crawford referred to the Defendant's concern that the action had been brought under Rule 68. Mr. Justice Crawford noted that this is a case where discovery of documents and oral examination are necessary and he ordered that Rule 68 ceased to apply to the action. There do not appear to have been submissions made referring Justice Crawford to his jurisdiction and power to order discovery. As well, there is no real description of the nature of the documents that were sought so it is not possible to determine whether those would have been documents that did not need to be disclosed under Rule 68. There appears to be very little, if any, argument against transferring the matter out of Rule 68.

The decision in *Cardamone v. Nishimura* was not put into written reasons but a transcript was obtained from the proceeding. This is a decision that was rendered during the time that the Rule was a pilot project. In essence, the arguments made by the defence in their application to remove this matter from Rule 68 included the number of experts anticipated to be required (three for each side), the Defendants' desire to have the matter determined by a jury, their view that credibility would be a substantial issue in the case and that the case remained unclear although pleadings were not closed. It is notable that the judge hearing the application appeared to be influenced somewhat by the fact that this was a pilot project and that, as a result, some litigants in the province could be forced into this while others could not. Mr. Justice Ehrcke concluded in granting the Defendant's application to remove the matter from Rule 68 that if the matter were to proceed under the Rule, there would have to be significant orders departing from the normal rule.

I have been faced with many of these applications in Case Management Conferences and none have resulted in orders that the matters no longer be included within the provisions of Rule 68. From those applications and the comments of the various judges that have



presided, the following types of arguments are likely to be persuasive if you are attempting to defeat an application to remove a proceeding from Rule 68:

1. Rule 68 is mandatory for matters where the value of the claim is \$100,000 or less;
2. More than one expert is contemplated by the Rule itself;
3. The judge presiding over the Case Management Conference has the specific authority to order additional expert witnesses;
4. The unavailability of a jury in a Rule 68 proceeding is not a proper consideration for the court in an application to remove a matter from Rule 68. There are legislated restrictions on a party's right to a trial by jury. Those include not only Small Claims matters and Rule 6 matters but cases where the value of the claim is anticipated to be \$100,000 or less;
5. The purpose of the Rule is to ensure that cases are tried proportionately.

Given the flexibility inherent in the Rule, including the Court's power to order discovery, to consider the scope of document production, to allow more than one expert and to make other orders that are appropriate in the circumstances, it should be the rare case in which an application to have it removed from the auspices of Rule 68 should be successful.

The one area in which the court has no flexibility is that a jury trial will not be allowed. However, this is a legislative decision and therefore the court does not have jurisdiction to order a matter to be removed from Rule 68 because of a party being deprived of a jury trial. This is akin to a party being deprived of a jury trial under either Rule 66 or in the Small Claims court. Removing a case from Rule 68 simply to allow a party an opportunity to have a trial by jury would work counter to the objects of Rule 68 specifically and to the Rules of Court generally.

d. Miscellaneous Important Provisions of the Rule

The following are miscellaneous provisions of Rule 68 that you should be aware of:

- Rule 68(4) provides that the court is not limited to awarding \$100,000 in an expedited action;
- Rule 68(6) provides that, in the event of a conflict between the provisions of Rule 68 and the Rules of Court, the provisions of Rule 68 will apply;
- Rule 68(7) provides that the provisions of Rule 68 will cease to apply on order of the court, either on its own motion or on the application of any party;
- Rule 68(8) provides that the style of proceeding for an expedited action must include the words "Subject to Rule 68" immediately below the listed parties. Likewise, if an action is not commenced pursuant to the provisions of Rule 68



but later becomes subject to the provisions of the Rule, the pleadings subsequent to the inclusion within Rule 68 must include the words “Subject to Rule 68” immediately below the listed parties;

- Rule 68(13) is the purpose rule and overlays all other provisions of Rule 68. This rule provides that in considering any application under Rule 68, the court must consider “what is reasonable in relation to the amount at issue in the action”;
- Rule 68(14) provides that the trial of a Rule 68 action is without a jury.

e. Interlocutory Applications

One of the fundamental differences between a Rule 68 proceeding and a proceeding under the usual Rules of Court is that neither party can bring an interlocutory application prior to either a Case Management Conference or a Trial Management Conference occurring (Rule 68(10)). There are exceptions to this general rule, in particular an application can be made if it is:

- (a) for an order under that the provisions of Rule 68 no longer apply;
- (b) to obtain leave to bring an application on grounds enumerated in subrule 12, specifically because it is unfair or impractical to make the party wait until after the Case Management or Trial Management Conference or if the application is urgent.

What this means in practice is that at the Case Management Conference, any issues relating to matters that might normally become the subject of an interlocutory application will be discussed. At the Case Management Conference, the presiding judge may make Orders based only on oral submissions, without any supporting affidavit material. Prior to attending the Case Management Conference, ensure that you have read the Requisition filed by the opposing party and that you are prepared to argue any potential application at the Case Management Conference.

The decision in *Total Vision Enterprises Inc. v. 689720 BC Ltd. Et al*, 2006 BCSC 639, provides an illustration of how the court may interpret the limitations on interlocutory applications. This was a decision of Mr. Justice Macaulay. The Plaintiff and the three Defendants by counter claim brought an application for summary judgment in favour of the Plaintiff and for dismissal of the counter claim. In considering the availability of applications of this nature under a Rule 68 proceeding, Mr. Justice Macaulay reviewed the various provisions of Rule 68 relevant to interlocutory judgments. Mr. Justice Macaulay referred to the following provisions of Rule 68:

- Rule 68(11)(c) permitted the application even though there had not been any case management conference in the action;



- Rule 68(10) prevents delivery of a Notice of Motion or affidavits in support of an interlocutory application except as specified in sub-rule (11) until a conference had been conducted;
- Rule 68 (12) (a) and (b) permitted relief against the requirement for a conference as a prerequisite where it is “impractical or unfair” to require compliance of the application is urgent.

Taking into consideration proportionality, Justice Macaulay made the order sought without first having the Case Management Conference occur.

The rules and procedure regarding interlocutory applications are significantly different under Rule 68. If you are contemplating an application, or if you are the recipient of an application, take a close look at the provisions of the Rule to ensure that the procedure has been compliant with what is required under the Rule. In my experience, the restrictions on interlocutory applications has greatly decreased applications or the threat of applications and has, at the same time, made much more simple and less time consuming the process of dealing either with an application or with the potential of an application.

f. Document Disclosure

The most frequent type of application that we see as personal injury practitioners relates to document production. Rule 68 provides a complete code with respect to document disclosure and is explicit in its exclusion of the provisions of Rule 26. Under the provisions of Rule 68, parties are required to disclose specific documents or classes of documents as described in the Rule. If a party believes the list provided does not list all documents or classes of documents that should have been disclosed, the court may make an order requiring the party who prepared the list to add to the list the documents the court considers should have been disclosed. There is no other provision in Rule 68 for production of documents. The powers of the court do not extend beyond ordering the party to fulfill its obligations under Rule 68 and the parties need only list the documents that fall within the enumerated categories.

The subrules governing document disclosure are found in 68(15) – (22). The Rule specifically states that Rule 26(1) – (10) and (15) do not apply to a Rule 68 case. Each party must provide their List of Documents as well as copies of the documents, within 15 days of the close of pleadings, or 15 days after the case has become included within Rule 68, whichever date is later. There is no provision or requirement for a Demand for Discovery of Documents. The timing of the Lists of Documents is the same for both the Plaintiff and the Defence.



The format of the List of Documents is different than under a Rule 26 action. There are three different types of documents that are to be listed:

- i. Documents referred to in the party's pleadings;
- ii. All documents to which the party intends to refer at trial; and
- iii. All documents in the party's control that could be used by any party at trial to prove or disprove a material fact.

There is no specified form for the List. I would caution against following the traditional Rule 26 form as the classes of documents that must be disclosed are different. In a Rule 68 proceeding there is no requirement to list privileged documents.

The continuing obligation to list and disclose documents is contained in Rule 68(17) as is the requirement that the originals of the documents on the list be made available for inspection.

If a party believes that there are documents that should have been on the list that are not, they can request that a party add them and provide a new list (Rule 68(19)) Rule 68(20) requires the written demand to be made under 68(19) prior to an application being made for production under 68(20). If an application is made it is for compliance with the parties obligations under Rule 68(19), not for production of the document.

The primary differences between the provisions of Rule 68 and document disclosure under the other Rules of Court are:

- There is no need to serve a demand for discovery of documents;
- The List of Documents does not include Part 2 and Part 3, but rather is simply a listing of all documents referred to in the pleadings, all documents which the party intends to refer at trial, and all documents within the party's control that could be used to prove or disprove a material fact;
- Copies of the documents are served with the list itself;
- On an application for provision of a list with further documents on it, the court must consider the difficulty or cost of finding and producing the document;
- There is no obligation on a party to list documents of which they are aware but do not "control". A party has to obtain a copy of a document before there is any obligation to list the documents.

Disclosure of documents is one area under Rule 68 that has been subject to a few applications. Madam Justice Allan considered an application for production of an MSP printout in the case of *Pridham-Sinn et al v. Barrett* (Vancouver Reg. No. M054888).



This application occurred on October 6, 2006. Madam Justice Allan ordered production of the MSP printout without providing reasons.

Dragutinovich v. Lee 2006 BCSC 1521 is a decision of Master McCallum relating to production of documents. The decision was rendered on October 16, 2006. This was a motor vehicle accident. The defendant was seeking production of additional documents relating to the Plaintiff's claim for loss of income. In denying the Defendant's application for production of documents, Master McCallum referred specifically to proportionality and the necessity of consider what is reasonable in relation to the amount at issue in the action in deciding any application under the Rule. Master McCallum concluded that, in the circumstances, the Defendant has not shown that the requested documents will assist him to prove or disprove a material fact within the bounds of proportionality and the application was therefore dismissed. Master McCallum stated specifically:

[29] The Defendant appears to expect the worst but ignores the reality of the Plaintiff's claim. The shortcomings the Defendant complains of in the Plaintiff's disclosure are the Plaintiff's problem and he is content to go ahead on that basis. The Plaintiff should not be required to do more to support the Defendant's view of what is required to advance his own claim.

Shortly after this decision, Master McCallum gave reasons in the case of *Louch, et al v. Decicco*, 2006 BCSC 1911. His decision in *Louch* was appealed, resulting in a definitive statement and clarification by the court of the obligations on the parties for disclosure of documents under Rule 68. *Louch* involved an application by the Defendants for production of documents in the hands of third parties, as well as disclosure of documents over which claims of privilege were made. Master McCallum concluded that the Defendant was not entitled to production of documents in the hands of third parties. Master McCallum's decision was a comprehensive review of the obligations imposed on the parties for document discovery under Rule 68. Under the Rule, when an application is made for production of documents not currently listed, the application must be founded on subrule 68(21) which provides for an order that the party add to their List of Documents.

Master McCallum highlighted the difference between Rule 68 and 26 and that even the form of the List of Documents was different. Under Rule 68, counsel are required to list three different categories of documents. Master McCallum highlighted the danger of utilizing the Rule 26 form for Lists of Documents under Rule 68 as there is no requirement to list privileged documents.

Master McCallum also explained that, for the Defendant to succeed in its application for production of records in the hands of a third party, the Defendant must establish that the documents are within the Plaintiff's control and that they could be used by the Defendant at trial to prove or disprove a material fact. Rule 68 narrows the scope of document disclosure and makes no provision for applications to third parties. In denying the Defendant's application for the third party documents, Master McCallum reviewed the



law relating to the definition of “control” and applied that to the Defendant’s application, stating the following:

[24] Control of documents has been defined in the authorities as an enforceable right to obtain documents from a person who has possession of the documents. The documents in issue are medical or employment records in the possession of Gregory’s employer and family doctor. The law in British Columbia is that medical or clinical records in the possession of a non-party are not in the possession or control of the party although it may be within the power of the party to produce copies. (*Rambow (Guardian ad Litem of) v. Grogan*, [1999] B.C.J. No. 1465). Employment records are similarly records in the “power” of the party, but not control of a party, when the party is not in possession of them.

[25] Parties to Rule 68 actions are obliged to list or produce documents that are in their possession or control. Parties to Rule 68 actions are not obliged to list or disclose documents, such as clinical or employment records that may fall into the category of documents in the party’s power meaning documents the party could obtain copies of upon request.

[26] In the result, the Defendant cannot compel production of the requested records either by order directed at a non-party or indirectly by order directing the Plaintiffs to execute authorizations. That said, the Defendant is not without a remedy since he could issue a subpoena requiring the record holders to bring to trial any document in their possession or control “relating to the matters in question”. (Rule 40(39)). The issuance of such a subpoena might encourage parties to obtain copies of documents in their power and disclose those falling within the ambit of Rule 68(16)(iii).

On March 14, 2007, Master Baker provided reasons in *Dettling v. Close* 2007 BCSC 356. This application was in advance of the appeal in *Louch*. *Dettling* involved a desk order application for production of an RCMP file. The parties had consented to the order. Master Baker refused the order indicating that the court does not have jurisdiction to grant the order sought and this lack of jurisdiction is not remedied by a consent. The parties consent cannot grant the court jurisdiction that it does not otherwise have.

Mr. Justice Edwards heard the appeal of *Louch*. Mr. Justice Edwards upheld Master McCallum’s order with respect to production of documents, concluding that a party does not need to list and produce documents of which they are aware but are in the hands of a third party, nor does Rule 68 authorize the production of these non-party documents to the defendant. Mr. Justice Edwards confirms that the scope of document disclosure is narrowed by Rule 68. Parties must obtain control of documents before there is an obligation to list them. Mr. Justice Edwards concluded that, if a party is aware of but does not control a document that could be used by any party to prove or disprove a material fact, under Rule 68(16)(a)(iii) that party need not list the document even if it is within that party’s power to gain control of the document unless that party intends to rely on the document at trial. Mr. Justice Edwards further confirmed that the remedy for a party seeking the production of documents in the hands of a third party was to issue a subpoena to a representative of the non-party document holder to testify at the trial and bring the relevant documents.



Mr. Justice Edwards also considered the decisions of Madam Justice Allan and Madam Justice Koenigsburg in which orders for production of documents under Rule 68 were granted. He held that he was not bound to follow those decisions as they were not “considered decisions” determinative of the issue of the jurisdiction of the court to make the orders made in those cases. Mr. Justice Edwards held that, at best, these two decisions demonstrated circumstances in which the court was persuaded that the orders requested might help to resolve the issues in those cases.

The decision in *Louch* also included an application by the Plaintiffs for disclosure of documents that the Defendant had listed as privileged, including a report and video tape. Master McCallum held that if the report and video tape fell within the enumerated categories of documents that are required to be listed under Rule 68, then they must be disclosed. Master McCallum’s rationale for this abrogation of privilege was that the documents must be disclosed in the interests of expediting the litigation. Master McCallum noted that the parties’ ability to either settle the claim or conduct an efficient trial can only be enhanced by early disclosure of all the material that is caught by Rule 68(16). Master McCallum concluded that there is no mechanism in Rule 68 for refusing to disclose documents that are said to be protected by litigation privilege. In concluding that the party’s obligations to list documents superseded litigation privilege, Master McCallum said as follows:

[37] Rule 68 seeks to strike a balance between protecting parties right to a fair trial on the merits and allowing them, in the circumstances of particular claims, to have the claim tried in an expeditious manner. One of the ways chosen to accomplish that objective is to provide for full disclosure of certain documents at an early stage of the action. Litigation privilege, in the way in which it has been described, is designed to fit the classic adversary process. Rule 68 is not an example, by definition, of the classic adversary process.

Mr. Justice Edwards overturned this portion of Master McCallum’s decision stating that the abrogation of a right to a claim of privilege, a common law right, cannot be implied in the absence of a clear expression of legislative intent. Mr. Justice Edwards found that there was no clear legislative intent and that therefore parties are able to continue to maintain a claim of privilege over documents that are subject to either solicitor client privilege or litigation privilege and that there is no obligation to list and disclose these types of documents.

In dealing with your obligations relating to document disclosure under Rule 68, keep in mind that the only types of documents that you need to be disclosing are:

1. All documents referred to in your pleadings;
2. All documents which you intend to refer to at trial; and
3. All documents in your control that may be used by any party at trial to prove or disprove a material fact.



Do not use the traditional List of Documents form. There is no specified form to use but in my experience the best form is simply to list the documents, without breaking them into the various categories. There is no need or requirement to specify on your list which of the required categories the disclosed document falls under. There is no requirement to list privileged documents. You cannot be compelled to obtain documents from third parties; however, production can be obtained by the opposing party through the use of a subpoena.

g. Examination for Discovery

In a Rule 68 proceeding, there is no Examination for Discovery as of right. Examination for Discovery will only occur if the parties consent or the court orders. The subrules governing examination for discovery are found at (23) to (30). Rule 28 and 29 do not apply to a Rule 68 case. If an Examination for Discovery does occur, Rule 27(20), (21) and (23) do not apply to the Discovery. If an Examination for Discovery does occur, under Rule 68(28) the Discovery is limited to 2 hours unless the parties consent or the court orders. Rule 68(29) provides that the court can order an extension on the time allowed for Discovery by two hours or any greater period to which the parties consent. The Rule limits the amount of time that the court can order for Discovery to a total of four hours.

Rule 68(30) lists the considerations that the court is to take into account when deciding either an application for Discovery or for an extension of the time allowed for Discovery. In addition to the overriding proportionality consideration, the court may consider:

- (a) the issues identified in the pleadings;
- (b) the number and nature of the documents that have been disclosed by the parties;
- (c) the completeness of any summary of evidence provided;
- (d) the subject areas to be canvassed;
- (e) the parties estimates of the time that will be required to complete the discovery;
- (f) the total amount of the plaintiffs claims; and
- (g) any other circumstances relevant to the fair resolution of the dispute on its merits.

Master McCallum in *Dragutinovic* considered and denied the Defendant's application to conduct an Examination for Discovery of the Plaintiff. In applying the principles enumerated in Rule 68(30), Master McCallum said as follows:

[28] Rule 68 requires the court to consider each application on its merits in the context of proportionality. In this case, the Plaintiff has made it plain how he intends to prosecute his case. He will rely essentially on his own evidence and a few collateral witnesses in support. He does not intend to call expert evidence in support of his claim for loss of income. Instead, he will tell the trial judge his story and rely upon that evidence. That decision is an example of proportionality at work. His claim is a modest one and will be prosecuted in a modest way.



Although it is not stated in the decision, it is apparent that the Plaintiff had provided a summary of the evidence that he would be leading at the trial. The existence and completeness of this summary would likely be persuasive in dealing with an application for an Examination for Discovery.

The important difference in the rules with respect to Examination for Discovery under a Rule 68 action are that a Discovery does not occur as of right and that, if it does occur, it is limited to two hours unless either the parties consent to a longer discovery or the court has ordered a longer Discovery.

h. Witnesses

The obligations to disclose witnesses and their evidence in advance of trial are significantly different under Rule 68. Rules 68(31) to (33) govern witnesses, including expert witnesses. With non-expert witnesses, within 90 days of the close of pleadings, or the case being included within Rule 68, the parties must provide a list of the witnesses that the party proposes to call at trial. The list must include the party delivering the list if the party intends to give evidence at trial and the list must not include expert witnesses. A written summary of the evidence that the party believes the witness will give at trial must also be provided. There is a continuing obligation to provide complete and accurate summaries of evidence, including an obligation to amend the summaries of evidence that have been provided if they are either inaccurate or incomplete.

What must be included in the summary of evidence is specified in Rule 68(31.2). The Rule provides that the summary of evidence must include the following:

- (a) the name and address of the witness;
- (b) a brief point for summary of the evidence expected to be provided by the witness;
and
- (c) the identity and nature of any document, not yet disclosed, that the witness expect to refer to at trial.

If you have not both listed the witness on the List of Witnesses and provided a summary of their evidence, then you can not call the witness at the trial unless the court orders otherwise. As well, you can not lead evidence from a witness that is not reflected in the summary of evidence. Arguably, the consequence of not providing a sufficient summary of evidence as required under Rule 68(31.2) is that you will not be able to call that witness at the trial. Likewise, if you have not provided a brief summary of the nature of the evidence that you are hoping to elicit from the witness at the trial, you will not be able to lead the evidence. Inherent in this is the ongoing obligation to update the summary of evidence if the evidence changes prior to trial. In conducting a Rule 68 trial, it will be important to be ready to make and respond to applications under Rule 68(32) and (32.1) to exclude evidence at the trial of a Rule 68 proceeding.



The ability to rely upon expert evidence is altered significantly by Rule 68. Although Rule 40A continues to be relevant and applicable, the amount of expert evidence and the necessity of obtaining leave of the court to lead more expert evidence is necessary. The rule governing expert evidence is Rule 68(33). This Rule provides that unless the court orders otherwise, a party to an expedited action is entitled, under Rule 40A, to tender the written statement of, or to call to give oral opinion evidence, not more than:

- (a) one expert of the party's choosing; and
- (b) if the expert referred to in paragraph (a) does not have the expertise necessary to respond to the other party's expert, one expert to provide the required response.

The order allowing for more expert evidence can be made at the Case Management Conference, at the Trial Management Conference or by the judge presiding over the trial.

In dealing with the limitation on experts, I always explain the reason that more than one expert is required. In my experience, judges hearing the application are concerned only with whether there is a real need for the expert. Judges in my experience do not feel bound or limited by the restriction, nor does the requirement of more than one expert make a case inappropriate for Rule 68. In my experience, Rule 68(33) has not negatively impacted on my ability to present a case in the manner which I choose. There is no case law that I am aware of on this issue.

i. Case Management Conferences

A Case Management Conference may occur at the request of either party to the action or at the request of a judge or master. The Conference can be conducted by either a judge or a master. The parties can request a Case Management Conference but they cannot do so until the expiry of the time limited for the delivery of a List of Documents and until they themselves have provided their List of Documents and copies of all documents. A judge or master may at any time direct the parties to attend a Case Management Conference. The rules governing Case Management Conferences are Rule 68(34) to (50). A Case Management Conference is scheduled by filing a Requisition in Form 142. If the Requisition specifies orders that will be sought at the Case Management Conference, the Requisition does not have to be supported by an Affidavit. Unless the court orders otherwise, under Rule 68(38) the parties themselves, or a person ``who has full authority to make decisions for that individual`` or if the party is not an individual then a person who has full authority to make decisions for that party concerning the action must attend at the Case Management Conference. If a party fails to attend a Case Management Conference, a judge or master can either proceed with the Case Management Conference or adjourn the Case Management Conference, and order that the party that did not attend pay costs to the other party.

The types of things that can be considered at a Case Management Conference are listed in Rule 68(41). Any of these can result in orders of the court. They include::



- (a) the issues that are in dispute and those that are not in dispute;
- (b) ways in which the issues in dispute may be resolved other than by way of trial, including Rule 18A;
- (c) striking pleadings;
- (d) pleadings be amended or closed within a fixed time;
- (e) discovery, production, exchange or examination of documents or exhibits;
- (f) discovery and examination of parties, including that Examinations for Discovery be conducted in accordance with the terms and conditions and within a schedule, that the court directs;
- (g) all procedures for discovery be conducted in accordance with a schedule that the court directs;
- (h) a timetable for the steps to be taken in the case before it comes to trial;
- (i) the parties attend a mini-trial, settlement conference or mediation and giving directions for the conduct of the mini-trial, settlement conference or mediation;
- (j) requiring that the evidence on any one or more issues be given by one jointly instructed expert only;
- (k) allowing one or more the parties to call 2 or more experts;
- (l) requiring a statement of agreed facts to be filed within a fixed time or by a specified date;
- (m) authorizing the bringing of interlocutory applications within a fixed time or by a specified date;
- (n) establishing a period within which any step in the action must be completed;
- (o) fixing one or both of the date and the length of trial;
- (p) trial preparation;
- (q) adjourning the trial;
- (r) settlement of the action or of issues;
- (s) any other matter that may assist in making the trial more efficient;
- (t) any other matters that may aid in the resolution of the proceeding.

Rule 68(49) provides that at a Case Management Conference a judge or master can not make an order adding, removing or substituting a party except by consent of the parties nor can an order for final judgement be given except by consent.

The judge or master presiding over the Case Management Conference can make orders on the basis of oral submissions, or can require written materials to be provided in relation to any application, can direct that the application be brought in chambers with Affidavit evidence and can give directions with respect to the bringing of the application, can give directions regarding the entry of an order or any other directions that he or she thinks are just or necessary.



With respect to costs at a Case Management Conference, Rule 68(50) provides that the court may award costs against any party at a Case Management Conference.

With respect to jointly instructed experts, Rule 68(43) provides that if the parties can not agree on who the expert shall be, the court may either select the expert from a list prepared by the parties or direct that the expert be selected in any manner that the court may direct. The Rule further provides that each party may give instructions to the expert and that each party must send a copy of their instructions to the other party at the same time as they are given to the expert. The court may give directions about the payment of the experts fees and also about any inspection or examination that the expert wishes to carry out. The court may limit the amount that can be paid to the expert. The rule also provides that the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

A judge who has presided at the Case Management Conference is not precluded from presiding over the trial. Rule 68(48) specifically provides for the possibility that the judge hearing the CMC may preside at the trial of the action.

The parties are required to attend the Case Management Conference. If, however, this would cause expense or difficulty for your client, seek an order that they either are not required to attend or that they can attend by telephone. I have done this on a couple of occasions by desk order and the order has been granted. Again, the focus on proportionality is appropriate. If it is not reasonable for your client to attend in person given the costs associated with attendance, seek an order that they do not have to attend.

Case Management Conferences are not a mandatory step in a Rule 68 proceeding, but should be brought if you need assistance with any of the items listed in Rule 68(41). In particular, if you think that you will require more than two experts to present your case (your chosen expert and then one to respond to the expert of the opposing party if necessary), then a Case Management Conference should be scheduled to obtain an order providing you with leave to call the evidence of the additional experts. In my experience, judges do take the opportunity at Case Management Conferences to discuss with counsel settlement possibilities.

j. Trial Management Conference

The provisions regarding the Trial Management Conference are contained within Rule 68(51) to (56). Between 15 and 30 days prior to trial, the parties must attend at a Trial Management Conference conducted by a judge. Seven days prior to attending the Trial Management Conference, the parties must exchange a trial brief. The trial brief must include the following:

- (a) a title page bearing the style of proceeding and the names of counsel;
- (b) an index;



- (c) a summary of the issues and the party's position on those issues;
- (d) a list of the witnesses, with names and addresses, whom the party intends to call at trial;
- (e) a summary of the evidence the party expects each witness to give and an estimate of the time required for that witness to give direct evidence;
- (f) a list of the expert reports the party intends to adduce at trial;
- (g) copies of any expert reports the party proposes to rely on at trial;
- (h) an estimate of the time that party requires for an opening statement and final submissions;
- (i) the terms of the order the party will seek at trial;
- (j) a list of any authorities the party intends to rely on at trial.

At the Trial Management Conference the judge may make any of the orders that can be made at a Case Management Conference and additionally may make orders respecting:

- (a) a trial scheduling plan;
- (b) admissions of fact at trial,
- (c) admission of documents at trial, including:
 - i. agreements as to the purposes for which documents may be admitted; and
 - ii. the preparation of common books of documents and document agreements;
- (d) imposing time limits for the direct or cross-examination of witnesses, opening statements and final submissions;
- (e) direct evidence of witnesses be presented at trial by way of Affidavit;
- (f) the parties present opening statements and final submissions in writing;
- (g) the number of days reserved for the trial be changed.

3. The Trial

A trial of a proceeding under Rule 68 will occur in the same manner as a trial under the usual Rules of Court, with the exception of any pre-trial orders that may have been made to expedite the case. There is no limit on the length of the trial, or the nature or complexity of the issues. It is important to note that specifically under the rules, the trial judge is not limited to awarding \$100,000.

The decision of Madam Justice Boyd in *Pascoa v. Xue* 2008 BCSC 791 dealt specifically with a defence submission that the judgment should be limited as the proceeding had been brought under Rule 68. Madam Justice Boyd ultimately awarded the Plaintiff just under \$200,000. In dealing with the Defendant's submission that the court should infer that the claim, because it had been brought under Rule 68, does not exceed \$100,000, Madam Justice Boyd stated as follows:

[62] I am unaware of any authority which suggests the Court may draw such an inference. To the contrary, Rule 68(4) specifically provides that "nothing in this rule prevents a court from awarding



damages to a plaintiff in an expedited action for an amount in excess of \$100,000". In this case, I understand that in the pre-trial management stage, the plaintiff sought an order allowing for the filing of two expert reports, with no defence objection. No defence motion was ever brought to remove the action from the Rule 68 procedure. I am unable to draw the inference suggested.

Of note in this case, in addition to two medical experts, the Plaintiff also relied upon a cost of future care report and an economist's report, presumably providing the present value of the cost of care items.

4. Costs under Rule 68

There are no specific provisions in Rule 68 with respect to costs, therefore the usual costs rules apply. However, expect arguments with respect to proportionality of costs. Given that in all applications under Rule 68 the issue of proportionality is to be considered, this would be an appropriate consideration of a Registrar assessing the Bill of Costs.

The fact that a matter has proceeded under the provisions of Rule 68 does not change the test that is to be applied to determine the reasonableness, and therefore recoverability, of incurred disbursements. In *Raju v. Bui*, the Defendant's submission was that the Plaintiff should be limited to the cost of one or at most two experts reports because the matter had proceeded within the provisions of Rule 68. Registrar Sainty rejected this submission, stating that Rule 68 does not say that a party is restricted on an assessment of costs, from claiming the costs of more than one expert.

Other issues with respect to costs that you should be aware of and prepared to address include:

- Whether a party should be deprived of costs for a failure to use the rule when they should have;
- The role that proportionality has in an assessment of disbursements incurred;
- The role of proportionality in an assessment of tariff units.

In my view, when it comes to assessing a Bill of Costs, it is best to stay away from generalities and focus on the specifics of your case, with the guiding principles of Rule 57 in mind. The traditional test for recoverability of disbursements enunciated in *Van Daele v. Van Daele* (1983), 56 BCLC 178, continues to apply in a Rule 68 case. That test is:

Whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

With respect to tariff items, present your client's case the same way that you would in litigation proceeding under the usual rules.



5. How to Use the Rule effectively for your clients

There are a number of elements of this Rule which make it ideal for personal injury clients. As counsel, we do not like anything that fetters our discretion to pursue a case the way that we want. However, Rule 68 provides us with the tool to ensure that the opposing party does not use the rules to make litigation so time consuming and costly for our clients, or so complicated, that we cannot effectively deal with our client's issues. Using the Rule effectively can ensure that a matter is moved forward without the delays that we often see in litigation. You can typically get a Rule 68 trial date in Vancouver within six months. The Rule can help you streamline the issues so that only matters that are truly at issue are being dealt with. The Rule can encourage settlement both through early disclosure and through the encouragements that are given to the parties throughout to discuss resolution. The Rule can ensure that rather than being bullied into a long, protracted, expensive trial, your client can have a trial that is more reflective of the true issues in the case. Finally, the Rule gives judges the powers to make orders that you want, to assist with the presentation and management of your case. Rather than viewing the Rule as taking away your abilities as counsel to manage the case, view the Rule as providing you with many new tools to control the manner in which the case proceeds.

The benefits of the Rule can only be achieved if you embrace the Rule and use its provisions. Follow the timelines that are provided under the Rule. Pay attention to your pleadings and make sure that they reflect what your claim really is, rather than simply using boiler plate pleadings. Provide document disclosure of the documents that are relevant to your case and really assess which documents need to be listed in light of the requirements of the Rule. Provide witness summaries that are meaningful. It will encourage resolution of the case as both you and the other side know what evidence you are able to garner. If you want to avoid Examinations for Discovery, ensure that the summary of evidence that you provide of your client's evidence is meaningful and substantive. Assess carefully the experts that you need to prove your case.

Keep control of your case. Know what the Rule says, what the jurisdiction of the court is and what orders the court can make. Use the provisions of the Rule to be a better litigator for your client. Do not let a judge take over the conduct of your case and dictate the manner in which you present it. Be proactive and seek ways to streamline your case. We have all been subject to lengthy, irrelevant Discoveries. See the rule as a way of forcing the defence to only deal with the relevant matters in the proceeding.

6. Steps in a Rule 68 proceeding

The following are the time frames that you will be dealing with in a Rule 68 proceeding:

- Within 15 days of the close of pleadings, each party must provide their list of documents as well as all documents;



- Within 90 days of the close of pleadings, each party must deliver a list of the witnesses, excluding the expert witnesses, as well as a written summary of the evidence;
- Rule 40A for experts;
- 7 days prior to Trial Management Conference – exchange of trial briefs;
- 15 – 30 days prior to trial – Trial Management Conference.