

WHAT I LIKE ABOUT SPECIAL RULES

RULES 18A, 66 AND 68

Introduction

An important part of the litigator's tool box are the *Rules of Court*. Knowledge of the rules and knowledge of the best ways to make use of the Rules are as important to advocacy as a litigator's ability to persuade with words. We have a responsibility as lawyers to ensure that we find ways to achieve results for our clients that are cost effective and appropriate in the circumstances. The "Special Rules" provide us with creative ways to make litigation fit any circumstance. It is not unusual for lawyers to balk at changes to the Rules and new procedures such as those found in Rules such as 66 and 68. The challenge is to learn how to use the rules and to make them work for your clients.

Purpose of the "Special Rules"

All three of the "Special Rules" have at their base an attempt to craft a procedure to assist lawyers to obtain the cost effective and speedy results for their clients. All three restrict trial by jury. The underlying purpose of the *Rules of Court* is found in Rule 1 (5) wherein the object of the *Rules of Court* is described as follows:

The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Rule 18A initially came into force in 1983. The rule provides for a trial on affidavit evidence, without the necessity of viva voce testimony at the hearing. It is distinct from Rules 66 and 68 in that it provides for a procedure for trial only, whereas Rules 66 and 68 provide for an entire regime for a matter to be dealt with. Rule 18A was arguably the courts initial attempt to provide for a streamlined process for resolution of matters.

Rule 66 was established in 1998 to create a fast track procedure for cases where the trial of the matter can be completed in two days or less. The rule provides a code for the entire litigation. The object of Rule 66 is defined in Rule 66(1): to provide a speedier and less expensive determination of certain actions the trial of which can be completed within 2 days. The various provisions of the Rule are geared towards eliminating the delays and expenses associated with traditional litigation.

Rule 68 came into force as a pilot project in September of 2006 and was extended in both time and application to make it available province wide. Rather than determining applicability of the Rule based on the length of time for trial, the Rule is applicable to actions where the total monetary amount claimed is \$100,000 or less. The guiding principle for the Rule is proportionality. Rule 68 provides a

complete code for actions included within the Rule, with the various provisions geared towards streamlining the process for cases within the Rule.

Rule 18A

The provisions of Rule 18A provide for a trial based on affidavit evidence. Prior to the enactment of Rule 66 and 68, Rule 18A was the only way of avoiding a long and extremely costly trial in a relatively modest claim if the defense were insisting on a jury trial. In my view, personal injury actions are generally not that well suited to summary determination. Much is lost by a trial judge not hearing viva voce evidence from the Plaintiff and their witnesses as to the effect of an injury. In my experience, putting together a trial on 18A is no simpler or more cost effective than doing a formal trial. The exception to this would, of course, be the case where the defense is insisting on a jury trial and where the costs of conducting the trial itself will far outweigh the monetary claims being made in the case. In those circumstances, it may be beneficial to bring a Rule 18A application.

The court under Rule 18A may grant judgment unless:

- a) The court is unable on the whole of the evidence to find the facts necessary to decide the issues of fact or law; or
- b) The court is of the opinion that it would be unjust to do so.

In deciding whether it would be unjust to give judgment, the court may consider the following:

- (1) The amount involved;
- (2) The complexity of the matter;
- (3) Its urgency;
- (4) Any prejudice likely to arise by reason of delay;
- (5) The cost of taking the case forward to a conventional trial in relation to the amount involved;
- (6) The course of the proceedings; and
- (7) Any other matters which arise for consideration.

Inspiration Mgmt. Ltd. V. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202

Rule 18A may also be beneficial for resolution of a discrete issue in a case, such as liability. Rule 18A (1) provides that a party may apply to the court for judgment either on an issue or in general. However, the court will not provide judgment on an issue if it will not serve to enhance the determination of the entire matter on its merits.

Rule 18A is a very efficient way to have entitlement to Part 7 benefits determined. If you do chose to go this route, keep in mind the things that must be proven and provide evidence only to prove those items.

With respect to procedure, the rule provides as follows:

- Either party may apply for judgment under Rule 18A (Rule 18A(1))
- The application for judgment under Rule 18A can be brought any time after the Statement of Defense has been filed, but prior to 45 days prior to trial (Rule 18A (1)(a) and Rule 18A(1.1))
- An application for judgment under Rule 18A is scheduled for hearing in accordance with Rule 51A (Rule 18A(2))
- The evidence supporting the application for judgment may include affidavits, answers to interrogatories, examination for discovery evidence, admissions, or opinion evidence from an expert (Rule 18A (3))
- Once the application and supporting materials are filed, the applicant cannot file any further evidence other than that evidence that would be considered rebuttal evidence, or evidence in response to a notice of motion from another party, without leave of the court (Rule 18A(5))
- The parties intending to rely on examinations for discovery, interrogatories or admissions must provide notice of the specific portions of that evidence that will be relied upon at trial (Rule 18A(6))
- If the court is unable to grant judgment on the summary trial application, they can make a variety of orders that may serve to expedite the matter (Rule 18A(13))
- The fact that a jury notice has been filed does not prevent a judge providing judgment under Rule 18A (Rule 18A(16))

Rule 66

Rule 66 is available for cases that can be heard in two days or less, regardless of the amount at issue. One of the early decisions on the applicability of Rule 66, which required an application to be made to have a matter included within Rule 66, was the decision of Mr. Justice Curtis in *Ryan v. Welch* (1999), 1999 CarswellBC 2548. In that decision, Mr. Justice Curtis stated that the rule was designed to remedy the two most notorious weaknesses of the litigation process: delay and expense. Mr. Justice Curtis described Rule 66 as a “structured attempt to achieve the stated objects of the Supreme Court rules generally...” In describing the applicability of the rule, Mr. Justice Curtis stated as follows:

The rule contemplates trials that can be completed within two days. I would interpret that provision to mean can, with the best efforts of counsel to litigate the case efficiently having regard to the amount in issue and the issues involved, be tried within two days. A party should not be allowed to

avoid application of the rule by tactics of unnecessary delay and cost escalation, the very evils the rule is designed to remedy.

An action can now be made subject to Rule 66 simply by one of the parties including an endorsement on either the Statement of Claim or Statement of Defense. Although it is open for the Defendant in a personal injury action to bring a matter within the provisions of Rule 66 by including the endorsement on the Statement of Defense, it is arguably inappropriate as the Defendant would not be in a position to determine at the time of filing of the Statement of Defense whether or not a matter can be heard within two days. However, from a Plaintiff's perspective, there really is no downside to having a matter included within Rule 66. The limitations included within the Rule, with the exception of the limitation on the amount of time for trial or the removal of the right to a jury trial, do not work to the disadvantage of the Plaintiff or prevent a Plaintiff generally from being able to prepare their case the way that they normally would.

If the matter has been made subject to Rule 66 and one of the parties does not agree to this, an application can be made under Rule 66(8) to have the rule cease to apply. The primary issue in such an application is whether the matter can be tried within two days with the best efforts of counsel. (*Bhate v. Telecom Leasing Canada (TLC) Ltd.* (1999), 33 C.P.C. (4th) 385; *Ryan v. Welch, supra*). The onus is on the party who wishes to have the matter removed from Rule 66 to establish why the litigation should not remain within the provisions of Rule 66 (*Pardanyi v. Wilson*, 2004 CarswellBC 270)

Rule 66 provides a streamlined approach to litigation which can greatly improve the efficiencies and decrease the costs associated with litigation. The differences between an action which proceeds under Rule 66 and a regular action include the following:

- The documents that must be listed on the List of Documents and the form of the List are the same as in a regular action, however, there is no requirement to send a Demand for Discovery of Documents. The requirement to provide a List of Documents is automatically triggered by subrule 12, which requires the party bringing the action within the provisions of Rule 66 by attaching the endorsement to their Statement of Claim or Statement of Defense, to also provide the List of Documents with that pleading. The other party then has 14 days to provide their List of Documents (Rule 66 (11) and (12))
- Examinations for discovery are limited to two hours per party unless the parties consent to a longer discovery or the court orders a longer discovery (Rule 66(13) and (14))
- Unless the court orders otherwise, there is no obligation to answer Interrogatories (Rule 66(18))
- The trial will be heard by the court without a jury (Rule 66(19))
- The ability to obtain a quicker trial date is enhanced through Rule 66(20) and (21) which provide that, if a party applies for a trial date within four months of the Rule becoming applicable to the

action, the Registrar must set a date for the trial that is not later than four months after the application for the trial date

- The parties are required to file a trial agenda at least two clear days prior to trial containing an estimate of the time required for opening statement, examination in chief, cross examination, closing submissions and any other matter that may affect the length of the trial (Rule 66(22) and (23))
- At the commencement of the trial, the court may verify the time estimates contained in the trial agenda and determine the amount of time that will be allowed for all items. (Rule 66(25))
- Costs are fixed in accordance with Rule 66(29) which provides for \$5,000 in costs if the trial is concluded in one day or less, and \$6,600 if the trial is more than one day

Rule 66 is ideal for cases that are relatively straightforward. The provisions of the Rule allow for a quick determination of the matter and limit the exposure of clients to costs.

Rule 68

Rule 68 is the newest addition to the Rules designed to promote efficiency and proportionality in litigation. Proportionality pervades all aspects of the Rule and is defined simply as relating to the amount at issue in a proceeding, with no reflection on the complexity of the issues. In my opinion, Rule 68 is ideally suited to many personal injury actions.

The Rule applies to all actions in which the monetary claims are \$100,000 or less. The Rule is mandatory. It has now been clearly established that actions that qualify as expedited actions (i.e. involving monetary claims of \$100,000 or less) must proceed under the provisions of Rule 68 (*Foster v. Westfair Properties (Pacific) Ltd.* 2008 BCSC 1658). There is, however, no limit on the amount that can be awarded and, in particular, a court may award more than \$100,000 following a trial if the evidence establishes that this is appropriate. (Rule 68(4)).

An action is included within the provisions of Rule 68 by one of the parties including the words “Subject to Rule 68” below the listed parties. In my opinion, a case may only be included within the provisions of Rule 68 on the motion of the Plaintiff, as the Plaintiff is the only party that can determine whether the claims being made in the action are \$100,000 or less. If, at some point in the course of litigation, it becomes evident to a Plaintiff that the claim is worth \$100,000 or less, they can have the matter included within the provisions of Rule 68 simply by adding the words “Subject to Rule 68” in the pleadings or by bringing an application under Rule 24 to amend the pleadings to include those words. (Rule 68(9); *Foster v. Westfair Properties (Pacific) Ltd., supra*)

Litigating a case under Rule 68 has many differences from litigation in the normal track. The following are the differences:

- Interlocutory applications generally cannot be brought prior to a case management or trial management conference (Rule 68(10), (11) and (12))
- In an application that is heard, an overriding consideration is what is reasonable in relation to the amount at issue in the action (Rule 68(13))
- The trial must be heard without a jury (Rule 68(14))
- Rule 26 does not apply and the scope of discovery obligations is more restricted. In particular, the parties must provide a list of documents which contains:
 - All documents referred to in the party's pleading;
 - All documents which the party intends to refer at trial, and
 - All documents in the party's control that could be used by any part at trial to prove or disprove a material fact

There is no obligation to list privileged documents or documents or documents not in the parties' possession or control (Rule 68 (15) and (16); *Louch v. Decicco*, 2007 BCSC 393)

- There is no provision within the rule for ordering disclosure of a document held by a third party. (*Louch v. Decicco, supra*)
- The parties are not entitled to examinations for discovery unless they are consented to or the court orders. Examinations for discovery will generally be limited to 2 hours (Rules 68(23) – (30))
- The parties must provide a list of witnesses along with a written summary of the evidence they expect the witness to give 90 days after the close of pleadings (Rule 68(31))
- Unless the name of the witness and a summary of their evidence has been provided, the party may not call that person as a witness at the trial unless the court orders otherwise (Rule 68(32.1))
- The parties are limited to submitting the opinion of one expert unless the court orders otherwise (Rule 68(33))
- A Case Management Conference (CMC) may occur at which both the parties and their counsel must attend. A variety of orders may be made at the CMC regarding the proceeding (Rule 68(34), (38) and (41))
- The court may give direction for a jointly instructed expert to be used (Rule 68(43))

- A Trial Management Conference (TMC) must be held 15 – 30 days prior to the start of the trial. (Rule 68(51))
- A Trial brief must be filed 7 days prior to the TMC (Rule 68(53))
- The judge presiding over the TMC may make a variety of orders geared towards expediting the trial of the action. (Rule 68(56))

I make extensive use of Rule 68 and find that personal injury actions are ideally suited to the Rule. The Rule does require me to disclose more of my case at an earlier stage but this increases the chance of settlement or at least assists in ensuring that, if the case goes to trial, it goes to trial because there is an actual issue to be dealt with. I find that the provisions of the Rule enable me to litigate cases efficiently having regard to the amount at issue and do prevent the never-ending production of voluminous documents that have little or no relevance to the issues in the case. The provisions of the Rule get my clients more involved in the case at an earlier stage and they have a better understanding of what to expect and how the case will proceed. The trial brief and TMC are of assistance in terms of focusing the issues and ensuring that all are better prepared for trial. I have not run into an issue with the number of experts, rather have found that judges are happy to consider the merits of the case and make a determination regarding the number of experts based on what is necessary in the case to prove the case.

Conclusion

The rules are your tools. There are many elements of the “special rules” which will assist you in making litigation more effective, efficient and affordable for your clients, without compromising their access to justice or a trial on the merits.