

# **PROPORTIONALITY: A MORE EFFECTIVE TOOL**

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## Proportionality: A More Effective Tool

By Craig P. Dennis\*

### 1. Introduction

The Notice to the Profession introducing Rule 68 identifies proportionality as the guiding principle of the new rule<sup>1</sup>. Proportionality refers to the idea that the pursuit of a just determination on the merits should not be indifferent to the speed and expense of obtaining that determination. The existing *Rules of Court* speak to the objective of the just, speedy and inexpensive determination of every proceeding on its merits<sup>2</sup> but do so without specifying how to reconcile those sometimes conflicting values. In practice, the balancing of those aims of justice, speed and economy has tended to see the quest for justice prevail in circumstances where speed and economy clash with the merits<sup>3</sup>. Rule 68 adjusts that balance by giving emphasis to the interests of speed and expense in two ways: first, by creating a streamlined procedure for cases where the amount in issue does not exceed \$100,000; and second, by requiring that in the course of an “expedited action”<sup>4</sup> the court hearing any application under Rule 68 consider “what is reasonable in relation to the amount in issue in the action”<sup>5</sup>.

The explicit regard for proportionality that Rule 68 demands echoes the direction of civil justice reform in England over the past decade. Reforms introduced as a result of Lord Woolf’s review of civil procedure require that proportionality have a “central role” in the resolution of civil litigation<sup>6</sup>. Other jurisdictions also have implemented reform measures aimed at ensuring that the cost of a case is proportionate to its size and complexity<sup>7</sup>. The underlying goal is to increase

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<sup>1</sup> Notice to the Profession Re: Rule 68, Expedited Litigation Project Rule, the Honourable Chief Justice Donald Brenner (30 March 2005).

<sup>2</sup> Rule 1(5).

<sup>3</sup> *Strata Plan LMS3851 v. Homer Street Developments Ltd. Partnership* (6 February 2003), New Westminster No. S0-76792, 2003 BCSC 2310 (Master) at para. 26.

<sup>4</sup> Rule 68(1) defines “expedited action” to mean an action to which Rule 68 applies under 68(2) or 68(3).

<sup>5</sup> Rule 68(13).

<sup>6</sup> *Lownds v. Secretary of State for the Home Department*, [2002] 1 W.L.R. 2450, 2453 (C.A.).

<sup>7</sup> See for example, the discussion of reforms in Queensland, Australia in the paper by the Honourable Geoffrey Davies, “Civil Justice Reform: Why We Need to Question Some Basic Assumptions”, CLE June 2005.

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<sup>8</sup>.

Proportionality as a guiding principle of civil procedure now has arrived in British Columbia in the form of Rule 68. It is therefore in the interests of litigators to understand what the principle means and how it will influence the conduct of expedited actions. The purpose of this paper is to assist in the development of that understanding. The next section of the paper, Part 2, expands on the meaning of proportionality in the civil justice context. Part 3 then presents a discussion of the English experience, in particular Lord Woolf's review and the introduction of the *Civil Procedure Rules 1998* which resulted from Lord Woolf's work. Part 4 examines the particular features of Rule 68 which reflect the principle of proportionality in operation. Finally, Part 5 draws on both the English experience and the text of Rule 68 to anticipate various issues which may arise in the course of expedited actions and offers suggestions as to their possible resolution in light of the mandatory principle of proportionality.

## **2. Proportionality: Justice at What Price?**

Lord Woolf summed up the essence of proportionality in the following words: "The achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result"<sup>9</sup>.

The concern for resolving disputes at a cost and pace proportionate to the magnitude of the dispute stems from the perception that high cost and delay are keeping would-be litigants out of court. The Chief Justice has commented on the declining number and increasing length of civil trials in the Supreme Court of British Columbia<sup>10</sup>. British Columbia's Justice Review Task Force issued a Green Paper, *The Foundations of Civil Justice Reform*, which documents what it describes as an access crisis. According to the Green Paper, "The B.C. civil justice system is becoming more complex and more expensive and, therefore, less accessible for the average

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<sup>8</sup> Lord Woolf, *Access to Justice*, Final Report to the Lord Chancellor on the civil justice system in England and Wales (July 1996) ("Final Report"), ch. 2, paras. 17, 27.

<sup>9</sup> Lord Woolf, *Interim Report on Access to Justice* (June 1995) ("Interim Report"), ch. 4, para. 6.

<sup>10</sup> Brenner, "Trends in the Supreme Court of British Columbia", *The Verdict*, Issue 99 (December 2003), p. 58.