CREDIBILITY UNDER SCRUTINY:

A Research Study of the Weight Placed on Expert Valuation and Damages Evidence in Canadian Court Judgments

Prepared for the 2011 Ian R. Campbell Research Initiative
of the Canadian Institute of Chartered Business Valuators

OCTOBER 31, 2011

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Prem M. Lobo and Peter J. Henein

"All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts"

- William Shakespeare, from "As You Like It".

A good name is more desirable than great riches; to be esteemed is better than silver or gold.

- Proverbs, 22:1

1.0 INTRODUCTION

Centuries ago, the great William Shakespeare compared the world to a vast stage upon which life was a play to be enacted, with many different individuals performing their specific roles at different points in time. In many ways, the litigation process, too, can play out like a riveting drama (or, perhaps in some cases, a tragedy), with lawyers, judges and witnesses playing out a complex plot, using the courtroom as their stage.

Often, a very important character in the "cast" of a litigation "production" is the expert witness. Expert witnesses are often retained in litigation matters, where, on the basis of their analyses of facts as well as preexisting knowledge, training and experience, they provide their expert opinions on specialized subject matter. Expert witnesses are expected to assist the Court in understanding the facts so that a better-informed decision can ultimately be arrived at.

In cases involving allegations of financial losses, or requiring the valuation of assets or shares, loss quantification experts and business valuation experts are frequently retained by the litigants to opine on the quantum of financial losses suffered by a particular party, or to opine on asset or share values.

This research paper focuses on how Canadian Courts view the role of loss quantification and business valuation experts (which we refer to throughout this paper as "valuation experts" and "valuation evidence"). The purpose of this paper is to better understand what factors impact the weight placed on expert valuation evidence in Court, and what factors impact whether valuation evidence is viewed as "credible" by the Court. What is the "magic elixir", if any, that distinguishes one valuation expert from another? Is it the strength of the facts or assumptions used by a valuation expert? Is it personality? Is it the level of detail employed in financial analyses used to arrive at an opinion? To take some more pages from the writings of Mr. Shakespeare, is the more effective valuation expert an eloquent orator like Mark Antony, a stoic and understated figure like Brutus, or a philosophical and contemplative one like Hamlet - or some combination of all three?

These are all relevant and important questions, not only for valuation experts, but also for the lawyers that retain them and the Courts that receive their evidence. Notwithstanding this, to the best of our knowledge, the canon of valuation research has not explored this subject in a methodical, empirical-based manner to date. We hope that our research findings may be useful in terms of furthering the quality, independence and effectiveness of expert loss quantification and valuation evidence in Canada.

ACT 1: RESEARCH METHODOLOGY AND SUMMARY OF FINDINGS

2.0 FORMAL DESCRIPTION OF RESEARCH TOPIC

Our research had two interrelated objectives. By undertaking a comprehensive review and analysis of reported Canadian legal judgments (as described in more detail below), we sought to:

1) Analyze the relevance and need for expert valuation evidence in Canadian Court proceedings. Our aim was to form **overall** conclusions with respect to the relevance and need for expert valuation evidence, and to identify any trends in the demand for such evidence.

2) Where possible, to "deconstruct" Court judgments in order to identify what factors resulted in expert valuation evidence being successful/credible and, ultimately, accepted by the Courts. Our aim was to form **specific** conclusions with respect to what factors (on the part of the individual valuation expert, and external/contextual factors) are instrumental in ensuring the success/acceptance or lack thereof of expert valuation evidence by the Court.

2.1 Survey of Canadian Judges

During the course of our research, we identified an opportunity to expand our research to include a written survey of Canadian Judges. A survey of Canadian judges would provide us with the ability to ask judges candid questions with respect to their views of and experiences with expert valuation evidence and the factors that distinguish valuation experts from each other.

To this end, we created a written survey for judges ("the Survey"). To date, we have contacted 38 Canadian commercial list, family court and Tax Court judges with respect to participating in the Survey, on an anonymous basis. We were also invited to circulate the Survey to members of the National Judicial Institute, an independent not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.[1]

Once the completed Surveys have been collected, we hope to analyze the results and summarize them by way of an Addendum to this paper. The results of some Surveys that we have received thus far have been enlightening and we are optimistic that the Survey will generated useful findings with respect to expert valuation evidence in Canada. We note that some judges expressed to us their reservations about providing any opinions on the subject. We have found that, generally speaking, the requirement that judges remain impartial and refrain from expressing opinions on legal issues outside of their judgments themselves, has been viewed by some of the judges as an obstacle to completing the Survey. We remain hopeful that we will be able to collect a sufficient number of completed Surveys so that we can analyze the results in a meaningful way to shed further light on the issue.

2.2 Research Team

Our research team consisted of Prem M. Lobo, CA CBV CPA, Principal, Cohen Hamilton Steger & Co. Inc. (Toronto), and Peter J. Henein, LL.B., Lawyer, Cassels Brock & Blackwell LLP (Toronto).

Brief bios of Prem and Peter are set out in Appendices A and B respectively.

Prem and Peter gratefully acknowledge the invaluable assistance of Tylar St. John of Cohen Hamilton Steger & Co. Inc. and law student, Jessica Braude of Cassels Brock and Blackwell LLP in helping with the research.

[1] National Judicial Institute website, http://www.nji-inm.ca/nji/inm/accueil-home.cfm

3.0 RESEARCH METHODOLOGY

3.1 Legal Judgments, and Criteria for Selection

We used Canadian legal judgments (i.e. case law) as the source of our data. Specifically we focused on Canadian legal judgments:

- Released over a 15 year period, from approximately 1996 to 2011. These spanned all levels of Provincial Courts, Federal Courts, Municipal Tribunals (such as the Ontario Municipal Board), the Tax Court of Canada and the Supreme Court of Canada.

- Involving valuation experts in the capacity of providing loss quantification evidence in commercial disputes, or business valuation evidence where the valuation of shares or intangible assets was required. We did not review judgments involving real estate, equipment, art or other appraisers, forensic accounting evidence, or personal injury claims.

3.2 Databases Used

Legal Databases

In order to obtain relevant legal judgments, we utilized the following legal databases:

1) LexisNexis Quicklaw;
2) Thomson Reuters Westlaw; and,
3) Canlii.

We ran various key word searches from these databases, filtering results by the 15-year time period and other criteria above. Key words used in the searches included combinations of the following, among others:

- “damages”
- “expert witness”
- “damages expert”
- “quantification of damages”
- “valuation”
- “business valuation”
- “business valuator”
- “valuation expert”

Certain key words, such as "damages", returned literally thousands of "hits". We reviewed resulting "hits" to further screen legal judgments for relevance, before identifying a "short list" of relevant legal judgments which formed the basis for our detailed analyses, and we reviewed the appellate history of cases, where applicable.

Valuation Casebook

In order to ensure that our database key word searches were as comprehensive as possible and returned as many relevant judgments as possible, we also referred to the legal judgments listed in the Valuation Casebook published by the Canadian Institute of Chartered Business Valuators (CICBV 2011). The Valuation Casebook lists and summarizes legal cases involving valuation subject matter, mostly ranging from approximately 1963 to the 2010. It is interesting to note that while the Casebook describes itself as summarizing Canadian valuation cases, a number of cases listed in the Casebook are US valuation cases.

We obtained full text versions of all Canadian judgments listed in the Valuation Casebook spanning our 15 year time period and ensured that all of these were added to our short list of judgments for analysis.

3.3 Matrix of Legal Judgments Analyzed

A matrix summarizing the number and breadth of legal judgments that we analyzed is set out below. A complete listing of the relevant legal judgments that we reviewed and analyzed can be found in Appendix C.

	Commercial Litigation	Tax Court	Matrimonial	Other	Total
Loss Quantification	30				**30**
Valuation	15	29	48	6	**98**
Other	4			1	**5**
Total	49	29	48	7	**133**

3.4 Comments with Respect to Research Methodology

Our chosen 15-year time period represented what we felt was an optimal balance between obtaining a sufficient number of legal judgments from which to formulate meaningful findings, and, at the same time, not subjecting ourselves to "information overload" by reviewing too many legal judgments had we selected a longer time period. Moreover, we were mindful that Canada (save and except for the province of Quebec) is a common law country, meaning that judges are

largely bound in their decision-making by previous decisions of the Court. This is known as the legal principle of *stare decisis*. As such, we felt that our analysis would benefit most by starting with the most recent cases and working backwards to find the seminal legal principles on which current decisions were based and upon which we expect future decisions **will** be based (again, to the extent that was discernible from the judgments themselves). A 15-year window of decisions provided us with good breadth while at the same time allowing us to focus on actual principles and approaches being applied by judges today.

While our aim was to review relevant legal judgments from our chosen 15-year time period, and while we undertook key word searches using three databases and cross referenced such searches with the Valuation Casebook, we did not obtain and analyze **every** case from this time period dealing with valuation experts.

Our review of legal judgments was focused on those judgments that contained detailed (and, as such, more valuable) comments regarding the quality of valuation evidence presented in Court, as well as discussions of the criteria by which the judge evaluated the valuation evidence, as well as comments regarding attributes and qualities that distinguished a particular valuation expert from another.

Accordingly, on balance, notwithstanding the above challenges with respect to our chosen research methodology, we were satisfied that we reviewed sufficient legal judgments - and sufficient judgments containing useful commentary with respect to valuation evidence - in order to formulate meaningful findings.

4.0 DISCLAIMER

In describing our findings, we make reference to and quote from a select number of legal judgments. We chose these judgments as examples because they stand out for their detailed commentary or probative value. We do not refer to the identities of the valuation experts involved in any of these judgments. In our view, the identities of the experts involved is irrelevant; our intent in preparing this research paper is not to criticize but review a large body of judgments and extract useful findings, in good faith, for the benefit of the valuation profession and all parties involved in judicial proceedings.

5.0 SUMMARY OF SIGNIFICANT FINDINGS

Pursuant to our research methodology, scope of review, restrictions and limitations as set out herein, our significant research findings are as follows:

I: The relevance and need for expert valuation evidence in Canadian Courts	
Relevance	• Canadian Courts view expert valuation evidence as relevant and useful. • Valuation experts have tremendous opportunities to make useful contributions to the Court.
Independence	• Independence and objectivity are mandatory for valuation experts. Independence is not a quality to be adhered to in outward form/appearance only, but, should be adhered to in spirit and substance. • Increasingly, Courts are going to greater lengths to scrutinize the independence of expert witnesses.
II: Factors impacting the weight placed on expert valuation evidence in Canada	
Proper Use of Assumptions	• Assumptions are appropriate when facts are not available, unclear or contradictory. However, valuation experts must reasonably attempt to obtain required factual information before reverting to assumptions. • When assumptions are used, adequate due diligence should be undertaken to test assumptions for reasonability and factual consistency. • The role of the valuation expert is to opine on financial loss or business value. Preparing hypothetical scenarios without a factual foundation and asking the Court to decide on the relevant scenario is often inappropriate in the eyes of the Court.
Explaining Concepts Logically and Clearly	• Articulation of complex concepts in a logical and clear manner is extremely important, and can, among other things, mean the difference between one expert's evidence being preferred over that of another.
Demeanour	• It is difficult to definitively conclude, from legal judgments, what is an "ideal" or "preferred" demeanour for valuation experts. • Some legal judgments suggest that Courts prefer valuation experts that maintain a modest, calm and "academic" demeanour.

	• Experts are better able to maintain a modest and calm demeanour if they are amenable to alternate views on cross-examinations.
Asking for Relevant Information	• It is not sufficient to disclose scope limitations in expert reports without making reasonable efforts to ask for required information or to obtain information from other sources or by alternate means. • Valuation experts should exercise caution and carry out adequate due diligence when using/adapting financial models provided by clients.
The Importance of Qualifications	• Having relevant qualifications for the subject matter at hand is important but the number of designations does not provide one expert with an advantage over another. • The facts suggest that the CBV designation is increasingly being accepted as the norm in commercial litigation matters. • In commercial litigation matters, experts with a CBV appear to have evidence accepted more often than those without the designation.
The Importance of Experience	• Courts value relevant experience on the part of valuation experts. However, what is more important is the independence and due diligence undertaken by an expert in arriving at his or her opinion.
Being Organized	• Valuation evidence (oral or written) that is well organized and presented in a methodical fashion tends to be viewed favourably.
Level of Detail Involved	• Being detailed is important to the extent that such detail relates to the subject matter at hand, and to the extent that sufficient work is undertaken by the valuation expert to support his or her opinion. • Notwithstanding the level of detail incorporated into an expert analysis, what is more important is that the "big picture" conclusions reached are reasonable and accord with common sense and commercial reality.
Remaining within one's Area of Expertise	• Valuation experts should avoid straying too far from their expertise of loss quantification, business valuation and financial matters. • In cases where a significant component of the overall analysis is outside of the valuator's expertise, valuation experts may need to consider retaining another expert.

ACT 2: THE RELEVANCE AND NEED FOR EXPERT VALUATION EVIDENCE IN CANADIAN COURT PROCEEDINGS

6.0 RELEVANCE OF EXPERT VALUATION EVIDENCE

Our review of legal judgments makes it manifestly clear that expert valuation evidence is valued by Courts (subject to such evidence being independent and credible). In cases where the quantum of financial loss or business value is complex, comprised of a significant dollar amount or disputed between the parties involved, Courts tend to welcome the insights, analyses and evidence provided by valuation experts.

This view is echoed in many legal judgments, including *Alfano v Piersanti*[2], in which the Court noted that "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the Courts". In *Alfano,* the Court goes on to quote *Eastern Power Ltd v Ontario Electricity Financial Corp*[3] as follows:

> "the purpose of expert evidence is to assist the trier of fact to understand evidence outside of his or her range of experience so that a correct conclusion can be reached…."

In *de Gobeo v de Gobeo*[4], the Court stated that it "wishe[d] to emphasize its dependence upon the work of experts".

A number of legal judgments acknowledged the usefulness of valuation evidence provided. For example, in *1230995 Ontario Inc v Badger Daylighting Inc*[5], the Court noted that both valuation experts that testified at trial "testified in a straight forward manner and did their best to assist the Court". Meanwhile, in *Adams v Amex Bank of Canada*[6] the Court noted that both valuation experts used the best available information and recognized data to quantify financial losses, and the resulting approaches followed by both experts were, in each case, reasonable and reliable.

Somewhat ironically, the relevance of valuation evidence is most appreciated in those cases where the evidence provided has been found to be deficient or unreliable. For instance, in *HL Staebler Company Limited v Allan*[7], the Court had difficulties owing to the fact that the evidence of both valuation experts involved was based on "unrealistic assumptions that were fundamental to their

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2 2009 CanLII 12799 at para. 6 (Ont. SCJ).

3 [2008] OJ No 3722 at para. 292 (SCJ), rev'd on other grounds at 2010 ONCA 467, 101 OR (3d) 81.

4 2003 MBQB 274, 179 Man R (2d) 200 at para. 44.

5 2010 ONSC 1587, [2010] OJ No 2166 at para. 194.

6 2009 QCCS, [2009] QJ No 5769 at para. 399.

7 2007 CarswellOnt 5792 at para. 59 (SCJ), rev'd on other grounds at 2008 ONCA 576, 92 OR (3d) 107.

ultimate conclusions". Similarly, in *Lydia Diamond Exploration of Canada Ltd v von Anhalt*,[8] the Court cited concerns with the evidence of both experts, noting that it was "unable to rely with full confidence on the expert evidence advanced by either of the parties".

In cases where Courts find the valuation evidence to be lacking, the Courts are not averse to choosing a value of a party's financial loss or a business value other than those suggested by the valuation experts involved. Similarly, Courts in these situations do not necessarily limit the financial loss or business valuation to the midpoint between the differing experts' calculations. For instance, in the frequently-cited decision of *Bibby v The Queen*,[9] the Court held as follows:

> "While it has been frequently been held that a Court should not, after considering all the expert and other evidence, merely adopt a figure somewhat between the figure sought by the contending parties, it has also been held that the Court may, when it does not find the evidence of any expert completely satisfying or conclusive, nor any comparable especially apt, form its own opinion of valuation, provided this is always based on the careful consideration of all the conflicting evidence. The figure so arrived at need not be that suggested by any expert or contended for by the parties".

In summary:

- Expert valuation evidence is considered relevant by Canadian Courts, particularly in cases where the quantum of financial loss or business value is complex, comprised of a significant dollar amount and/or disputed.

- Valuation experts have a tremendous ability to make useful contributions to the Court in terms of assessing financial loss or business value – provided that their analyses and opinions are prepared objectively and are viewed as credible by the Court.

7.0 WHAT COURTS REQUIRE - INDEPENDENCE

7.1 Independence is Mandatory

From our review of the case law, it is clear that Courts place tremendous value on expert independence and objectivity, and this focus appears to have amplified in recent years.

Courts repeatedly stress the fact that the foremost duty of the expert is to assist the Court, and this overrides any obligation to the party from whom the expert has received instructions or payment.

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8 2011 ONSC 3862, 78 BLR (4th) 214 at para. 75.

9 [1983] C.T.C. 121 at para. 32 (F.C.T.D.).

An expert who appears as an advocate at trial, who refuses to acknowledge weaknesses in his or her analyses or refuses to examine alternate points of view or assumptions will not ultimately be of much assistance to the Court. In contrast, an expert who, given a suggestion on cross examination that another reasonable view of a certain fact or assumption might lead to a different result or conclusion, agrees with such a suggestion and is willing to assist the Court with the implications arising from such an alternate view will be of far more value to the Court.

The importance of independence is best demonstrated by way of an example; *Love v Acuity Investment Management Inc.*[10] In this case, the Court took exception to a number of aspects of the plaintiff's expert report. The Court was "*concerned and disappointed"* to learn that the plaintiff's expert took a model of damages that the plaintiff had created and simply "*put it forward unchanged in any material respect conceptually and un-audited for accuracy of the facts assumed within the model".* The Court noted that the plaintiff's model and analysis was "*simplistic, aggressive and over-reaching".* In adopting the plaintiff's model, the plaintiff's expert quantified damages for a number of theoretical scenarios that did not have a factual foundation, and not just for those scenarios that were reasonable. Overall, the Court took objection to the plaintiff's expert's approach that the model prepared by the plaintiff was "*one we could work with",* rather than preparing an independent analysis.

The Court also noted that the plaintiff's report was co-signed by a second principal, but this principal had played such a limited role in the preparation of the report that he did not understand the content of the report and could not defend the report if required. The Court took a dim view of an expert signing or cosigning an opinion report without being intimately aware of the content of the report and opinion, and noted that it expected "*more of expert witnesses than that".*

Similarly, in *DeBora v DeBora*,[11] the Court needed to determine, among other things, the fair market value of a nutraceutical company for equalization purposes in the context of a matrimonial dissolution. Both parties retained their own experts to testify as to the fair market value of the shares of the company, among other matters.

The husband's valuator relied upon information presented to him by his client, including the characterization of various financial statement items such as non-arms length loans and the fact that charges against the company under the *Competition Act*, RSC, 1985, c C-34 were minor issues, and did not conduct independent due diligence. In contrast, the wife's valuator performed an in-depth forensic analysis of the company's cash flows and financial records and made a

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10 (2009), 74 C.C.E.L. (3d) 272 at paras. 138, 140, 141 (Ont. SCJ), varied at 2011 ONCA 130, [2011] OJ No 771.

11 (2004), 8 RFL (6th) 32 (Ont. SCJ).

number of normalization adjustments to the maintainable earnings of the company based on his findings.

Both valuators were accused of acting as advocates for their clients. The court rejected the charge that the wife's expert acted as an advocate by making assumptions regarding the assets of the company without reviewing adequate supporting documentation. The court noted "*While it is the role of the court to draw the appropriate inferences where documents which should have been produced have not been, it would not be possible to do so in this case if there was not expert evidence as to the proper financial calculations.*"[12] The court expressed satisfaction as to the thoroughness of the wife's expert's work.

Meanwhile, the court found that the husband's expert "*fell short of the independence required of an expert witness. It seems that the husband's deliberate obfuscation and failure to disclose infected…[his] work".* The court noted that an expert witness should be neutral and independent and not an advocate for a party. The husband's expert took the position that it was appropriate for him to accept on an "*uncritical basis"* what the husband told him. The court noted that it had *"rejected the husband's evidence as not worth of credit. It follows that, to the extent that [the husband's expert's] opinion is based on what the husband told him, it must also be rejected."*[13]

In *Antrim Truck Centre Ltd v Ottawa (City)*,[14] a claim for injurious affection before the Ontario Municipal Board ("OMB"), it was argued that the Claimant's valuation expert had become an advocate and had not prepared his own report. It was pointed out that parts of the expert's report were typed in the office of the Claimant's Counsel. The OMB noted that issues of independence would go towards the weight placed on this expert's evidence. The OMB ultimately found that the Claimant's expert's written report had "weaknesses…..as to preparation, scope and objectivity".[15]

In *de Gobeo v de Gobeo,* the Court appeared to be so troubled at the lack of impartiality demonstrated by one of the experts involved, that the Court devoted an entire section of the legal judgment to dealing with "the Role of Experts". In this section the Court stated that the expert in question was an advocate whose evidence was "*lacking in objectivity in the face of existing and valid evidence and therefore it cannot be considered by this Court as expert testimony*".[16] The

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12 *Ibid.* at para. 345.

13 *Ibid.* at paras. 346, 350.

14 [2009] OMBD No 1, rev'd on other grounds at 2011 ONCA 418, 332 DLR (4th) 641

15 *Ibid.* at para. 28.

16 *Supra,* note 3 at para. 45.

Court went so far as to suggest "perhaps it is time for our Court rules to be amended to provide for an absolute clear standard of impartiality on the part of experts".[17]

In fact, it appears that the procedural rules governing the use of experts' evidence in court proceedings are changing and a clear standard of impartiality is being explicitly required on behalf of experts. For example, in Ontario, the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, were amended, effective January 1, 2010, to include a number of changes specifically regarding experts. Rule 4.1.01 sets out the duty of every expert as follows:

DUTY OF EXPERT

> **4.1.01** (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is ***fair, objective and non-partisan***;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.
>
> [emphasis added]

Furthermore, in Ontario, experts must sign a certificate appended to their reports, confirming that they understand the duty set out in Rule 4.1.01(1)(a) to be fair, objective and non-partisan. Similar changes have been made both at the federal level, and provincially (for example in British Columbia and Nova Scotia).

In the 2008 Ontario case, *Frazer v Haukioja*,[18] (a case involving medical expert evidence), the Court set out the following factors relevant to the receipt of expert evidence, derived from both U.K. and Canadian case law:

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[17] *Ibid.*

[18] (2008), 58 CCLT (3d) 259 at para. 141 (Ont. SCJ).

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise ... An expert witness ... should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his [or her] opinion is based. He [or she] should not omit to consider material facts which could detract from his [or her] concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.

5. If an expert's opinion is not properly researched because he [or she] considers [there to be] ... insufficient data ... available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

In summary:

- The message from the above legal judgments – indeed one that is echoed in numerous other judgments that we reviewed – is simple: independence and objectivity are mandatory for valuation experts. Independence is not a quality to be adhered to in outward form/appearance only, but, should be adhered to in spirit and substance.

7.2 Trends with Respect to Independence

Increasingly, Courts are going to greater lengths to scrutinize the independence of expert witnesses.

Some of this can be attributed to various judicial initiatives, such as the Goudge Inquiry which was commissioned by the Province of Ontario after Dr. Charles Smith, an apparently well-accredited expert from a world-renowned institution was allowed to give expert evidence regarding pediatric forensic pathology that led to a number of criminal convictions. Dr. Smith's evidence was often admitted without challenge. In 2005, the Chief Coroner for Ontario requested

a full review of Dr. Smith's work in "criminally suspicious cases and homicides in the 1990s".[19] The Chief Coroner's Review did not agree with significant facts cited by Dr. Smith in many of his reports and/or testimony.[20]

The Goudge Inquiry was set up to examine, among other things, how such systemic miscarriages of justice were allowed to occur and how to enhance the role of Courts as "gatekeepers" with respect to the admissibility of expert evidence. The Goudge Inquiry found that "Dr. Smith failed to understand that his role in the criminal justice system required independence and objectivity".[21] His evidence was seen as too categorical, "potentially skewing the criminal investigation".[22] Further, the Goudge Inquiry concluded that the "serious failings" in the way Dr. Smith performed his role "ranged from his misunderstanding of his role, to his inadequate preparation, to the erroneous or unscientific opinions he offered, and, perhaps most important, to the manner in which he testified, which ranged from confusing to dogmatic".[23]

Whatever the reason for the increased scrutiny of expert independence, we note that the increased scrutiny is manifesting itself in *voir dire* examinations of the independence of experts at trial and the production of experts' working papers and emails, among other things.

For example, in *Alfano v Piersanti*, the Court ordered production of the working papers, time dockets and certain emails referred to in the time dockets of one of the accounting experts retained in the matter. Upon review of this information during a three day *voir dire* and reviewing the time dockets and underlying emails in question, the Court noted that the Defendants' expert based his analysis on theories advanced by the Defendants. The Court further noted that the Defendants' expert was "*committed to advancing the theory of the case of his client, thereby assuming the role of an advocate",* and noted that the expert was "*trying to do their best for their client to counter the other side".*[24]

The Court concluded that the Defendants' expert had become a spokesperson for the client, and did not complete independent verification of key issues in "*accordance with the standards that are*

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19 Stephen T. Goudge, *Inquiry into the Pediatric Forensic Pathology in Ontario* (October 1, 2008), executive summary at 7, online: Website of the Ministry of the Attorney General of Ontario <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en.html>. Last accessed August 25, 2011.

20 *Ibid.*

21 *Ibid.* at 16.

22 *Ibid.*

23 *Ibid.*

24 *Supra,* note 2 at para. 11.

expected of an expert".[25] As a result, the Defendants' expert was disqualified from giving expert testimony in this case.

Similarly, the Court was quite critical in *CanBev Sales & Marketing Inc v Natco Trading Company*,[26] where a valuation expert involved in the case was seen to be biased. This expert was seen as merely advocating his client's position. The Court described this as brazen "oath helping", and, therefore, dismissed this expert's evidence entirely.

In summary:

- Increasingly, Courts are going to greater lengths to scrutinize the independence of expert witnesses – checking working papers, emails and correspondences for instance – and eventually even disqualifying experts from testifying. In the past, questions about expert independence were more likely to go towards the weight placed on that evidence. More recently, questions about independence could potentially lead to the disqualification of an expert.

ACT 3: FACTORS IMPACTING THE WEIGHT PLACED ON EXPERT VALUATION EVIDENCE IN CANADIAN LEGAL JUDGMENTS

8.0 PROPER USE OF ASSUMPTIONS

Making assumptions is an important element in the quantification of financial loss and business valuation. Every analysis will usually require a number of assumptions, for instance, regarding most likely future events, anticipated trends in cash flows, the existence of contingencies, the existence of strategic purchasers of a company's shares, and so on. It is commonly accepted among valuation experts that 1) key assumptions need to be set out in a written expert report such that the basis of conclusions reached can be clearly understood and 2) assumptions need to be tested and be realistic in order for expert reports to be viewed as being credible.

Notwithstanding this commonly accepted view, what is immediately obvious from our review of legal judgments is that assumptions, or, specifically, the inappropriate use of or reliance on assumptions, are one of the most frequently cited point for criticism of valuation experts and valuation evidence by the Courts. What are the underlying reasons for these criticisms, and what can valuation experts do better with respect to assumptions?

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25 *Ibid.*

26 (1996), 30 OR (3d) 778 at para. 58 (Gen Div).

8.1 When to use Assumptions and When Not To

Legal judgments suggest that valuation experts need to think about when to make certain assumptions, and when to try to obtain further information so as to replace assumptions with facts.

As a starting point, generally, assumptions with respect to overall legal theories to be proven in Court are appropriate. For instance, in a breach of contract case, a valuation expert may assume that the contract in question was indeed breached, and may quantify loss arising from such breach. The proving of the breach is a matter to be determined by the Court, and the expert does not have to weigh in with respect to this.

Valuation experts sometimes make assumptions where facts are not available, unclear or contradictory. Care must be taken to ensure that facts are indeed not available in these cases and that reasonable attempts have been made to obtain further information to no avail. Insufficient attempts to obtain factual information where information was indeed available are not viewed favourably by the Courts. For instance, in the matrimonial case, *DeBora v DeBora,* the husband declined to produce many documents and did not answer many questions relating to financial matters. The husband's expert accepted the lack of disclosure and prepared his analyses without this information, making assumptions where information was missing. The wife's expert meanwhile undertook a forensic analysis and was able to obtain some of the missing information, or was able to arrive at a coherent picture of the financial facts by putting together "bits and pieces of often contradictory disclosure made over a prolonged time period".[27] The Court found that the "husband's deliberate obfuscation and failure to disclose infected [his expert's] work", and, therefore preferred the wife's expert's evidence in most cases.[28]

Similarly, in *Love v Acuity*, the Court took objection to certain assumptions that the plaintiff had proposed and which were adopted by his valuation expert without independent verification. Among these, the plaintiff's expert assumed that the plaintiff would have generated growth in sales of not less than 10% and as high as 30% per quarter. A 30% quarterly growth rate translates to an annual growth rate of about 186%, a rate that the Court found was unsupported by the evidence presented. For this and other reasons, the Court found the plaintiff's expert's view of what was reasonable was "*startlingly unreasonable*".[29] In this case, estimating quarterly growth rates was well within the expertise of the valuation expert, and adopting a series of client-provided assumptions was seen as improper.

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[27] *Supra ,* note 11 at para. 345.
[28] *Ibid.* at para. 350.
[29] *Supra ,* note 10 at para. 142.

In summary:

- Assumptions are appropriate when facts are not available, unclear or contradictory. However, valuation experts must make reasonable attempts to confirm this, or to obtain required factual information before reverting to assumptions.

8.2 Due Diligence

If assumptions are used, legal judgments are clear in requiring that valuation experts test significant assumptions for reasonability and to establish that they are grounded in "common sense and commercial reality".[30]

For example, in *Brown v Canada*,[31] one of the issues at trial was the valuation of certain computer games purchased by a limited partnership. The appellant's valuation expert performed a "*technical review"* of the programs and little else. The expert took a number of management projections and incorporated them into his calculations with little in the way of due diligence. The expert also made the significant assumption that the partnership held a Sega game licence at the valuation date. However, it did not. As a result, the court determined that it was prudent to "*minimize*" its evidentiary value as in the words of the trial judge, the evidence "*lacked any concrete basis on which I could find comfort*".[32]

In *Fulmer v Peter D. Fulmer Holdings Inc*[33] the court noted that the respondent's expert made two important but erroneous assumptions in arriving at the fair market value of certain shares. Essentially, the valuation expert made assumptions regarding the priority of the respondent as the holder of certain shares and the repayment of certain debt obligations. The Court reviewed the shareholder's agreement, articles of amendment and security agreement and found the assumptions used to be invalid. Partly because of this, the Court accepted the applicant expert's valuation.

In *Love v Acuity*, the Court took exception to the fact that the plaintiff's valuation expert took a model of damages that the plaintiff had created and "*put it forward unchanged in any material respect conceptually and un-audited for accuracy of the facts assumed within the model".*

The amount of reasonability testing varies depending on the significance of the assumptions to the overall analysis. For instance, assumptions regarding the future inflation rate may be supported by reference to historical inflation rates in a case where inflation is not a significant component of the

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30 *Hallatt v Canada* [2001] 1 CTC 2626 at para. 30.

31 [2001] TCJ No 763.

32 *Ibid.* at para. 89.

33 (1997), 36 BLR (2d) 257 at paras. 47-50.

financial calculations. However, in the above examples, assumptions used had a material impact on the financial calculations, and the threshold for due diligence should have been correspondingly higher.

In summary:

- When assumptions are used, adequate due diligence should be undertaken to test assumptions for reasonability.
- Ensure that assumptions don't run counter to facts (as in *Fulmer,* above).
- Always test client-provided data and financial models for reasonability and technical accuracy before adopting these in financial calculations. Wherever possible, independently prepare financial models and calculations.

8.3 Hypothetical Scenarios

Sometimes, valuation experts may be requested by counsel or clients to run financial calculations based on certain hypothetical scenarios and assumptions without opining on which scenario is the "reasonable" or "most likely" one, and with the understanding that the Court will decide which scenario to choose. Our review of legal judgments indicates that Courts generally take a dim view of valuation experts that present hypothetical scenarios of financial loss or business value which are based on speculation rather than verifiable facts.

For example, in *Independent Muti-Funds Inc v The Bank of Nova Scotia*,[34] the valuation expert for the plaintiff prepared five scenarios of financial loss, each calculating financial losses given different sets of facts. On cross-examination, the expert could not say that one of his five assumptions was any more reasonable than any other, and he could not provide a "bottom line" on the quantum of damages.[35] The defendant's expert criticized this expert for "accepting uncritically the assumptions of [the plaintiff]" and suggested that "one of the duties of the author of an expert report is to identify the relevant assumptions underlying the conclusions and deal with the reasonableness and appropriateness of those assumptions".[36] The Court found that the lack of evidence at trial to support the assumptions on which the plaintiff's expert's report was based "seriously undermine[d] the usefulness of that document". The Court noted, with respect to one significant assumption, that it was "founded on bare hope and not on reality".[37]

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34 [2004] OJ No 340 (SCJ).
35 *Ibid.* at para. 129
36 *Ibid.* at para. 128.
37 *Ibid.* at para. 131.

In summary:

- It is the role of the valuation expert to opine on financial loss or business value based on an objective assessment of facts and reasonable assumptions. Preparing hypothetical scenarios without a factual foundation and asking the Court to decide on the relevant scenario is often inappropriate in the eyes of the Court.

9.0 EXPLAINING COMPLEX CONCEPTS LOGICALLY AND CLEARLY

The legal judgments we analyzed make it clear that Courts appreciate and tend to be better disposed to valuation experts who are able to articulate complex calculations and concepts logically and clearly. While articulating concepts in written reports is important, the ability to articulate clearly during oral testimony appears to be what truly distinguishes one expert from another. Indeed, from some of the judgments we looked at, logical oral articulation appears to have "carried the day" in terms of leading the Court to prefer one expert's evidence over another. Conversely, illogical or unclear oral articulation can mislead the Court with respect to important concepts.

The importance of logical and clear articulation can be found in numerous judgments. For example, in *Baxter v The Queen*,[38] the Court commented with respect to one of the valuation experts that he was "articulate, succinct and clear in the presentation of his pithy hypotheses", which led to "his written report and his oral evidence [being] very persuasive". Similarly, in *Deer Creek Energy Limited v Paulson*[39] one of the valuation experts went to great lengths to explain complex valuation concepts clearly. These included explaining the concept of discount rates, the choice between various valuation methods and comparable company data. In contrast, the Court felt that the other valuation expert involved was not able to logically explain certain aspects of his methodology and certain choices he made with respect to obtaining data. Some explanations were "obscure". This, in part, led the Court to comment that the latter expert's evidence was "not credible or persuasive".[40]

Meanwhile, in *RBC v Merrill Lynch*,[41] it appears that the concept and purpose of a discount rate (in respect of present valuing future losses) was not clearly articulated to the Court. This appears to have led the Court to view the discount rate as a "contingency reduction" rather than a risk-adjusted interest rate/present value rate. The Court went on to determine that a 20% discount rate (as suggested by one of the valuation experts) was inappropriate, and that discount rates of 20% to

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38 2006 TCC 230 at para. 96, rev'd on other grounds at 2007 FCA 172, [2007] 3 C.T.C. 211.

39 2008 ABQB 326, 49 BLR (4th) 1.

40 *Ibid.* at para. 452.

41 2004 BCSC 1464, 50 BLR (3d) 308, varied at 2008 SCC 54, [2008] 3 SCR 79.

60% ought to be used instead. As an aside, for valuation practitioners, a discount rate of 60% represents a tremendously high rate (usually reserved for special circumstances such as valuations or present value calculations involving startup/high tech/biotechnology companies), and would be rarely used insofar as a discount rate is indeed seen as a risk adjusted interest rate/present value rate.

In summary:

- Articulation of complex concepts in a logical and clear manner, particularly during oral testimony in Court, is extremely important, and can, among other things, mean the difference between one expert's evidence being preferred over that of another.

10.0 DEMEANOUR

Closely related to the topic of "explaining concepts logically and clearly", is that of the ideal or preferred demeanour of the valuation expert in Court. Demeanour refers to the manner in which an expert witness carries himself or herself, the air with which an expert asserts himself or herself and the overall physical appearance and bearing of the valuation expert in Court. Clearly, demeanour is more of an esoteric quality that is hard to objectively study. Nevertheless, we were interested in exploring the extent, if any, to which demeanour "matters" in the eyes of the Court.

From our experience, different valuation experts have different "styles" of oral communication. Some valuation experts are more reserved and cautious, others are rather more energetic and flamboyant, while others may have a completely different style of their own.

By and large, we found that legal judgments don't often comment on the demeanour of valuation experts. As an aside, legal judgments do comment frequently on the demeanour of **fact** witnesses in a case. One legal judgment that did have comments on expert demeanour was *Baxter v The Queen.* In this judgment, the Court noted that it was "persuaded by the demeanour, substance, presentation and **modest certainty**" [emphasis added] of one of the valuation experts involved.[42] Similarly In *1230995 Ontario Inc v Badger Daylighting Inc,* the Court noted that both valuation experts that testified at trial did so in a "straight forward manner and did their best to assist the Court".[43]

The cases we reviewed also suggest that experts are better able to maintain an earnest and sincere demeanour in Court if they are flexible on cross examinations and open to accepting alternative suggested facts from opposing counsel and running through the implications of such alternative

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42 *Supra,* note 38 at para. 97.

43 2010 ONSC 1587, [2010] OJ No 2166 at para. 194.

facts for the benefit of the Court. This is opposed to rigidly sticking to a pre-existing position and risking appearing as an advocate. For instance, in *de Gobeo v de Gobeo*, the Court found that one of the valuation experts on cross-examination continued to "buttress an unsupportable position" on behalf of his client, in an attempt to "support his retainer".[44] As a result, this expert's position was "shaken on cross-examination", during which opposing counsel was successful in a "complete knock down" of all the expert's valuation theories. Rather than maintaining a sincere and calm demeanour, this expert's testimony "degenerated".[45]

The above legal judgments suggest that, for the Courts involved, they preferred valuation experts that are modest, respectful and almost "academic" or "professorial" in their demeanour. Unfortunately, we cannot extrapolate this across all Courts given the limited number of cases that explicitly make reference to demeanour.

In summary:

- It is difficult to definitively conclude, from an analysis of legal judgments, what is an "ideal" or "preferred" demeanour for valuation experts.
- Some legal judgments suggest that Courts prefer valuation experts that maintain a modest, calm and academic demeanour.
- Valuation experts are better able to maintain an earnest and calm demeanour if they show themselves to be flexible on cross-examinations.

11.0 ASKING FOR RELEVANT INFORMATION

A potential distinguishing factor between some valuation experts at trial is the extent to which particular experts made good-faith attempts to obtain information that was required for their analyses.

What is clear from the case law reviewed is that it is not sufficient for valuation experts to just disclose in their written reports that they were unable to obtain certain documents or pieces of information. Where such information exists but was not provided by one of the parties, the onus appears to be on the expert to try to obtain the information from other sources, or arrive at the information using alternate means.

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[44] *Supra ,* note 4 at para. 44. .

[45] *Ibid.* at para. 43.

For example, in *Shamber v Shamber*,[46] a matrimonial case, the Court found it "concerning" that although one of the valuation experts complained of not having received additional information or full access to interview the husband, there was no evidence of efforts made to access this through the Courts, nor any acknowledgement that the absence of this information could have had an impact on his conclusions". Similarly in *Bravo v Pohl*[47] the wife's valuation expert acknowledged that important information for his analysis was missing and would be needed to finalize his calculations. The wife's expert did not interview certain individuals in order to clarify questions, did not take adequate steps to seek more information even after receiving the husband's expert report, and did not ask for certain pieces of relevant financial information. Although the fact of the missing information was clearly disclosed by way of a "scope limitation" in the expert's report, the Court felt that the expert in question should have made more effort to furnish himself with the missing information. The Court stated that the scope limitations were to "such a degree that the conclusions reached are without merit and should be given no weight".[48]

A number of legal judgments we examined also suggested that, where valuation experts are provided with financial models prepared by clients, experts should check the assumptions in such models and also check for technical accuracy/errors before relying on the models for valuation calculations. To this end, valuation experts should ask sufficient questions and obtain sufficient backup for such financial models so as to be able to be comfortable with the models.

In summary:

- It is not sufficient for valuation experts to disclose scope limitations in their expert reports without making efforts to ask for required information. If the information is then not provided or not available, valuation experts should take steps to otherwise obtain the required information from other sources or by alternate means.

- Valuation experts should exercise caution when using/adapting financial models provided by clients. These models should be checked thoroughly before relying on them.

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46 2004 MBQB 183, 14 RFL (6th) 444 at para. 45

47 (2008), 62 RFL (6th) 209 (Ont. SCJ).

48 *Ibid.* at para. 16.

12.0 THE IMPORTANCE OF PROFESSIONAL QUALIFICATIONS

It is not uncommon to see some valuation experts with multiple professional designations (CA, CBV, IFA etc.) and multiple academic degrees (MBA, B.Com etc.), while others have comparatively fewer qualifications. Are experts with more qualifications more effective than those with fewer qualifications? And, which qualifications tend to be seen as superior to others in the eyes of the Courts?

12.1 More Versus Fewer Professional Qualifications

Many legal judgments list valuation experts' professional qualifications when describing why particular individuals were accepted as experts. Courts don't spend much time discussing the qualifications. However, by virtue of listing professional designations and academic degrees, this suggests that Courts do consider qualifications to be important.

Our analysis of legal judgments reveals that, interestingly enough, the number of qualifications does not determine whether a particular valuation expert is going to be more or less effective in Court. Courts certainly look for an expert to have relevant qualifications for the subject matter at hand - for example, a CBV for business valuations or an accounting designation for investigative analyses. More important than the number of qualifications themselves is which expert provided a more thorough analysis, made better assumptions, and was more independent. For example, in both *DeBora v DeBora*[49] and *de Gobeo v de Gobeo*,[50] the Court accepted the evidence of the valuation expert that had fewer designations (two designations versus three designations in both cases), based primarily of the strength of one expert's analysis over the opposing expert.

In summary:

- While having relevant qualifications for the subject matter at hand is important, the number of designations does not, in and of itself, provide one expert with an advantage over another.

12.2 What Types of Qualifications are Better?

From our analysis, the success of particular qualifications over others appears to be stratified depending on the type of case.

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[49] *Supra,* note 11.

[50] *Supra,* note 4.

We have noted that in **matrimonial** cases:

1) Courts appear to accept a wider range of qualifications with respect to testifying on business value, forensic investigations to locate family assets and other financial analyses required. At a minimum, qualified experts all had accounting designations. Qualifications most often include Chartered Accountants (CAs) and CBVs, but also include Certified Management Accountants (CMAs), Certified General Accountants (CGAs), and Investigative and Forensic Accountants (IFAs).

2) No particular designation appears to have the "edge" over any other designation in terms of having evidence accepted by the Court. Again, the key distinguishing factor is the strength and independence of the underlying analyses undertaken.

3) In more recent years, there appears to be a trend towards more valuation experts in family law cases possessing CBV designations.

Meanwhile, in **commercial litigation** and **tax court** cases:

1) A more limited range of qualifications appears to be the norm. The majority of valuation experts tend to possess at least a CA designation, or a CA together with a CBV. In larger and more complex litigations it appears possessing a CA and CBV combination is the norm.

2) We observe that in those cases where one valuation expert possesses a CBV designation whereas another expert does not possess a CBV designation, the expert with a CBV designation appears to have valuation evidence accepted by the Court more often. This is certainly not a "given" in all situations, and, as always, depends on the quality of the analyses conducted of each respective expert. We note that the underlying reason for the observed acceptance of CBV-experts may be, in part, due to their more specialized training in valuation methodology, rather than purely due to the perception of the CBV designation, in and of itself, by the Court.

In summary:

- What is most relevant to the Court is not possessing a particular designation, but the quality and independence of the valuation evidence provided by experts.

- Notwithstanding the above, the facts suggest that the CBV designation is increasingly being accepted as the norm in litigation matters.

- In commercial litigation and tax matters, experts possessing a CBV designation appear to have evidence accepted more often than those non possessing the designation.

13.0 THE IMPORTANCE OF EXPERIENCE

Another important question that arises with respect to valuation experts is to what extent the experience of a business valuator impacts his or her ability to have evidence accepted by a Court. As with qualifications, it may initially seem obvious that the more experience the better. However, our review of legal judgments reveals quite the opposite.

To begin with, Courts do value experience on the part of valuation experts. As with an expert's qualifications, a number of legal judgments make reference to the years that a valuation expert has practiced. Presumably, the greater the level of experience, the greater the body of knowledge that a valuator can draw upon in arriving at valuation opinions, and the more comprehensive the resulting analysis. In particular, Courts value relevant experience. For example, when valuing an oil and gas company, Courts may look for prior oil and gas experience on the part of the valuator. This is perhaps best echoed in *Deer Creek Energy Limited v Paulson*, in which the Court stated that "the knowledge and experience of the valuator in a specialized industry is a factor that must be considered in evaluating the expert opinions tendered". [51]

Having said this, it is certainly not a given that the more experienced expert will have his or her evidence accepted in preference to a less experienced expert. For example, in *Alfano v Piersanti,* the Court acknowledged that one of the valuation experts was "very experienced", whose "qualifications to give opinions in matters such as those that are in issue in this case were not challenged".[52] Nevertheless, the Court disqualified the expert because of his lack of independence. Similarly, in *DeBora v. DeBora*, one of the valuation experts involved had given evidence approximately 30 times and had a longer career as compared to the other who had given evidence on 2 prior occasions and did not have quite as long a career. Nevertheless, the Court preferred the evidence of the latter expert based on the latter being more independent and undertaking a more thorough analysis.[53]

In summary:

- Courts do value relevant experience on the part of valuation experts.
- However, what is more important than experience is the independence and due diligence undertaken by a particular expert in arriving at his or her opinion.

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[51] *Supra ,* note 39 at 556.
[52] *Supra,* note 2 at para. 5.
[53] *Supra,* note 11.

14.0 BEING ORGANIZED

A number of legal judgments make it clear that valuation evidence (oral or written) that is well organized and presented in a methodical fashion tends to be viewed favourably by the Court. For instance, the Courts liked the succinct, methodical and focused manner in which valuation evidence was presented by one of the valuation experts in *Baxter v. The Queen, Deer Creek Energy Limited. v. Paulson* and *Love v. Acuity,* among others.

15.0 LEVEL OF DETAIL INVOLVED

A question that valuation experts often consider is what level of detail to delve into while preparing financial analyses underlying their opinions. Some Courts have characterized valuation as an "inherently uncertain process" given the many facts, projections, assumptions and judgment calls that are required.[54] Considering this, does it make more sense, therefore, for a valuation expert to prepare a more "conceptual" analysis, which captures the significant financial details but perhaps not every immaterial nuance, or is it more prudent to adopt an almost "forensic" approach, which takes into account significant financial details but also valuation adjustments of a smaller dollar value. The former approach may be easier for Courts to grasp and understand especially where a case has a lot of technical details. The latter may be seen as more thorough and researched. From our experience, different valuation experts tend to adopt one of these approaches or fall somewhere in between. However, which approach tends to be viewed more favourably by the Courts? Our research reveals a number of interesting responses to the above question.

On the one hand, some legal judgments favour valuation experts who are more detailed and undertake a more comprehensive scope of review, so long as the work undertaken is relevant and meaningful. For example in *Deer Creek Energy Limited v Paulson*, the Court noted that one of the experts checked a client-provided financial model for errors and made adjustments to the model; retained an independent petroleum engineering firm to check the reasonableness of certain assumptions; analyzed a larger selection of comparable companies; and, undertook a detailed analysis of capital costs.[55] This, in part, let the Court to prefer this more expansive scope of review to the comparatively more limited review of the other expert. In *Baxter v The Queen,* the Court noted that one of the valuation experts "incorporated information from several sources not canvassed by [the other expert]" in preparing a more thorough analysis.[56] In *Adams v Amex Bank of Canada*, the Court noted "both sides filed lengthy and detailed experts' reports on the calculation of [the] quantum [of damages]". The Court noted that "both expertises [*sic*] have

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54 *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, *supra* note 41 at para. 94.

55 *Supra ,* note 39 at paras. 508-566.

56 *Supra ,* note 38 at para. 76.

thoroughly perused and analyzed Amex's available data and records to evaluate the amount of the Commission paid to Amex for the period at issue."[57]

On the other hand, notwithstanding the level of detail, what becomes clear from the comments of the Courts is that what is far more important is that the overall analysis and opinion accords with "common sense and commercial reality".[58] In other words, valuation experts may prepare detailed financial models and calculations, reconciling numbers to the individual dollar and ensuring their calculations are mathematically correct. However, if the "big picture" end result runs contrary to key facts, if significant assumptions are unrealistic, and if conclusions don't make commercial sense, then the valuation evidence may be accorded less weight or dismissed by the Courts. Moreover, the importance of "articulate, succinct and clear" presentation of analyses in written reports and oral testimony cannot be underscored.[59]

In summary:

- Being detailed in the scope of work undertaken is important to the extent that such detail relates to the subject matter at hand, and to the extent that sufficient work is undertaken by the valuation expert to support his or her opinion.

- Notwithstanding the level of detail that an expert incorporates into his or her analysis, what is more important is that, "big picture" the conclusions reached are reasonable and accord with common sense and commercial reality.

16.0 REMAINING WITHIN ONE'S AREA OF EXPERTISE

Valuation experts may sometimes be asked by their retaining counsel for their comments on topics which may not be within their area of expertise. These areas may include matters of law, or commenting on data such as the quantum and value of oil and gas reserves, or providing an opinion as to the expected market size of a pharmaceutical drug.

Legal judgments indicate that valuation experts need to exercise care to avoid straying too far from their "core" expertise of loss quantification, business valuation and financial matters. For example, in cases where opining on the expected market size of a pharmaceutical drug is concerned, valuation experts may need to consider retaining a marketing expert if the market data is a significant component of the overall valuation assessment, and independent factual information cannot be obtained from accepted and trustworthy sources. Similarly, when assumptions such as

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57 *Supra ,* note 6 at para. 386.

58 *Hallatt v. Her Majesty the Queen*, *supra* note 30 at para. 30.

59 *Baxter v. The Queen*, *supra* note 38 at para. 96.

the quantum of oil and gas reserves are a significant component of the overall analysis, an oil and gas specialist should be separately retained.

Courts tend to look unfavourably on valuation experts who stray out of their area of expertise. For instance, in *CanBev Sales & Marketing Inc. v. Natco Trading Company*,[60] a valuation expert was retained to comment on the reasonableness of an assumption that a particular dollar figure relevant to the facts of the case was a "net" figure. However, the Court felt that this retainer had "nothing to do with the area of [the expert's] expertise", and the expert's findings "did not have a reliable basis in the knowledge and experience of the expert's discipline and on this basis such evidence is not admissible". The question was, in fact, a legal/factual question, "for the Court to decide on the totality of the evidence".[61]

17.0 CONCLUSION

William Shakespeare once compared the world to a stage. In this paper, we extended the analogy of a stage to the litigation process, in which many individuals play out a complex plot, with valuation experts often important members of the cast of characters.

What, if anything, can we suggest to valuation experts, to assist them in playing out their role on the Court's "stage" more effectively?

On balance, there is no "magic elixir" that guarantees a particular valuation expert's evidence will be accepted as credible or preferred over another expert's. Having said that, like every good actor, successful valuation experts will tend to be those that make every effort to "get into character" and internalize their role: to be independent and objective witnesses for the benefit of the Court rather than a hired advocate for a particular litigant. In other words, experts must remember that their audience is the Court itself.

Courts greatly appreciate valuation evidence; therefore, valuation experts have a tremendous potential to assist the Court – but only if such evidence is independent.

With independence as a "given", our research identifies a number of other qualities and factors that could help distinguish a particular valuation expert over another in the eyes of the Court, ranging from explaining concepts logically and clearly, to demeanour, to proactively asking for relevant information.

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60 *Supra,* note 26 at para. 58.

61 *Ibid.* at para. 58.

We hope that our research findings may be useful in terms of furthering the quality, independence and effectiveness of expert loss quantification and valuation evidence in Canada.

We end this paper, as we began, with a quotation from Shakespeare, which, in our view, again underscores the point that reputation and integrity are a valuation expert's greatest assets:

The purest treasure mortal times afford
Is spotless reputation—that away,
Men are but gilded loam, or painted clay.

-William Shakespeare, from "Richard The Second"

APPENDIX A

cohen hamilton steger
Expertise. Independence. Objectivity.

Prem Lobo CA, CBV, CPA

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Professional Experience

Prem Lobo is a Principal at Cohen Hamilton Steger & Co. Inc. Prem specializes in the quantification of damages, business valuations and forensic accounting. His practice has been focused exclusively in this area since 2001. Prem was formerly an Associate Director in Navigant Consulting's Disputes and Investigations practice.

Prem has been involved in the quantification of damages with respect to breach of contract, misrepresentation, intellectual property matters, class action lawsuits and expropriation proceedings, among other commercial matters. He has been involved in preparing business valuations for shareholder disputes, purchase price allocations, corporate acquisitions, tax litigations, and for various transactions. Prem has conducted forensic accounting investigations with respect to alleged fraud, accounting improprieties and non-arm's length transactions, among others.

Prem's damages quantification, business valuation, and forensic accounting experiences have encompassed a diverse range of industries including manufacturing, oil and gas, software development, power generation, pharmaceuticals, financial services, real estate, retail and others.

Prem has prepared or assisted in the preparation of numerous expert reports and affidavits and has appeared as an expert witness at trial and at mediation proceedings.

Prem is a frequent public speaker and writer, and has published articles and papers in numerous legal and accounting periodicals including the Journal of Business Valuation, CA Magazine, Business Valuation Digest, the Advocates' Journal, Commercial Litigation Review and Class Action Defence Quarterly. Prem has taught accounting courses at the undergraduate and graduate levels at York University's Schulich School of Business and the University of Ontario. Prem has authored or co-authored six accounting-related text books and study guides.

Prem sits on the Board of Directors of the Ontario Expropriation Association.

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APPENDIX B

Peter J. Henein LL.B

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Professional Experience

Peter's commercial litigation practice is focused on class actions, product liability, intellectual property and securities. He has worked with a wide variety of clients, ranging from small businesses to multinational corporations, including both international auto and drug manufacturers to national and international franchisors.

Some of Peter's most recent work includes:

- Working on numerous class actions involving a wide range of issues for a variety of clients, including specifically auto manufacturers and pharmaceutical companies
- Handling a multi-million dollar arbitration of a franchise dispute for an international client
- Handling product liability files for automobile manufacturers and distributors
- Working with copyright collectives on tariff enforcement and copyright infringement issues
- Assisting corporate clients with risk management issues and shareholder disputes
- Defending an oppression remedy application for a multinational corporation
- Enforcing letters rogatory (i.e. letters of request) from foreign jurisdiction

Peter is a tutorial leader and guest lecturer for the Osgoode Hall law school civil procedure class. He is a contributing writer to the Watson & McGowan "*Annual Survey of Recent Developments in Civil Procedure*." Peter is an active member of the Advocates' Society, and is nominated vice-chair to the Young Advocates' Standing Committee, and sits on the Collegiality, Mentoring and Membership Committee. In 2009, Peter sat on the *Principals of Professionalism Committee* of the Advocates' Society Symposium on Professionalism.

Peter attended the University of Western Ontario Law School, where he received the Blake, Cassels & Graydon LLP Company Law Award. At Western, he represented his law school in the Jessup International Law Moot, winning second prize in Canada for factum writing.

Education

LL.B., University of Western Ontario, 2003
B.A. (with Distinction), University of Toronto, 1994

Call to the bar

Ontario, 2004

Associations

- Advocates' Society
- Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
- Canadian Actors' Equity Association
- Canadian Bar Association
- Canadian Defence Lawyers
- DRI (Defence Research Institute)
- Ontario Bar Association

APPENDIX C

CREDIBILITY UNDER SCRUTINY: A RESEARCH STUDY OF THE WEIGHT PLACED ON EXPERT VALUATION AND DAMAGES EVIDENCE IN CANADIAN COURT JUDGMENTS

LISTING OF RELEVANT LEGAL JUDGEMENTS

1	1230995 Ontario Inc. v. Badger Daylighting Inc.	2010 ONSC 1587
2	27 Cardigan Inc. and 33 Cardigan Inc. v. Canada	[2004] TCJ No 318
3	342583 B.C. Ltd. v. The Queen	[1999] 3 CTC 2279
4	Aikman v. The Queen	2000 DTC 1874
5	Airst v. Airst	[1998] OJ No 2629 (SCJ)
6	Alers-Hankey v. Solomon, Teixeira, West Coast Beadworks Inc. and Justin Gems Inc.	[2004] BCJ No 2201 (SC)
7	Alfano et al v. Piersanti et al	2009 CanLII 12799 (Ont. SCJ)
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