

ADDENDUM TO CREDIBILITY UNDER SCRUTINY: Final Findings and Views from the Bench

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

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Addendum to Credibility under Scrutiny¹: Final Findings and Views from the Bench

Prem M. Lobo and Peter J. Henein

“Where do we come from? What are we? Where are we going?”
-Paul Gauguin

“Angie....Angie....Where will it lead us from here?”
-“Angie”, by the Rolling Stones

1.0 INTRODUCTION

In 2011 we, the authors, had the opportunity to prepare a research paper for the Canadian Institute of Chartered Business Valuators’ 2011 Research Initiative. Our paper was entitled “Credibility under Scrutiny” and was submitted on October 31, 2011 (the “Research Paper”). Our Research Paper analyzed Canadian legal judgments in order to: 1) analyze the relevance and need for expert valuation evidence in Canadian Court proceedings, and 2) “deconstruct” Court judgments in order to identify what factors resulted in expert valuation evidence being successful/credible and, ultimately, accepted by the Courts.

During the course of preparing our paper, we identified an opportunity to expand our research to include a written survey of Canadian judges. We developed a survey and circulated this to selected Canadian judges. As not all survey responses had been received by the time we finalized our Research Paper, we decided to collect the returned surveys and analyze the responses by way of this Addendum to our Research Paper.

As such, this Addendum should be read in conjunction with our Research Paper. All defined terms are as set out in our Research Paper.

¹ “Credibility under Scrutiny: A Research Study of the Weight Placed on Expert Valuation and Damages Evidence in Canadian Court Judgments” was a paper prepared October 31, 2011 for the 2011 Ian R. Campbell Research Initiative of the Canadian Institute of Chartered Business Valuators.

We hope that the findings contained herein provide useful and candid insights into how judges view valuation experts and valuation evidence, and what judges regard as important with respect to such evidence.

2.0 SUMMARY OF SIGNIFICANT FINDINGS FROM RESEARCH PAPER

In order to provide the reader with sufficient context to properly understand this Addendum while, at the same time, not repeating too many details from our Research Paper, we have summarized the most significant findings from our Research Paper below.

I: The relevance and need for expert valuation evidence in Canadian Courts	
Relevance	<ul style="list-style-type: none"> • Canadian Courts view expert valuation evidence as relevant and useful. Valuation experts have tremendous opportunities to make useful contributions to the Court.
Independence	<ul style="list-style-type: none"> • 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.
II: Factors impacting the weight placed on expert valuation evidence in Canada	
Proper Use of Assumptions	<ul style="list-style-type: none"> • Assumptions are appropriate when facts are not available, unclear or contradictory. However, valuation experts must reasonably attempt to obtain factual information before reverting to assumptions. • When assumptions are used, adequate due diligence should be undertaken to test assumptions for reasonability. • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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.
The Importance of Qualifications	<ul style="list-style-type: none"> • 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 Importance of Experience	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Valuation evidence (oral or written) that is well organized and presented in a methodical fashion tends to be viewed favourably.
Level of Detail Involved	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Valuation experts should avoid straying too far from their expertise of loss quantification, business valuation and financial matters.

The above findings were derived from our analysis of reported legal judgments. We were also interested in hearing from Canadian judges directly as to whether the factors we identified as important in establishing the weight placed on expert valuation evidence were indeed viewed as

important by them. Therefore, we undertook a written survey of Canadian judges, as described below.

3.0 THE SURVEY

We developed and distributed a survey to 40 judges who sit on the Ontario Superior Court of Justice, the family Court and the Tax Court. The survey consisted of 14 questions set out in 5 main categories and was to be answered on an anonymous basis. The questions included in the survey are set out and discussed herein.

Survey participants were invited to first provide information about their legal backgrounds and then to provide responses to a number of questions dealing with valuation experts and valuation evidence. For many questions, participants were asked to select their responses from a list (with the option to add additional items to the list) and to rank their responses in order of importance. For other questions, participants were asked to provide direct responses. For most questions, participants were provided with space to write down additional comments, or their reasoning for certain responses. We were pleased that many participants chose to do so.

4.0 CAVEATS

We designed the survey to focus on what we considered to be important questions to ask judges. We appreciate that there may be additional questions that could have been asked, or that our questions could have been formed differently. As such, the survey represents our good faith attempt to obtain additional information from judges and thereby add to the findings from our Research Paper.

The intent of the written survey was not to survey every judge from across Canada but to reach out to a finite number of judges from whom meaningful responses could be obtained and analyzed.

A written survey is an inherently challenging exercise. The usefulness or “value” of a survey depends on the number of responses received and, if the survey contains qualitative elements, the extent of additional comments or information provided by participants. We have found that, generally speaking, the requirement that judges remain impartial and refrain from expressing opinions on legal issues outside of their reported judgments themselves has been viewed by some as an obstacle to completing the survey. Another challenge arises from the fact that judges tend to carry significant case loads and have extremely limited time to respond to initiatives such as surveys.

We received 15 completed surveys out of 40 sent out, for a response rate of approximately 38%. Considering the challenges outlined above, we consider this to be a good response rate. Moreover, we were encouraged by the additional comments that respondents included in their surveys.

It is our view that the survey process was useful and productive, and resulted in valuable information from judges, as set out below.

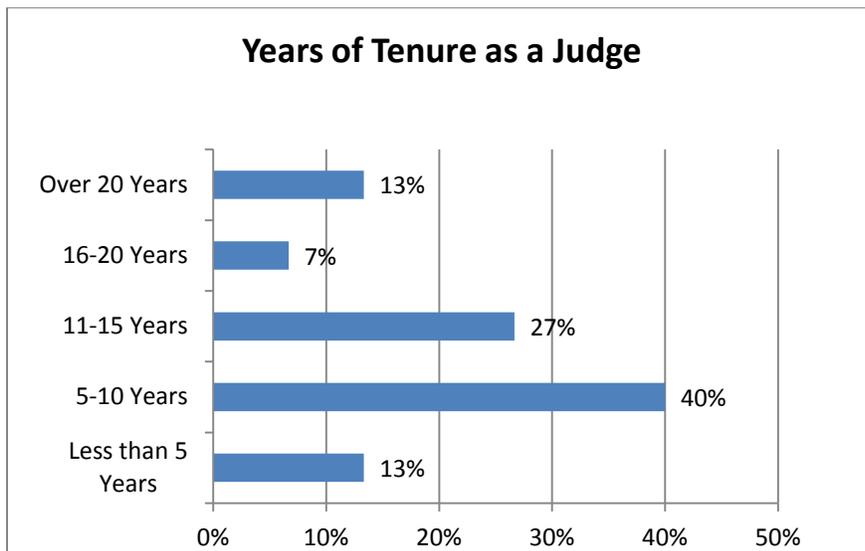
5.0 ANALYSIS OF SURVEY RESPONSES

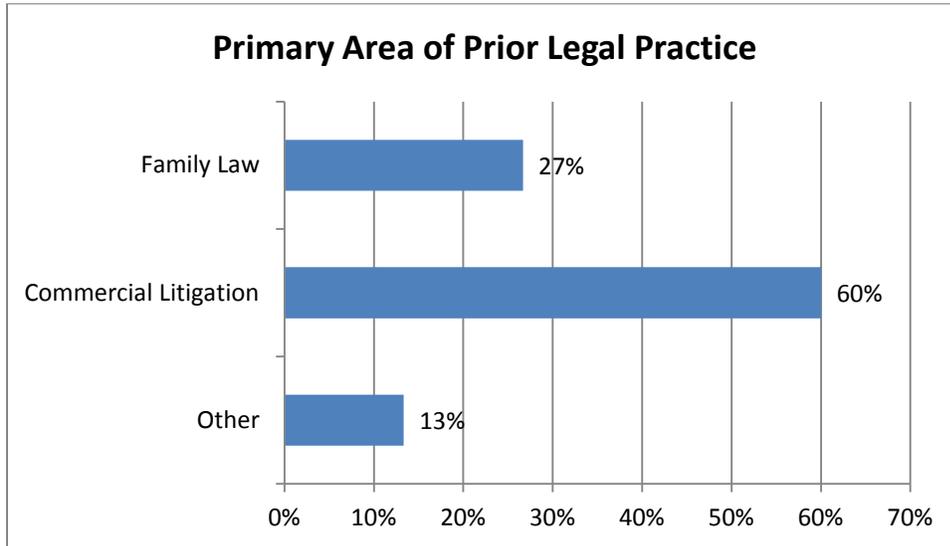
5.1 Legal Background of Participants

In order to understand the background and experience of survey participants, we asked participants the following questions:

- 1) As of the present date, how long has it been since you were appointed to the bench?
- 2) What was the primary area of your legal practice prior to being called to the bench?
- 3) Over the course of your tenure as a judge, approximately how many cases involving business valuation and damages quantification experts have you presided over?

Their responses were as follows:





On average, each survey respondent had presided over 10.3 cases that involved valuation or damages expert witnesses.

In short, survey respondents were from a wide range of seniority/tenure as judges, had practiced primarily in commercial litigation or family law prior to becoming judges, and had on average presided in over 10 cases involving valuation experts and valuation evidence. As a result, their feedback would be drawn from on-point experience and would be that much more relevant.

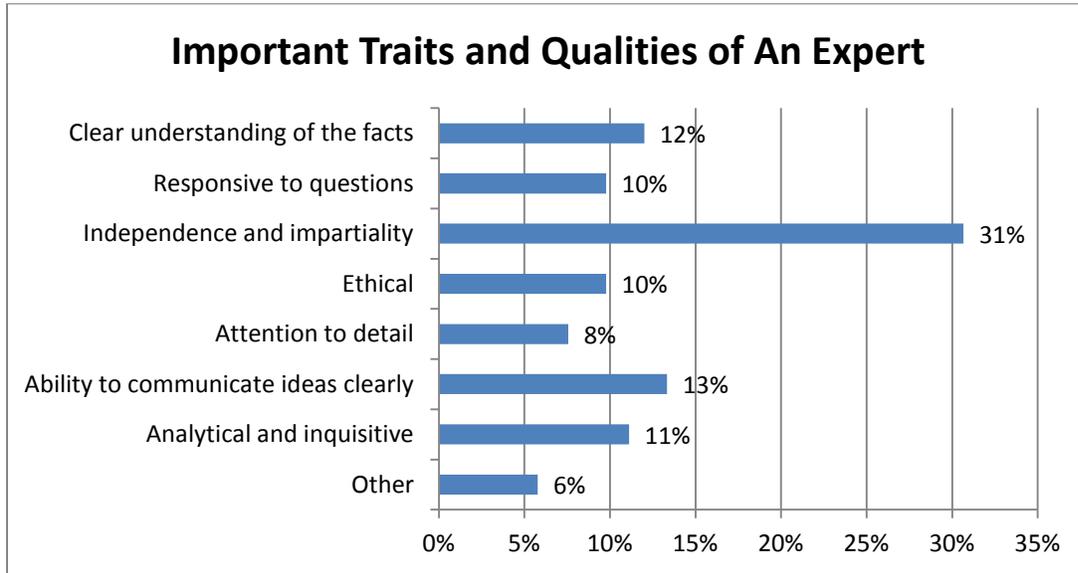
5.2 Attributes with Respect to Valuation Experts

Important Traits and Qualities of an Expert

Survey participants were asked the following question:

- 4) From the list below, please identify the 5 most important traits or qualities that you believe an effective valuation/damages expert should possess, and rate those 5 traits from 1 (most important) to 5 (least important).

We assigned marks to the traits that respondents selected based on their relative ratings. The results were as follows:



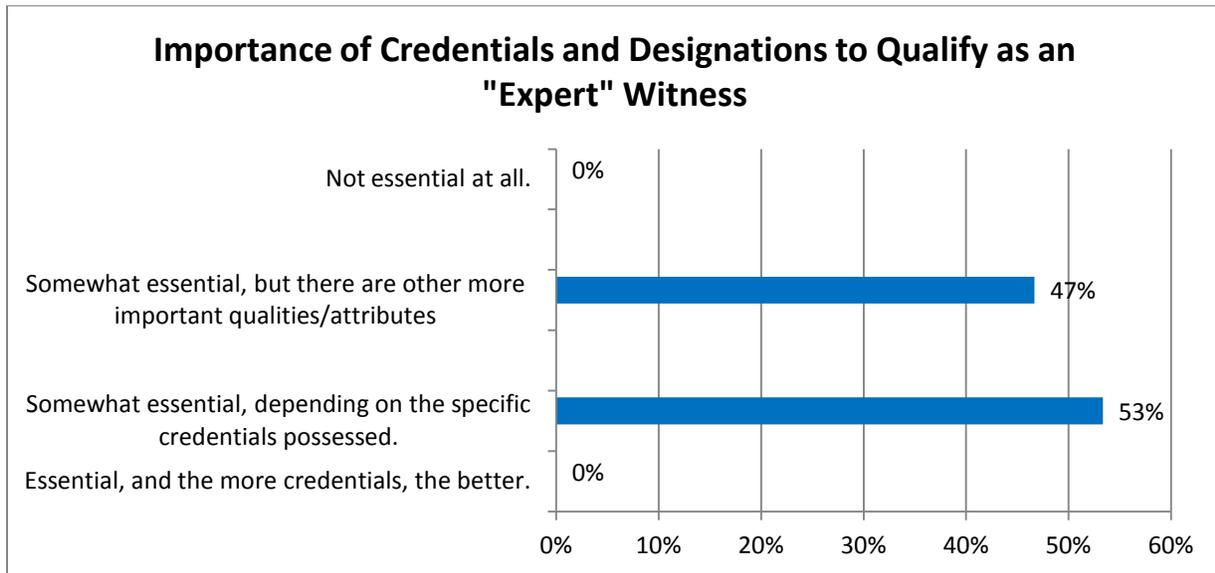
Not surprisingly, independence and impartiality was seen as very important by survey respondents. Effective communication skills, a firm understanding of the facts, and analytical abilities/inquisitiveness were also noted as valued traits. Somewhat surprisingly, attention to detail, while important, did not feature as prominently.

Importance of Credentials and Designations

Survey participants were asked the following question:

- 5) In your view, how essential are possessing credentials/professional designations in order to qualify someone as an “expert witness” (please select one), and why?

In response:



Respondents provided the following additional comments:

- Judges need to know an expert has the background to know what he is talking about.
- Expertise, experience, intelligence, and integrity are more important than credentials.
- In terms of qualification, training in the specified field is important, so credentials are important. However, experience in the particular area at issue is also important on the question of qualification.
- Professional designations sometimes mean joining for a fee without any special qualifications.
- Experience sometimes trumps academic and professional training. However, a balance is ideal.
- Basic credentials are critical. Beyond that, the most persuasive experts tend to have numerous credentials.

Clearly, credentials and designations are important. However, almost half believed that, while important, there were other qualities/attributes that were more relevant for expert witnesses to possess. Half also believed that credentials could be important, but their importance varied

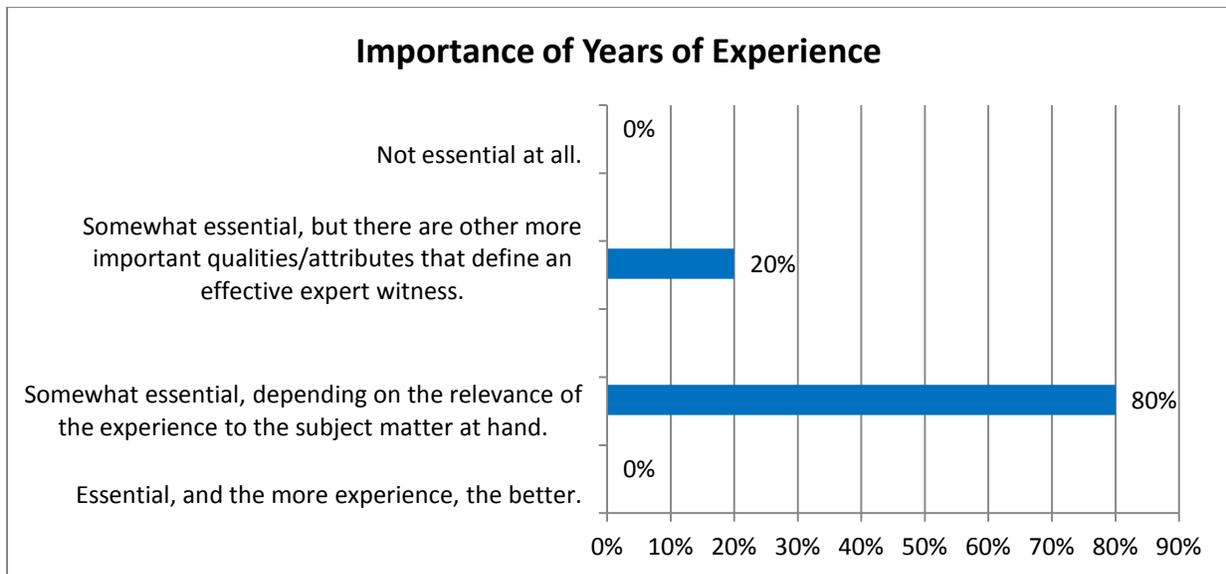
depending on the specific credentials possessed and the relevance of the credentials to a particular case or subject matter.

Importance of Years of Experience

Survey participants were asked the following question:

- 6) In your view, how essential is the number of years of experience that an expert witness possesses (please select one), and why?

In response:



Respondents provided the following additional comments:

- A biased valuator with 20 years experience will fare poorly against an impartial valuator with only 5 years experience.
- Some older experts tend to be somewhat stale in approach and delivery.
- Experience is always important; by the time a valuator seeks to approach the Court as an expert witness he usually has some seasoning.
- If a valuation is complex, experience is critical. Not just in terms of the number of years, but with regard to experience with similar matters.

Respondents believe that having years of experience in a particular field of practice is important. However, 20% believed that there were other qualities/attributes that were more relevant for experts to possess, while 80% believed that the need for experience depended on the subject matter at hand. Respondents' comments acknowledge the importance of experience, but also suggest that an intelligent, unbiased expert with fewer years of experience would be better received by the Court than a biased expert with many years of experience.

Which Credentials and Designations are Important for Valuation Experts

Survey participants were asked the following question:

- 7) In your view, which specific credentials/professional designations are particularly useful for a business valuation and damages quantification expert to possess? (Select the ones that apply).

In response:

Credentials and Designations	%
Chartered Accountant designation (CA)	47%
Chartered Business Valuator (CBV)	80%
Investigative & Forensic Accountant (IFA)	40%
Certified Financial Analyst (CFA)	20%
Certified Fraud Investigator (CFE)	7%
Undergraduate business degree	0%
Master of Business Administration (MBA)	7%
Other accounting designation	13%
Do not know	7%

It is worth highlighting that 80% of respondents noted that the CBV designation was useful for business valuation and loss quantification experts to possess. The 80% figure suggests a significant level of acceptance among judges that the CBV designation is perhaps the "premier" designation for valuation experts to possess.

Given the extent of accounting information that needs to be analyzed in valuation cases, it is not surprising that 47% of respondents suggested that a CA was a useful designation. Meanwhile, 40% suggested that an IFA would also be useful.

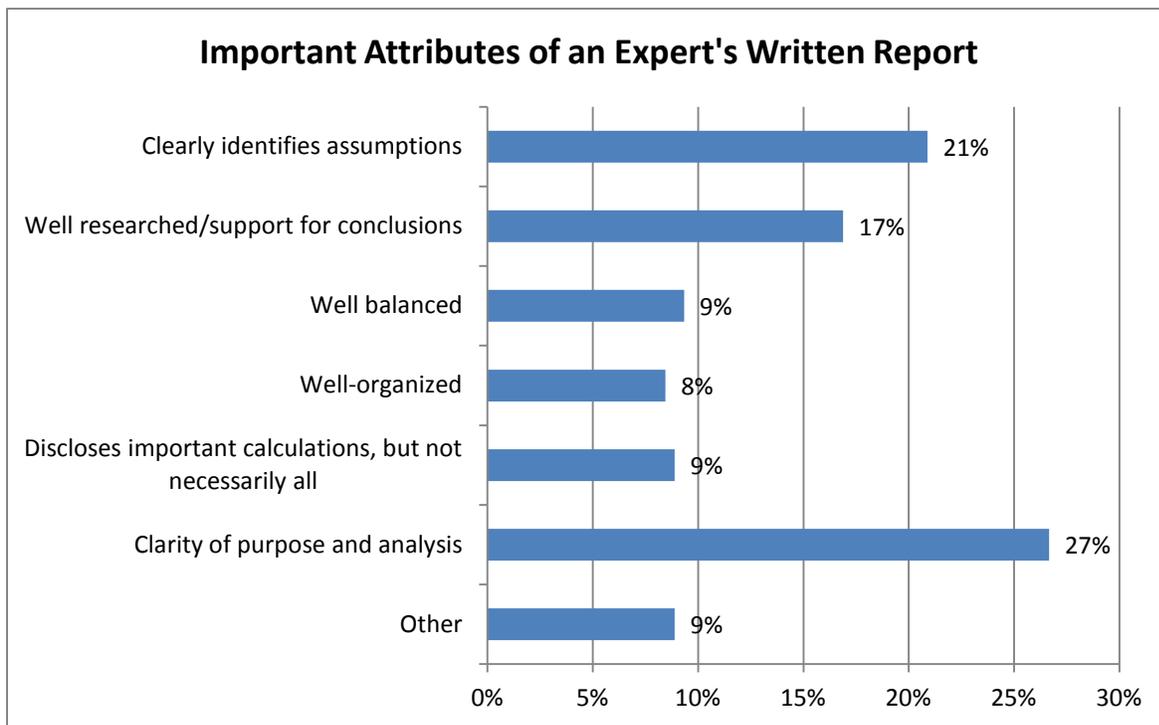
5.3 Attributes with Respect to Expert Reports

Important Attributes of an Expert's Written Report

Survey participants were asked the following question:

- 8) From the list below, please identify the 5 most important attributes of an expert's **written report** with respect to business value or the quantification of damages, and rate those 5 attributes from 1 (most important) to 5 (least important).

In response:



27% of respondents rated clarity of purpose and clarity of analysis as the most important attribute of an expert's written report. Meanwhile, a further 21% identified the clear disclosure of assumptions used in the report as the most important attribute. This suggests that judges value "clarity". In other words, judges value reports that set out and adhere to a clear and unambiguous mandate, as well as reports that disclose key assumptions rather than attempting to be silent on those assumptions and thereby avoiding discussion of the issues associated with such assumptions. 17% of respondents rated the level of research and whether conclusions were well-supported as the most important attribute of written reports.

Interestingly, included in the “other” category above (which we did not graph in order to focus on the main categories that were selected), were two items: “details” and “discloses detailed calculations”. In our survey, neither category received weight as an important attribute of a written report. One might expect that the more detailed and calculation-intensive a written report happens to be, the more credibility it might have. However, the survey findings (as well as findings from our Research Paper) indicate that this is not necessarily true.

Production/Disclosure of Draft Reports

Survey participants were asked the following question:

- 9) Have you ever ordered that an expert produce their draft reports? If yes, how many times approximately?

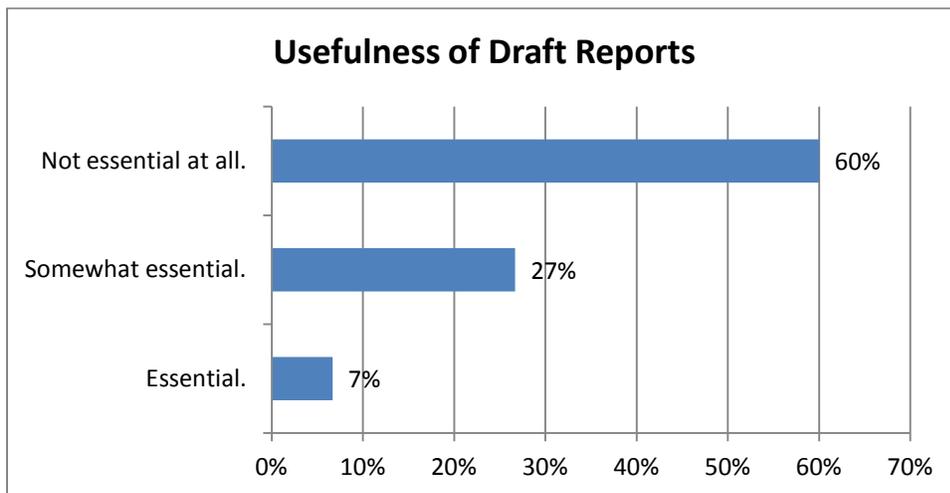
Only one respondent out of 15 had ordered experts to produce/disclose their draft reports in a proceeding and this judge noted that he/she “always” ordered that draft reports be produced.

Usefulness of Draft Reports

Survey participants were asked the following question:

- 10) In your view, how useful to the Court are draft reports with respect to establishing the qualifications and or credibility of an expert witness? (Please select one).

In response:



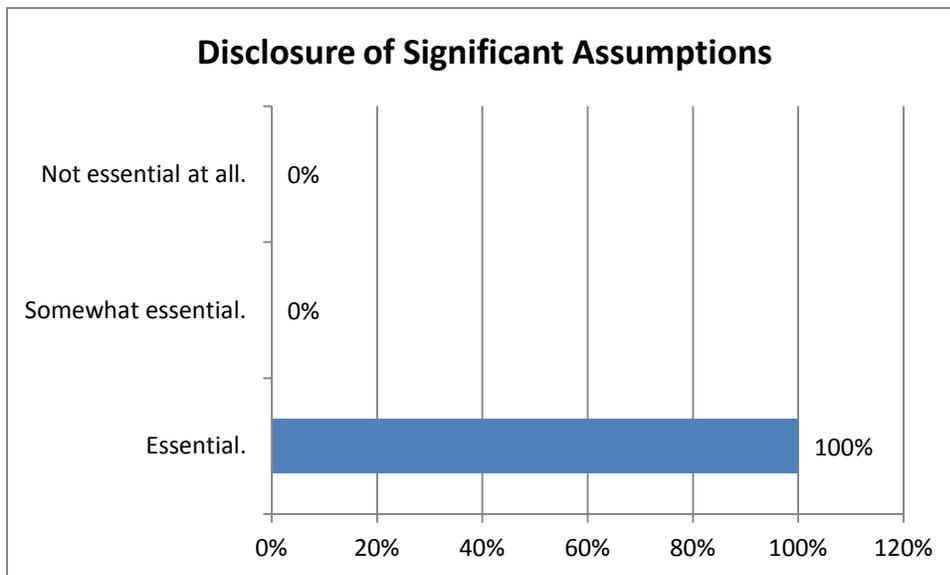
The majority of respondents suggested that draft reports were not useful/essential at all to establish the qualifications or credibility of an expert. This certainly is a widely held view among valuation experts themselves, with the notion being that a draft is an interim work product prepared for the confirmation of the accuracy and completeness of information contained therein, and which is subject to revision.

Disclosure/Verification of Significant Assumptions

Survey participants were asked the following question:

- 11) In your view, how important is it for expert reports to explicitly disclose significant assumptions and the verification of the reasonability of such assumptions?

In response:



Disclosure of significant assumptions appears to be regarded unanimously by the respondents as essential.

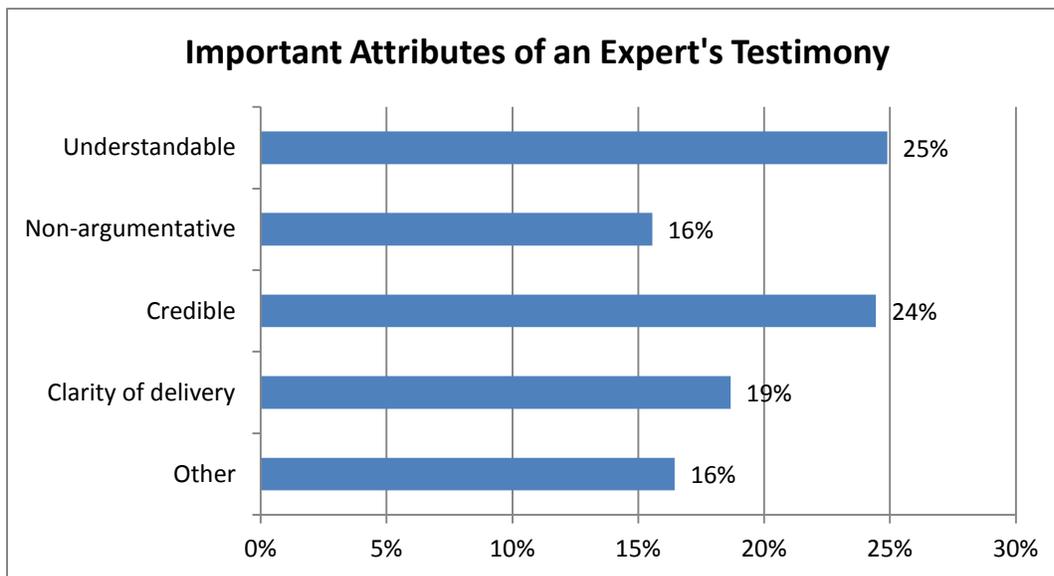
5.4 Attributes with Respect to Expert Oral Testimony

Oral Testimony

Survey participants were asked the following question:

- 12) From the list below, please identify the 5 most important attributes of an expert's oral testimony in Court with respect to business value or the quantification of damages, and rate those 5 attributes from 1 (most important) to 5 (least important).

In response:



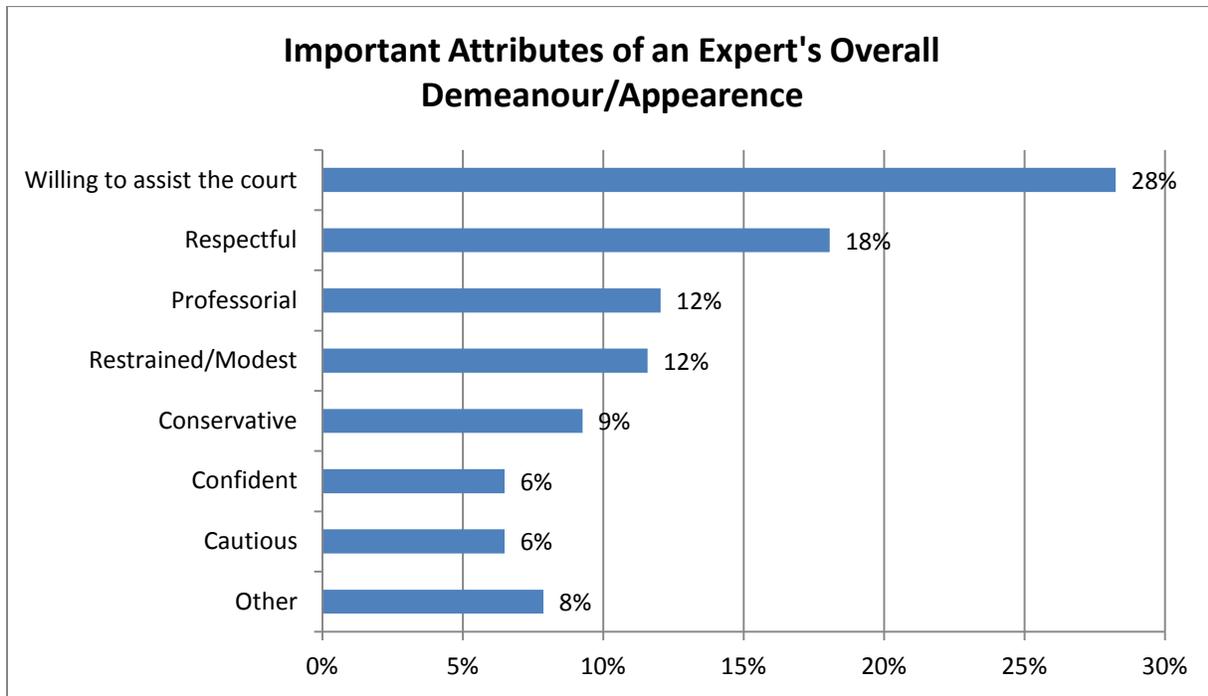
Being understandable and credible were almost equally ranked as the most important attributes of an expert's oral testimony. Clarity of delivery and being non-argumentative were also ranked as important by respondents.

Demeanour and Appearance

Survey participants were asked the following question:

- 13) From the list below, please identify the 5 most important attributes of an expert's overall demeanour and appearance in Court when providing expert witness testimony, and rate those 5 attributes from 1 (most important) to 5 (least important).

In response:



Respondents provided the following additional comments:

- Expert witness testimony should be “conservative” in that oral testimony should not go further than factual support.
- An effective witness answers questions, makes reasonable concessions in Court and is non argumentative.

28% of respondents indicated that a “willingness to assist the Court” was the most important attribute of an expert’s overall demeanour/appearance in Court. 18% selected having a “respectful” demeanour, while 12% selected having a “professorial” demeanour and 12% selected a “restrained/modest” demeanour.

5.5 Other Comments

Survey participants were asked the following question:

- 14) Given our stated intent behind this survey and our research paper – to identify specific factors which are instrumental in ensuring the success and acceptance of business valuation and damages quantification expert evidence by the Court – do you have any additional comments/remarks/advice that would be helpful to improve the quality and credibility of such expert evidence in Canadian Courts?

Respondents provided the following comments:

- Experts have to take their duty to the Court seriously. Independence and impartiality are “key”.
- Experts have to convey that they are not an advocate for the party hiring them, and are willing to assist the Court.
- An expert is not an advocate. The expert should be neutral at all times. The expert’s only client should be the Court.
- Generally, experts are professional and helpful. Occasionally, we get the impression that an expert is a “hired gun” and that quickly depreciates his or her testimony.
- Being detailed and accurate is important. However, more important is that the expert captures the “big picture” and does not make inappropriate assumptions.

6.0 COMPARISON OF SIGNIFICANT FINDINGS: SURVEY VS RESEARCH PAPER

All said, the findings from our survey are consistent with and support many of the findings from our Research Paper. Notably:

- A valuation expert is the expert of the Court, not a particular client. Independence and willingness to assist the Court are paramount.
- Accuracy and detail are important. However, there are more important attributes with respect to written and oral testimony such as clarity of analysis and mandate and disclosure and verification of significant assumptions.

- Having a number of years of experience as an expert witness and having professional designations is important. However, more important is the credibility of an expert and the quality of an expert's analysis in support of key conclusions.
- Many judges view having a CBV designation as useful and beneficial for valuation experts.
- Having a demeanour that is deferential, helpful to the Court, respectful and modest is preferred over having an overconfident demeanour in Court.

7.0 CONCLUSION

At the culmination of our analysis of reported legal judgments and our survey process as set out in our Research Paper and in this Addendum respectively, it is perhaps useful to take a step back and ponder, in the words of the Rolling Stones "(Angie)... where will it lead us from here?"

Our Research Paper identifies a number of 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 maintaining a modest demeanour. Our survey confirms many of these qualities.

Every valuation and damages quantification case/engagement is different. Every circumstance in which an expert provides testimony is different. Every judge is different and may value some attributes of written and oral testimony differently than another. However, our research and the survey results suggest that certain features are valued above all by our courts – namely:

- Experts should be independent and impartial;
- They should have relevant credentials but also relevant experience;
- Reports should clearly identify assumptions and have clarity of purpose and analysis;
- Significant assumptions should be disclosed; and
- An expert's testimony should be both understandable and credible.

While on the one hand, some of this may be readily apparent, this underscores that above all else, an expert's primary role is to provide independent assistance to the court.