

**Using CBVs to Your Advantage**  
***Family Law – Fundamentals in Property***  
***OBA***  
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The clichéd description of family lawyers is that they are social workers. The reality is that we have become accountants, albeit unqualified accountants. Much of the work that we do for families is to assist them in determining what their assets are worth and how much income that they or their spouses really earn, as opposed to what is declared for tax purposes. Most of us are not trained as accountants and for that reason we increasingly rely on our fellow professionals trained as Chartered Accountants (“CA”) or Chartered Business Valuators (“CBV”). The lawyer’s role is to spot the issues, know when to advise a client that he or she needs to retain a CBV, understand how to work co-operatively and effectively with the CBV and, if necessary, appreciate how to present the CBV’s evidence to a court and how to challenge it.

As a family lawyer you are likely not an accountant but you need to be enough of a fellow traveler to represent your client properly. In this paper my intention is to provide an introduction to this area.

**1. Retaining a Chartered Business Valuator (“CBV”): When, Who and How**

**(i) When do you need a CBV on your case?**

At the first interview with a client you must assess which experts you will need to retain, if any, to establish property and support rights and obligations.

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## *For Separation Agreements*

### *Property Interests*

Following a separation of married spouses, if either your client or his or her spouse owns property and the couple are married, assets need to be valued as of the date of separation in order to establish the proper equalization payment owing. If assets are held jointly, valuations may also need to be calculated as of the date of settlement to permit a buy out by one spouse. Whether the spouses are married or cohabiting, one may also have a claim to a beneficial interest in a property on the basis of unjust enrichment or resulting trust which may require valuations to be prepared.

You will need to retain a CBV if your client has assets whose values cannot be assessed by a lay person. For example:

- (a) Options, warrants or restricted shares;
- (b) Shares in a private corporation;
- (c) Limited Partnership interests;
- (d) Tax Shelters; and,
- (e) Trust interests.

You will also likely need to retain a CBV or a CA to calculate liabilities such as contingent taxes related to a tax.

A client may have other assets that require expert valuation by another professional. You will require an actuary to value a defined benefit pension plan and a real estate appraiser to value commercial or residential real estate interests. If your client holds real estate inside a company, a not uncommon situation, you will need to retain both an appraiser and a CBV to value the interest.

### ***Support Claims***

The introduction of *Child Support Guidelines* by the Federal and Provincial governments in 1997 has been a boon to the CBV profession. One of the primary policy goals of the introduction of the *Guidelines* was to simplify the calculation of child support and reduce transaction costs in calculating it. At the time, courts and policy makers professed concern at the legal fees wasted by parties cross-examining on child related budgets and expenses. Instead of determining child support based on the particular needs of specific children and families, the *Guidelines* provide a fixed amount of support based on income earned. This works extremely well for salaried employees of arm's length companies who have no investment assets. Regrettably for separating spouses, the *Guidelines* opened up a new and complex area of mixed law and accounting as spouses, their counsel and the courts have struggled with how to determine the income of self-employed individuals, those who work in family companies, and those who earn their living in part or in whole through investments. At the same time, the importance of imputing income to a payor spouse has become much more

significant and worth pursuing. In a regime in which child support was based on expenses it might not have been worthwhile to hire experts and enter into an income imputing exercise. Under the *Guidelines* it may not only be financially worthwhile for the recipient spouse to do so, but it may be necessary to complete a settlement or conduct a court case to do so for how can the monthly amount of child support be determined without knowing a parent's income?

Given the heavy onus on a spouse to make full disclosure of his or her income and the fact that retroactive support obligations are now vigorously enforced by our courts, if you are acting for a payor spouse who has income that is more complicated than a straightforward salary evidenced by a T4, you may well need to advise that he or she retain a CBV to calculate income. If you are acting for a recipient spouse then you will also likely wish to retain a CBV for this purpose. Income calculation reports by CBVs have become quite routine in recent years. Depending on the family circumstances not all such reports are truly expert reports. If all that is required is that the payor spouse's income be adjusted pursuant to Schedule III of the *Guidelines*, then that is a task that a competent lawyer or judge may perform without expert accounting assistance in most cases.<sup>2</sup> If a more complicated analysis is required, for example to determine if a private corporation controlled by a payor spouse has redundant assets, or perhaps if income needs to be grossed up to normalize

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<sup>2</sup> Schedule III *Adjustments to Income*, *Federal Child Support Guideline*, R.97-175 as am.

the impact of a preferential tax treatment, the CBV's expertise is called on and essential.<sup>3</sup>

### **For Marriage Contracts or Cohabitation Agreements**

The standard required by the courts for full and complete financial disclosure for a marriage contract or cohabitation agreement has been unsettled in recent years. Any party entering such a contract must provide disclosure of his or her income and net worth at the time of entering the contract. In *LeVan v. LeVan*, Madam Justice Backhouse held that a spouse must do more than provide a list of his or her assets and liabilities but rather must also disclose the values. She did not insist on formal valuations.<sup>4</sup> Where an asset's value cannot be accurately determined by a lay person, for example a defined benefit pension, a closely-held private company or a trust interest, presenting a value without the assistance of a formal expert valuation seems risky. It would be all too easy to place an estimated value on an asset that proves utterly wrong and quite possibly a material misrepresentation undermining the validity of the contract. The decision in *LeVan* is currently before the Ontario Court of Appeal which court will, I hope, provide guidance to counsel and spouses as to how far they must go to satisfy the disclosure requirements under s. 56(4) of the *Family Law Act*. Very recently, in *Dougherty v. Dougherty*, the Ontario Court of Appeal overturned a lower court decision which had set aside a marriage contract for non-disclosure in party because the husband's Ontario Hydro pension had not been

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<sup>3</sup> *Sarafinchin v. Sarafinchin*, [2000] CarswellOnt 2640 (Ont.S.C.J.)

<sup>4</sup> *LeVan v. LeVan*, [2006] CarswellOnt 7334 (Ont.S.C.J.), appeal to Ont.C.A. pending

valued by an actuary.<sup>5</sup> Rosenberg J.A. writing for the court held that in that case the fact that the wife knew that the husband held a pension at the date of the signing of the contract was sufficient disclosure to satisfy the legislative requirements. His Honour rejected the lower court's finding that the lack of an actuarial valuation of the pension at the date of the contract was grounds to set the contract aside.

The decision in *Dougherty*, suggests that it is not necessary to retain a CBV to value assets formally for a marriage contract. However, for comprehensive direction on this point we must await the decision of the Ontario Court of Appeal in *LeVan*.

**(ii) Whom should you retain?**

Once you have identified the need for expert evidence, the next question is whom should you retain? The obvious answer is that you require a properly trained professional. Although most cases are settled amicably (or grudgingly) at some point, it is helpful to keep in mind what a court requires to accept expert evidence if the matter does go to trial. Having the right professional on your team from the start will enhance the likelihood of settlement by persuading the other party that there is no angle to attack the report and will assist you in proving your case at trial if required.

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<sup>5</sup> *Dougherty v. Dougherty* (2008) ONCA 302

The standard for the admission of any expert testimony at trial is set out in the Supreme Court of Canada decision *R. v. Mohan*.<sup>6</sup> The admission of expert testimony is an exception to the general bar against opinion evidence. The test for the admission of the opinion of an expert is:

- (i) The evidence must be relevant to an issue in the case;
- (ii) The evidence must be necessary to the trier of fact;
- (iii) The evidence must not violate the exclusionary rule<sup>7</sup>;
- (iv) The witness must be a properly qualified expert.

It is important to retain an expert with the right qualifications for the problem at hand and that expert must give testimony on a matter that falls within his or her expertise. The expert must make a contribution in explaining to the court a technical area which the court could not otherwise determine. On that point there are no doubt many income calculation reports which do not satisfy the test.

In deciding whom to hire counsel must consider credentials. For example to provide testimony on the valuation of an asset, a CBV may be essential. However, a CA designation may be perfectly adequate for some tasks such as calculating taxes payable or perhaps a tax gross up to compare dividend income to salaried income. Counsel should also consider whether the expert has given testimony in court before, even if there is no intention to litigate the case. Having an expert capable of giving testimony in a court

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<sup>6</sup> *R.v. Mohan*, [1994] 2 S.C.R. 9

<sup>7</sup> i.e. character evidence or similar fact evidence, neither being relevant to an accounting expert.

setting provides a real strategic advantage. There is a particular skill to giving evidence in an articulate manner and withstanding cross-examination. A CBV's reputation in the community and *curriculum vitae* provides some information to enable counsel to make the selection. Also, counsel should take the precaution of conducting a Quicklaw or Westlaw search to see how courts have responded to evidence from the expert. An extremely important consideration is the independence of the expert. There is no advantage to retaining an expert who provides a biased report that may initially delight the client but will not stand up under cross-examination. A CBV is hired to provide independent advice. Counsel should take comfort from an expert who is not amenable to adjusting his or her opinion to the task and retainer at hand.

The retainer of a CBV will involve some considerable expense to a client. Many clients understandably shrink from the expense. A frequent request is to use a family or business accountant with whom the client may be comfortable because after all that individual knows the business and may cost less. This can be a strategic mistake. Firstly, the accountant likely may not have the CBV designation. Secondly, the accountant may easily be portrayed, or may in fact be, biased in his or her conclusions. Courts are much more likely to reject the evidence of such a witness and the lack of apparent detachment may make it more difficult for the other side to accept the opinion, however strong.

**(iii) How do you retain a CBV?**

The obligation to value an asset, and the cost of doing so, rests with the spouse who owns it.<sup>8</sup> If the owner of the asset refuses to value it, the other spouse may have grounds to claim an order for interim disbursements to pay for a valuation. The non-owning spouse may also choose to retain his or her own expert to assess the work done by the CBV for the other party.

An option is to consider a joint retainer of a CBV by both parties to minimize the cost of the exercise and the capacity for dispute. If you take that route you need to establish a clear agreement in advance as to the scope and nature of the retainer. You need to decide whether the parties will agree to accept the conclusion of the jointly retained valuator or will they each retain the right to hire another valuator. While leaving the right open to challenge the conclusions of the joint valuator may seem to defeat the purpose of a joint retainer, agreeing to be locked into an opinion in advance of your client seeing it may be a somewhat nerve-wracking experience. There is always a risk in any report that the professional retained makes a mistake or generates a report completely antithetical to your client's position.

Most importantly if you proceed with a joint retainer you need to allocate the responsibility for payment clearly and ensure that payment is made. Otherwise, a party who is unhappy with the result may refuse to pay the expert.

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<sup>8</sup> *Conway v. Conway*, [2005] CarswellOnt 1677 (Ont.S.C.J.)

Be aware that as counsel you have an obligation to ensure that the expert has been paid by your client and that if your client refuses to do so you may be liable for the fees. It is advisable to have the client pay appropriate retainer fees to the expert to avoid this risk.

## **2. Reports**

When retaining a CBV counsel must decide what level of report is required. There are three levels of report which are ( in order of detail, reliability and cost): calculation reports, estimate reports and trial ready reports. To decide what level of report is required, counsel needs to consider the purpose of the report as well as the client's resources.

### **(i) Calculation Reports**

The main attraction of a calculation report is the cost. A calculation report will be a rough cut of the expert's views. Often all that is provided with the calculation report are schedules and calculations, with little or no narrative explanation or justification of the conclusions drawn and summarized in the calculations. The expert may not have completed a full review of all the necessary background information. In a matter that is not complex, the calculation report may be sufficient. If a party has no means to pay for a higher level report there may be no alternative to proceeding with this low level report. Before relying on a calculation report counsel should review the circumstances with the CBV who can provide a knowledgeable view of what is

needed. Counsel should review with the client the possible shortcomings of a calculation report.

**(ii) Estimate Reports**

An estimate report represents the result of a much more detailed analysis of the issues and the facts. The report will look much more like a trial ready report. It should contain a narrative statement of the opinion in addition to any necessary calculations and schedules. An estimate report will contain a disclaimer by the CBV which should be reviewed carefully as it will indicate the limits of the report. An estimate report may well be sufficient to assist parties in settling a case through negotiation. It may also be all that the client can afford. Whether it is sufficient in the circumstances should be canvassed with both the expert and client.

**(iii) Comprehensive/Trial Ready Reports**

Counsel will likely only commission a comprehensive report at the point at which it is clear that the case must go to trial. A trial ready report is the highest level. The expert will have reviewed all the relevant information and evidence. His or her report will be close to an audit level. While the report will identify the assumptions on which it is based, it should support an unqualified opinion to which the expert is prepared to testify in court.

**(iv) Critique Reports**

On occasion, counsel will commission a critique report. A critique report involves no independent work by the expert. The retainer is a limited one. This level of report has a number of uses. First, it may be used solely by counsel and the client to assist in assessing the strength of an estimate or trial ready report prepared by the other side. If the expert performing the critique has not as yet undergone any independent work the purpose of the report may simply be to determine if it would be reasonable for the client to settle based on the other side's valuation or if, rather, a full report should be obtained. Second, counsel may retain an expert to provide a critique of the other party's report as part of trial preparation in order to prepare for cross-examination. In either of these two cases counsel will likely not disclose the critique report to the other side. A third use of a critique report is to support the testimony of the expert at trial. This approach has its risks as the lack of independent work done by the expert preparing the critique may leave him or her very vulnerable on cross-examination.<sup>9</sup> Using a critique report in this manner is likely only strategically sensible if the other expert has made a clear error in method.

#### **(v) Counsel's Role**

As counsel, the family lawyer's role is much more than to simply co-ordinate production of the reports. In the first case, the family lawyer instructs the expert as to the issues and the work that needs to be done. When working with an experienced expert counsel is well-advised to take note of that expert's accumulated wisdom on these issues. Any expert opinion, however, is only as good as the accuracy of the underlying

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<sup>9</sup> See *Khan v. Kong*, [2007] CarswellOnt8983 (Ont.S.C.J.). This case dealt with a parenting assessment but the court's comments underscore the difficulties inherent in testimony based on a critique report.

information. Counsel needs to assist the expert in obtaining all necessary facts whether helpful or unhelpful to the cause. Many expert opinions also rely in part on legal determinations provided by counsel.

Once counsel receives a report it is negligent to simply review the summary page and ignore the detailed and possibly tedious narrative, charts and footnotes of the actual report. Counsel must review it with care to assess any inadvertent errors in fact, mis-stated assumptions or legal errors. Counsel should weigh the strength of the opinion. Family lawyers may not have the specific technical expertise of a CBV but neither does the ultimate decision-maker at trial. It is counsel's role to decide if the opinion is persuasive. If not, counsel may quite properly work with the expert to improve the opinion either by challenging the expert to address logical gaps or assisting the expert in presenting the opinion more appropriately.

Similarly, if counsel receives a report from the other side, while it makes good sense to have it reviewed by one's own expert, that does not release the lawyer from the obligation to review it carefully himself or herself. Counsel may be best placed to see flaws in the assumptions made by the other party's expert or legal issues raised by the report's analysis.

If the case does proceed to trial or a hearing counsel must lead sufficient supporting evidence to prove the underlying facts and assumptions on which the expert's opinion relies. The recital of facts in an expert's report is no more than hearsay. Without

the proof of the building blocks of the opinion in evidence, the court will reject the opinion.

### 3. Disclosure Obligations

#### (i) Rights to access the Expert's file

Neither party has to produce any expert's report unless the expert is to be called as a witness at trial. A spouse may need to bury an expert's report that is not favourable to his or her case. If the party intends to call a witness at trial, then the report must be produced. The *Family Law Rules* provide that any expert report must be produced 14 days before trial.<sup>10</sup> While that is the technical deadline, likely production of the report or at least an estimate report will have occurred much earlier as part of the negotiations. At questioning, the scope of permitted questions includes: "the names, addresses, findings, conclusions and opinions of expert witnesses whom a party intends to call or on whose reports the party intends to rely at trial."<sup>11</sup> This language is quite similar to that used in the *Rules of Civil Procedure*.<sup>12</sup> The only significant difference between the two rules is that under the *Family Law Rules* an

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<sup>10</sup> *Family Law Rules* R.23(23) **Expert Witness Report Served Before Trial** – A party who wants to call an expert witness at trial shall, at least 14 days before the start of the trial, serve on all other parties and file a report that,

(a) is signed by the expert;  
(b) sets out the expert's name, address and qualifications; and  
(c) summarizes the expert's proposed evidence.

23(24) **Failure to Serve Expert Witness Report** – A party who has not followed subrule (23) may not call the expert witness unless the trial judge allows otherwise.

<sup>11</sup> *Family Law Rules*, R. 20(18)(c)

<sup>12</sup> *Rules of Civil Procedure*:

R. 31.06(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that related to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relating to the matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and  
(b) the party being examined undertakes not to call the expert as a witness at the trial.

expert report and related details need not be produced if the expert is not called even if the report was prepared in part for some other purpose. Under the *Family Law Rules* as long as the report was prepared for litigation or in contemplation of litigation, at least in part, it is privileged.

Disclosure questions turn on what constitutes “findings, conclusions and opinions.” If a case does reach trial having access to an expert’s entire file, including his or her working drafts, may give a real advantage to the cross-examiner. Whether and when an opposing party has access to this information has generated a lively jurisprudence. One line of cases has closely protected the litigation privilege attaching to an expert’s report and file. In *Bell Canada v. Olympia & York Developments Ltd*<sup>13</sup> the court refused to compel the disclosure of all communications between the instructing counsel and the expert witness. In *Piche v. Lecours Lumber Co.*<sup>14</sup> the court restricted production to those facts and assumptions provided by counsel to the expert which provided the basis of the opinion. Typically a competent expert opinion will identify such facts and assumptions in the report itself.

However, in *Caputo v. Imperial Tobacco Ltd.* the court refused to order production of preliminary drafts of a report but did permit questioning on whether any opinions expressed in an early draft were omitted from the final draft.<sup>15</sup> In other decisions, courts have ordered the production of preliminary drafts of the expert’s report<sup>16</sup> and instructing correspondence from counsel to expert.<sup>17</sup>

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<sup>13</sup> (1989) 68 O.R. (2d) 103 (Ont.H.C.J.)

<sup>14</sup> (1993), 13 O.R. (3d) 193 (Ont.Gen.Div.)

<sup>15</sup> [2002] O.J. No. 3767 (Ont.S.C.J.)

<sup>16</sup> *Kelly v. Kelly*(1990), 42 C.P.O.C. (2d) 181 (Ont.U.F.C.)

In an interesting decision, *Browne (Litigation Guardian of) v. Lavery*, Mr. Justice Ferguson reviewed the jurisprudence in this area and concluded that in light of a criminal law decision of the Supreme Court of Canada in *R. v. Stone*<sup>18</sup> the earlier Ontario decisions restricting disclosure of expert reports in civil matters are no longer good law. His Honour held that while expert reports are subject to litigation privilege, once counsel has waived that privilege with respect to the opinion the waiver extends to:

- (a) Documents or information received by the expert whether or not the expert relied on them in order to reach his or her conclusion;
- (b) Any report provided to the expert whom the party intends to call at trial even if that party undertakes not to call as a witness the individual who prepared the first report; and,
- (c) Information that would otherwise be subject to solicitor and client privilege, such as client statements.

In the result, Ferguson J. ordered the production of a report by an expert which the party had intended to suppress, despite the fact that the party undertook not to call the witness at trial. Ferguson J. held that in addition to the factors set out above, the party had waived litigation privilege with respect to the report because he had permitted opposing counsel to meet with and interview the first expert.

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<sup>17</sup> *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254 (Ont.Gen.Div.)

<sup>18</sup> (1999), 134 C.C.C. (3d) 353 (S.C.C.)

The narrow scope of litigation privilege delineated in *Browne v. Lavery* was approved by Gillese J.A. in *Horodynsky Farms Inc. v. Zeneca Corp (c.o.b. Zeneca Agro)*<sup>19</sup> In *Horodynsky Farms Inc.*, the Court of Appeal ordered the production of a memorandum prepared by counsel recording a lengthy conversation that she held with an expert. Gillese J.A. further approved the production of such information at the discovery stage and not at trial.

What are the practical implications of this case law for counsel? First, prudent counsel should assume that all correspondence to an expert may be producible. *Horodynsky Farms Inc.* indicates that the solicitor's own work product reflecting discussions with an expert is also producible. The tendency in the case law is to make the expert witness's deliberations as open as possible to ensure that the opinion can be tested in cross-examination. In using a CBV counsel must be aware that information, documents and instructions communicated to the expert in all likelihood have lost their litigation privilege. A prudent counsel will think twice before producing an expert for an interview by opposing counsel, forwarding a report by an unhelpful expert witness to a newly retained expert and preparing memoranda internally which all may be subject to production.

The very broad rules of production of background materials on which experts rely are often not taken advantage of by counsel. That may be because there is an element of deterrence in a case in which both parties have retained experts. When a case does

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<sup>19</sup> [2006] O.J. No. 3012 (Ont.C.A.)

go to trial, however, counsel should consider the benefits of compelling the full disclosure permitted by the Rules.

### **The Advantage of Using CBVs**

Some of the more interesting issues in a family law practice arise in the context of business valuations and income calculations. Working with professionals in another discipline often adds intellectual stimulation to a family law file. By working effectively with CBVs, bringing them in to a file at an early stage and ensuring that they have all the information that they need counsel will enhance the chance that clients reach fair settlements at the earliest possible stage. Family lawyers need to inform themselves sufficiently to be educated consumers of the CBV reports and to have a sufficient grasp of civil procedure to bring the case to trial if needed. CBVs have essential expertise but a client will still likely settle based on his or her solicitor's advice. That advised should be informed and effective. Learning to work well with CBVs and take advantage of their expertise is now an essential part of becoming a competent family lawyer.