

## Focus CIVIL LITIGATION

# Study looks at credibility of expert valuation evidence



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In 2011, Peter Henein of Casels Brock and Blackwell and Prem Lobo of Cohen Hamilton Steger & Co. Inc. were commissioned by the Canadian Institute of Chartered Business Valuators to analyze how courts view the role of loss quantification and business valuation experts and identify, to the extent possible, what qualities differentiate effective experts from less effective ones.

Their study, titled *Credibility under Scrutiny*, was published in two parts during 2011 and 2012 and reviewed more than 130 Canadian legal judgments released during a 15-year period up to 2011, analyzing the key factors impacting the weight placed by various courts on the evidence provided by valuation experts. Their research was well-timed in view of the 2010 updates to the Ontario Rules of Civil Procedure with respect to the duties of expert witnesses, and the increased focus on and criticisms of expert evidence in recent legal judgments in Canadian courts.

This article summarizes their key findings and highlights crucial qualities affecting the credibility of expert valuation evidence.

### Relevance of expert evidence, independence and objectivity

The Henein-Lobo study confirmed that courts do rely upon the insights and analyses provided by valuation experts in terms of assessing financial loss or business value, particularly in cases where the determination of damages is complex, comprised of significant dollar amounts or in dispute. However, the study emphasized that, in order to consider valuation evidence to be relevant, it was of paramount importance that the court find the valuation expert to be independent and objective “in spirit and substance,” and that courts are generally going to greater lengths to scrutinize and validate expert witnesses in this regard, including *voir dire* examinations and reviewing experts’ working papers and correspondence.

Courts have stressed that an expert’s foremost duty is to assist the court. Experts who refuse to acknowledge weaknesses in their position, or the impacts of alternative view-

points and assumptions on their conclusions, might be viewed as advocates with little to offer the court. Courts place greater value on experts who are willing to consider the implications of reasonable alternatives to their own positions.

Proper use of assumptions and requesting relevant information: The Henein-Lobo study found that the inappropriate use of and reliance upon assumptions is one of the most frequently cited points of criticism by courts. Assumptions are appropriate when facts are unavailable, unclear, contradictory, or if they relate to overall legal theories to be proven in court. However, experts must ensure that they have made reasonable attempts to obtain required factual information before reverting to assumptions. Courts take a dim view of experts that make assumptions in place of factual information where the information was available. Courts also do not favour experts that present various hypothetical scenarios based on speculation rather than verifiable facts, or experts that do not opine as to which scenario is the most relevant but rather leave this matter for the court to decide.

Not surprisingly, courts have clearly indicated that when assumptions are used, experts should undertake adequate due diligence to test their assumptions for reasonability, technical accuracy and factual consistency. It is also not sufficient for experts to disclose scope limitations in their reports without making efforts to ask for required information. If requested information is not provided or not available, courts are clear that valuation experts should take steps to otherwise obtain the required information from other sources or by alternate means. It is also recommended that experts exercise caution when using or adapting financial models provided by clients and that these models be thoroughly reviewed and checked before experts rely on them.

### Importance of being organized

The study found that courts tend to favourably view valuation evidence that is well organized and presented in a methodical fashion. It is also clear from case law that logical and succinct articulation of key valuation concepts and calculations is extremely important, particularly during oral testimony, and is often a distinguishing factor in leading the court to preferring one expert’s evidence over another.

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precision compared to a more intensive, thorough level of detail to underlie an expert’s valuation evidence. It was found that, while the courts do support a thorough and detailed scope of work to the extent that it is relevant and needed to support the expert’s opinion, it is more important that the “big picture” conclusions are reasonable and accord with common sense and commercial reality.

The Henein-Lobo study concluded that 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, the study did find that independence is very important to the courts and that a number of other qualities and factors can help distinguish an expert over another, from explaining concepts logically and clearly, to demeanour, to proactively asking for relevant information. As such, the Henein-Lobo study is a useful piece of empirical research for both counsel and expert witnesses alike.

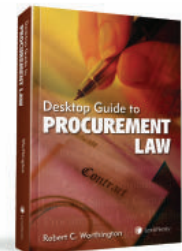
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### Level of detail

The study sought to determine whether courts preferred a more general, comprehensible level of