

## **TAB 4**

### **Evidentiary Challenges in Proving Income**

**Cheryl Goldhart (Moderator)**

*Goldhart & Associates*

**The Honourable Madam Justice Mary Lou Benotto**

Senior Judge, Family Court

*Superior Court of Justice*

**Harold Niman**

*Niman Zemans Gelgoot*

**Farley J. Cohen MBA CA•IFA CIRP CBV ASA**

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### **Valuation and Income Calculations For Family Law Lawyers**



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## **VALUATION AND INCOME CALCULATIONS**

### **EVIDENTIARY CHALLENGES IN PROVING INCOME**

#### **INCOME SCENARIO**

##### **BACKGROUND**

Jack and Diane have been married for 15 years and have 2 daughters, aged 11 and 8. Although when they got married neither had any significant assets, over the course of their marriage, Jack has accumulated a very complicated web of ownership in numerous companies, many of which he has partners or other shareholders in.

Jack and Diane separated 8 months ago and Jack has been paying support based on his lawyer's calculation of the required amounts for child and spousal support, relying on Jack's representation that his income is \$10,000 per month, the amount of his draw from one of the businesses.

Diane has told her counsel about the lavish lifestyle they live, including the gifts she receives, the donations they make to various charities, the trips they take at each school break, the cost of summer camps for both daughters and the ongoing renovations to their home. Jack has also been able, since they separated to buy a condominium to live in.

Diane's counsel has suggested that her husband's income may be significantly greater than \$10,000 per month or \$120,000 per year; Diane was totally relieved to hear this as this was what she was sure of, but didn't want to be seen as accusing her husband of being a liar.

With instructions from Diane, counsel retained a business valuator to assist and then prepared a motion application (IS this the right terminology?), requesting an increase in support for Diane and the children, and additional disclosure by Frank.

## STAGE 1: INTERIM MOTION FOR SUPPORT

As part of the motion/application materials an affidavit was sworn by Diane which included the details of family spending by she and Frank and the following exhibits:

1. Diane's income tax return, showing she received income from some of Frank's companies in the past;
2. Copies of the joint bank account statements for the past year showing large unexplained deposits, and cheques;
3. A corporate chart of Frank's estimated ownership positions in various entities prepared by the business valuator retained by counsel;
4. A report prepared by the business valuator (i) estimating Frank's income at \$240,000, including imputed income and the benefit of personal expenses paid by some of the companies, and (ii) setting out a list of additional information and access to individuals required to determine Frank's income;
5. A summary of Frank's recent credit card expenditures; and
6. A summary of Frank's past and anticipated expenses.

The motion was heard, at which the following issues and questions were raised:

1. *What is the purpose of the motion? Increase in support? Disclosure? Both?*
2. *What information must be included in the materials? Did Diane's affidavit include enough?*
3. *What information can be included in the materials? Can the business valuator's chart and report be included? Is this considered "evidence"? If not, should counsel make the arguments and calculations of income and present it as such?*
4. *What decisions, if any, would a Judge expect to make based on this motion?*
5. *How might the applicant have improved the outcome of the motion? How could the materials be more convincing in order to be given as much weight as possible?*
6. *What cases are relevant to these matters?*
7. *Will the court make a retroactive order? On what basis?*

## STAGE 2: THE TRIAL

Diane eventually received an increase in support, on an interim basis to reflect an income level for Frank of \$200,000. However, she was still not satisfied, and given the additional disclosure that Frank had made, it appeared that his income was well in excess of \$200,000 based on bonuses which had been declared. Furthermore, in the interim Canada Revenue Agency had undertaken an audit of some of the companies and Frank had been reassessed personally for significant personal expenses paid for by the companies, including the cost of the renovation to the matrimonial home, as had been suspected by Diane. The business valuator now estimated Frank's income for support purposes was at least \$350,000; there was still outstanding information from Frank.

In preparing for the trial (mediation was attempted but was unsuccessful), and Diane's counsel should consider the following:

1. *Should there be a motion for more disclosure before the trial?*
2. *What is the best way to get income evidence before the court? How will it be most convincing?*
3. *Should the valuator prepare an opinion report regarding income? Was a new report necessary for the trial or could the report used for the interim motion just be updated? What is the effect of non disclosure?*
4. *How far can the valuator go in making assumptions about income if the information requested is not produced?*
5. *How far will the court go in making inferences based on alleged earnings and spending? What types of evidence are essential to put before the court?*
6. *Should a reply report be prepared by the valuator in response to the other expert report or should it be dealt with in cross examination?*