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The Joint Expert Regime in Family Law & Related Issues

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THE JOINT EXPERT REGIME IN FAMILY LAW & RELATED ISSUES

I. Introduction

This paper discusses the law and some practical considerations surrounding the engagement of financial experts in family law in British Columbia.

Part 5 of the BC *Family Law Act*[1] deals exclusively with property division, and contains definitions for the types of property to be divided between spouses following separation. Property categories include family property, which is generally property accumulated during the relationship, and excluded property. The definition of excluded property includes property that a spouse brought in to the relationship, and gifts and inheritances received by a spouse during the relationship (as well as property derived from such property or its disposition). The value of property needs to be ascertained as at specific dates in order to effect the division of assets contemplated by the legislation.

The valuation of real and personal property is often complex; even where the valuation issues are fairly straight-forward they are often beyond the expertise of family law counsel. As such, it is usual for counsel to engage the assistance of financial experts. Where financial experts are engaged, counsel play an important role throughout the valuation process. At the outset, counsel determines whether a financial expert is required. If an expert is required, counsel are involved in the formal engagement process, including the determination of underlying facts and assumptions. In this respect, evidentiary issues often require careful assessment, in particular when dealing with historical valuations.

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1 *Family Law Act,* S.B.C. 2011, c. 25 [*FLA*].

It is important in protecting the best interests of the client that counsel maintain a "big picture" approach to valuations, as opposed to a task-oriented approach. There should always be a preliminary assessment as to whether a formal valuation is required. For example, if the subject asset is to be sold or remain jointly owned, the valuation may be redundant. The cost of the valuation may also be avoided if the parties are able to agree on value. In some instances, input may be sought from a valuator at the outset to assess whether a formal valuation is cost-effective. Such an assessment may result in the parties agreeing on value rather than incurring the cost of a formal valuation. Alternatively, the parties may agree that the scope (and consequent cost) of the valuation be limited.

Where experts are engaged regarding financial issues, the default position under the *Family Rules*[2] is that the parties jointly retain an expert to value the property in question. This will be discussed in further detail in the next section.

II. Joint Experts

A. Rule 13-4: Jointly Appointed Experts

Rule 13-3(2) of the *Family Rules* provides that if any party wishes to present the court with expert evidence on a financial issue, that evidence must be presented to the court by a jointly appointed expert *unless* the court otherwise orders *or* the parties otherwise agree.[3] Financial issues are those that arise out of Part 5 or Part 6 of the *FLA*, encapsulating both property and pension division issues. The parties may agree on an expert, but if they do not, the court may appoint one for them.[4] Where a joint expert is appointed, subject to an agreement or court order, the appointed expert is the only expert who may give evidence on the issue(s) that have been delegated.[5]

The legislative intention behind the joint expert rule was stated by Justice Smith in *Aquilini v. Aquilini*, 2012 BCSC 1616:[6]

> In making those *Family Rules*, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:
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> > a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;
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> > b) The cost of obtaining such expert evidence in many cases;
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> > c) The fact that the parties frequently do not have equal ability and resources to retain experts;
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> > d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in

2 *Supreme Court Family Rules* [*Family Rules*].

3 *Bartch v. Bartch*, 2017 BCCA 94 at para. 26 [*Bartch*]; *Supreme Court Family Rules*, R. 13-3(2).

4 *Supreme Court Family Rules*, R. 13-4(3).

5 *Supreme Court Family Rules*, R. 13-4(5).

6 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 10 [*Aquilini*].

> needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and
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> e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.

To date, only a handful of cases have interpreted the relevant provisions of the *Family Rules*. Following are select cases that have discussed and applied the rules for joint experts on financial issues, with a brief summary focusing on how the cases have added to the joint expert jurisprudence.

- *Aquilini v. Aquilini*, 2012 BCSC 1616, interprets the relevant sections of the *Family Rules* and is currently the leading case on the process behind engaging a joint expert. Note, some of the conclusions in *Aquilini* have been modified by the BC Court of Appeal decision in *Bartch*, discussed below;
- *Janis v. Janis*, 2013 BCSC 116, provides judicial insight into the availability of tendering into evidence a responding or critique report to a joint report, as contemplated by Rule 13-6(4);
- *Jensen v. Jensen*, 2013 BCSC 297, clarifies that leave is required to introduce a critique report at trial.[7] *Jensen* also states that it is an available option to use an additional expert, not for a critique report, but instead for the purposes of cross-examining the joint expert;[8]
- *Hilborn v. Wright*, 2014 BCCA 92, involves parties that attempted to tender valuation reports at trial that did not comply with the joint expert regime and were thus determined to be inadmissible on appeal, however the Court of Appeal does not discuss the joint expert regime to a great extent;[9]
- *Kumagai v. Campbell Estate*, 2016 BCSC 450, involves a joint expert that was not provided with all necessary information from one of the parties.[10] The Court emphasized the importance of cooperating fully with the joint expert and providing all necessary information to him or her.[11] The requirement for full and timely disclosure to the joint expert exists in Rule 13-4(9);
- *Cornett v. Woike*, 2016 BCSC 2365, involves an application to appoint a joint expert business valuator and simply follows the guidance from *Aquilini*;
- *Bartch v. Bartch*, 2017 BCCA 94, explores what to do when parties disagree over appointing a joint expert, and suggests that when faced with such a disagreement courts should insist on applications from both parties before deciding the matter.[12] This case discusses the joint expert regime to a fuller extent than in *Hilborn*, for the most part affirms the guidance of *Aquilini* and *Jensen*, and clarifies a statement made in *Aquilini*. In *Aquilini*, Justice Smith held that before making an order relieving a party of the joint expert requirement, the court

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7 *Jensen v. Jensen*, 2013 BCSC 297 at para. 43 [*Jensen*].

8 *Jensen v. Jensen*, 2013 BCSC 297 at para. 52.

9 *Hilborn v. Wright*, 2014 BCCA 92 at paras. 49-50.

10 *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para. 103 [*Kumagai*].

11 *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para. 103.

12 *Bartch v. Bartch*, 2017 BCCA 94 at para. 44.

"should be satisfied that there are circumstances in the individual case that make a joint expert inappropriate or impracticable."[13] *Bartch* clarifies that the court's discretion is "not so limited," and that courts should not "unduly fetter" their discretion in this area, as no such limitations exist in the *Family Rules.*[14] In fact, the *Family Rules* give the court full discretion with respect to "whether or not to appoint a joint expert or allow a party to retain its own expert."[15]

B. Process for the Engagement of a Joint Expert

Rule 13-4(1) and (2) set out a procedure that parties must follow in jointly engaging an expert. If the parties do not agree, the court has jurisdiction to make an order appointing a joint expert under Rule 13-4(3). The relevant sections are reproduced below:

> **13-4(1)** When an expert is to be jointly appointed by 2 or more parties under Rule 13-3(2) or (3)(a), the following must be settled before the expert is appointed:
>
> (a) the identity of the expert;
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> (b) the issue in the family law case the expert opinion evidence may help to resolve;
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> (c) any facts or assumptions of fact agreed to by the parties;
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> (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
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> (e) the questions to be considered by the expert;
>
> (f) when the report must be prepared by the expert and given to the parties;
>
> (g) responsibility for fees and expenses payable to the expert.
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> **13-4(2)** If the parties agree on the matters referred to in subrule (1), they must enter into a written agreement that reflects those agreed upon matters and
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> (a) the agreement must be signed by each party to the agreement or their lawyers,
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> (b) the agreement must be signed by the expert to signify that he or she
>
> (i) has been made aware of the content of this Part, and
>
> (ii) consents to the appointment reflected in the agreement, and
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> (c) a copy of the agreement must be served, promptly after signing, on every party to the family law case who is not a party to the agreement.
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> **13-4(3)** If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order

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13 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 35.

14 *Bartch v. Bartch*, 2017 BCCA 94 at para. 28.

15 *Bartch v. Bartch*, 2017 BCCA 94 at para. 28.

> (a) appointing a joint expert, and
>
> (b) settling any matter relating to the appointment of the joint expert

Aquilini distilled the process for engaging a joint expert into three stages:[16]

(1) Have the parties agreed to each appoint their own experts on the relevant financial issue pursuant to R 13-3(2)?

(2) If there is no such agreement, should there be an order under R 13-3(2) that they each appoint their own experts?

(3) If there is no agreement or order for separate experts and no agreement on the appointment of a joint expert, should the court appoint a joint expert under R 13-4(3)?

The Court in *Aquilini* held that on an application to appoint a joint expert, the court will likely consider the following factors:[17]

(1) Is the financial issue one in which the court is likely to require expert evidence?

(2) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?

(3) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?

As pointed out by Justice Smith in *Aquilini*, Rule 13-2 refers to a joint expert on a financial issue, unless the parties agree or the court orders otherwise.[18] Therefore, if there are multiple financial issues, any agreement or order must specify the issue(s) in respect of which each individual expert is retained.[19] Any issues that are not specified are thus subject to the joint expert requirement, and require an additional joint expert.[20]

C. Practice Points

When assessing potential valuation issues, counsel should consider what decision would be pragmatic and cost effective. It is in fact part of the legislative intent identified in *Aquilini* that the joint expert regime is intended to save costs for both parties.

Part of the cost-benefit analysis of obtaining an expert report is determining whether a formal valuation is necessary at all. For example, retaining an expert may not be required if the value can be estimated or agreed to. If the property is likely to be sold, or if there is a potential for the property to continue to be jointly owned, it may also not be necessary. When deciding whether an expert valuation is necessary, it is worthwhile to return to first principles of evidence law as stated in *R v. Mohan*, [1994] 2 SCR 9,[21] and reiterated in the helpful paper prepared by Jeffrey A. Rose, QC and

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16 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 29.

17 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 43.

18 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 30.

19 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 30.

20 *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 30.

21 *R v. Mohan*, [1994] 2 SCR 9 [*Mohan*].

Kimberley J. Santerre, "Overview of Expert Reports in Family Law".[22] *Mohan* held that expert opinion should only be admitted where the following conditions are met:[23]

(1) the evidence is relevant, in that it is related to a fact in issue;

(2) the evidence is necessary in assisting the trier of fact, meaning that it provides information which is likely to be outside the trier of fact's experience and knowledge. The subject matter of the inquiry must be such that ordinary people are "unlikely to form a correct judgment" about it, if unassisted by persons with special knowledge;

(3) there is no exclusionary rule of evidence that the expert opinion would run afoul of, separate and apart from the opinion rule itself (for example, if the report relies on hearsay); and

(4) the evidence is given by a properly qualified expert that has special or peculiar knowledge of the matter, gained through study or experience.

If these conditions make it imperative for an expert report on a financial issue to be commissioned, obtaining a joint expert report would then be the default. Counsel should engage with opposing counsel, and if there is particular complexity, it may be useful to meet with the financial expert early to discuss the process, including the determination of underlying facts and assumptions, and to seek input on the appointment agreement required by Rule 13-4(2). Even before that, if counsel is unsure as to whether he or she should be obtaining an expert report, it may be prudent to reach out to more experienced counsel or a colleague for assistance on the judgment call to be made.

Once a joint expert is retained, communications between counsel and the joint expert must be sent to all parties involved. Furthermore, for both counsel and their clients, full and frank disclosure of all necessary information and documentation should be promptly provided to the expert to ensure efficiency. Comprehensive disclosure is imperative for the integrity of the report.

The issuance of a draft report prior to the final report is becoming a usual practice and may assist in ensuring the correctness of all salient facts and assumptions. However, the purpose of the draft is not to invite argument from the parties or counsel.

Rule 13-4(6) allows for either party to retain an additional expert to respond to or critique the joint report within 21 days after receiving the joint expert's report. The process and options for rebutting a joint expert report are discussed below.

III. Rebutting the Joint Expert

A. Additional Experts

Pursuant to Rules 13-4(6)-(7), an additional expert may be appointed with leave of the court to respond to the opinion of the joint expert. The option of appointing a responding expert to create a "critique" report was addressed by Master Caldwell in *Janis v. Janis*, 2013 BCSC 116, where he states that the rule allows "any of the parties affected by a joint report to commission a purely

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22 See Jeffrey A. Rose, QC & Kimberley J. Santerre, "Overview of Expert Reports in Family Law" *Family Law Practice and Procedure 2015* at p. 2 [Rose & Santerre].

23 *R v. Mohan*, [1994] 2 SCR 9 at para. 17.

responsive or rebuttal report."[24] Master Caldwell further states that, from his review of the authorities, there is no requirement that a critique report be done by a joint expert, or by an expert authorized by court order.[25]

Shortly thereafter, Justice Baker in *Jensen* further held that leave is not required for a party to obtain a critique report from an additional expert.[26] Justice Baker clarified that the *Family Rules* do not prohibit commissioning the critique report, they only prohibit introducing the critique report as evidence at trial "without leave of the court or agreement of the parties."[27]

The decision of whether to grant leave to introduce a critique report will not be founded on a mere disagreement with the joint expert's opinion.[28] In *Jensen* Justice Baker noted that if this were the case, the legislative purpose of the applicable *Family Rules* would be defeated.[29] The test for leave that must be satisfied is whether the evidence of the additional expert is "necessary to ensure a fair trial."[30] Pursuant to Rule 13-4(8), in deciding whether to grant leave, the court may consider:[31]

(a) Whether the parties have fully cooperated with the joint expert and have made full and timely disclosure of all relevant information and documents to the joint expert;

(b) Whether the dispute about the opinions of the joint expert may be resolved by requesting clarification or further opinions from that expert; and

(c) Any other factor the court considers relevant.

On the facts in *Jensen*, Justice Baker found that the application for leave to admit the additional expert's report was "premature."[32] The parties only cooperated with the joint expert up to the first draft being delivered to them, after which Ms. Jensen failed to provide the expert with all relevant information regarding the areas where her own expert disagreed with the joint expert's methodology.[33] Justice Baker further found that the parties had not satisfied the requirement under Rule 13-4(8)(b), that before leave is granted for an additional expert the parties must try to resolve disagreements with the joint expert.[34]

B. Shadow Experts

A party is always at liberty to engage a separate expert (a "shadow" expert), regardless of whether there is an initial intention to seek leave to tender evidence from that expert. Prior to the default regime of joint experts, having an expert on retainer served counsel in ways that are not possible

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24 *Janis v. Janis*, 2013 BCSC 116 at para. 21 [*Janis*].

25 *Janis v. Janis*, 2013 BCSC 116 at para. 21.

26 *Jensen v. Jensen*, 2013 BCSC 297 at para. 43.

27 *Jensen v. Jensen*, 2013 BCSC 297 at para. 43.

28 *Jensen v. Jensen*, 2013 BCSC 297 at para. 44.

29 *Jensen v. Jensen*, 2013 BCSC 297 at para. 44.

30 *Supreme Court Family Rules*, R. 13-4(7).

31 *Supreme Court Family Rules*, R. 13-4(8).

32 *Jensen v. Jensen*, 2013 BCSC 297 at para. 50.

33 *Jensen v. Jensen*, 2013 BCSC 297 at para. 48.

34 *Jensen v. Jensen*, 2013 BCSC 297 at para. 49.

under the joint expert regime. The protocol now with joint experts is that all communications are shared, and counsel is not allowed to have separate discussions with the joint expert.

In certain cases, however, it may be invaluable for counsel to discuss the facts and issues with a separately engaged expert, for example in understanding the valuation process, addressing facts and assumptions, and in formulating issues to be addressed by the joint expert. In addition, shadow experts can assist in reviewing the joint expert report, assessing whether or not counsel should consider tendering an additional report into evidence, and assisting in preparation for cross-examination, as mentioned in *Jensen*.[35]

With business valuations in particular, subject to economic constraints, it may be important for the party who is not the business owner to consider engaging a shadow expert, even on a limited basis. Often, the business owner will have more sophisticated knowledge of valuation issues as well as access to resources that are readily available to the business. This may put the other party at a disadvantage that the assistance of a shadow expert can mitigate.

C. The Expert's Limitations on a Critique Report

The limitations on critique reports depend largely on the retainer. For example, the Canadian Institute of Chartered Business Valuators ("CICBV") prohibits its members from stating any formal conclusions as to value when preparing a "Limited Critique Report." When responding to a joint expert through a "Limited Critique Report," the critiquing expert may only state that they disagree with the other expert's assumptions or methodology and state the reasons why, along with the directional impact of each disagreement (whether raising or lowering the valuation). This necessarily means that the additional expert cannot state that they believe the value of the company is a different specified amount without performing a full and independent valuation. At a practical level, it may be possible for a business valuator to communicate the impact of their critique on the valuation of the joint expert without providing a direct opinion on value.

If counsel is seeking to commission a critique report, and wants to have an alternative valuation opinion admitted into evidence, there needs to be a combination "Limited Critique and Independent Valuation Report" prepared by the critiquing expert. But, as the Court cautioned in *Janis*, it is ultimately up to the trial judge's discretion whether or not to admit the valuation opinion.[36]

D. Communications with the Expert: Ethical Considerations

The line between permissible and impermissible communication between expert and counsel is determined by asking whether the communication would compromise the independence and objectivity of the expert.[37] Experts also have their own obligations to their own professional bodies, who may place additional duties upon their members to be independent and impartial when giving expert evidence.[38]

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35 *Jensen v. Jensen*, 2013 BCSC 297 at para. 52.

36 *Janis v. Janis*, 2013 BCSC 116 at para. 22.

37 *Moore v. Getahun*, 2015 ONCA 55 at paras. 56-59.

38 *Moore v. Getahun*, 2015 ONCA 55 at para. 60.

Just as lawyers and judges require expert input, experts need lawyers' assistance in framing their reports in a way that is responsive to a case's legal issues.[39] Counsel should ensure that experts understand matters such as "the difference between the legal burden of proof and scientific certainty, the need to clarify facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness' area of expertise, and [avoiding] usurping the court's function as the arbiter of the issues."[40] Being mindful of these ethical issues and their boundaries will aid counsel and experts alike to achieve a full resolution of legal issues, ensuring that the process is done ethically and efficiently.

IV. Issues in Specific Valuations

A. Historical Valuations

Under the *FLA*, historical valuations are used to determine the increase in value of property in situations where excluded property has increased in value over the course of the relationship. The increase in value of excluded property is family property, and therefore must be divided.[41] The party claiming the exclusion bears the onus of establishing it.[42] Therefore, in many instances an historical valuation is required to determine the value of property at a specific date.

As noted by Rose & Santerre, in the absence of an expert historical valuation, sometimes parties may agree on the historical value of the property,[43] or the court may estimate the value.[44] With historical valuations, there are inherent evidentiary issues which make it difficult for all those involved, as even the most basic of documents, such as financial statements and tax returns, may no longer be available. For more complex cases, such as those involving the valuation of companies, without these documents an expert will not be able to provide a meaningful opinion. Counsel ought to ensure that all available information is produced and assessed. In some instances, industry information may be helpful.

Generally, the expert reviews information that was available at the valuation date, but there is some precedent for courts to look at subsequent information to determine if the historical values are within the appropriate range.[45] In *Brown v. Silvera*, 2011 ABCA 109, the Alberta Court of Appeal holds that this "hindsight" information can assist courts where there are multiple valuators to determine which of the valuators' views are correct, especially when they are disparate.[46]

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39 *Moore v. Getahun*, 2015 ONCA 55 at para. 62.

40 *Moore v. Getahun*, 2015 ONCA 55 at para. 63.

41 *Family Law Act*, s. 84(2)(g).

42 *Family Law Act*, s. 85(2).

43 See *Williams v. Killey*, 2014 BCSC 1846 at para. 64.

44 See *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 43.

45 See *Brown v. Silvera*, 2011 ABCA 109 at paras. 84-85.

46 *Brown v. Silvera*, 2011 ABCA 109 at para. 84.

The "hindsight" principle is also followed in Ontario. As discussed by the Ontario Court of Appeal in *Debora v. Debora* (2006), 83 OR (3d) 81 (Ont. C.A.):[47]

> [46] The general principle that emerges from both *Domglas*, *supra*, and *Ford*, *supra*, is that hindsight information is generally inadmissible and cannot be used as part of the process of establishing the value of shares at a particular date. An exception to this principle is that hindsight, or the actual results achieved after the valuation date, may be compared against the projected or forecasted corporate results made by valuators and used to test the reasonableness of the assumptions made by those valuators.
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> [47] A similar consensus respecting the use of hindsight emerges in the family law context when the value of a business for equalization purposes is in issue. See: *Harry v. Harry* (1987), 9 RFL (3d) 121 (Ont Dist Ct); *Woeller v. Woeller* (1988), 15 RFL (3d) 120 (Ont Dist Ct); *Martin v. Martin* (1988), 17 RFL (3d) 78 (Ont HC); and *Bobyk v. Bobyk Estate* (1993), 13 OR (3d) 559, 47 RFL (3d) 310 (Ont Gen Div) at para. 33. As stated in *Harry*, *supra*, at para. 17, "when evaluating the fair market value of a business hindsight is inappropriate." However, as in the corporate context, "one cannot entirely ignore events which followed [the valuation date] in assessing the fundamental assumptions underpinning the opinions expressed by [the experts]." *Woeller*, *supra* at para. 31.

The hindsight principle has been followed in BC in the corporate and commercial context.[48] If there is any discrepancy or uncertainty in historical valuations, hindsight information may therefore be a helpful option in a family dispute to compare the valuation to reality.

B. Fair Market Value

The value of family property must be based on its fair market value, unless an agreement or order provides otherwise.[49] There are few cases in BC interpreting situations where a value other than the fair market value was used, but those that exist will be briefly discussed.

In *Stober v. Stober*, 2015 BCSC 2505, the valuation by the joint expert was for a beneficial interest in a discretionary trust.[50] The wife argued that a different approach to value should be adopted in this scenario, as there was no actual market for a beneficial interest in a wholly discretionary trust.[51] Justice Skolrood held that the starting point remains fair market value: [52]

> [39] … while s. 87 of the FLA leaves open the possibility that a value other than fair market value will be used when ascertaining and dividing family property, it nonetheless dictates that the value must be based on fair market value.

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47 *Debora v. Debora* (2006), 83 OR (3d) 81 (Ont. C.A.) at paras. 46-47, quoted in *Wehbe v. Wehbe*, 2016 ONSC 1445 at para. 31.

48 See *Nunachiaq Inc. v. Chow*, 1993 CarswellBC 524, [1993] BCWLD 574 at paras. 20-21; but see also *Amos Investments Ltd. v. Minou Enterprises Ltd.*, 2008 BCSC 332 at paras. 39-44, where the Court summarises the state of the law surrounding hindsight evidence, finding that the use of hindsight information was inadmissible in that case; and *Guang v. WEX Pharmaceuticals Inc.*, 2013 BCSC 1949 at para. 129, where the court states that hindsight evidence should not be admitted except in limited circumstances.

49 *Family Law Act* at s 87.

50 *Stober v. Stober*, 2015 BCSC 2505 [*Stober*].

51 *Stober v. Stober*, 2015 BCSC 2505 at para. 35.

52 *Stober v. Stober*, 2015 BCSC 2505 at para. 39.

> Thus, when valuing family property for the purposes of division, the court must start with the fair market value and then go from there. In order to do so, the court requires evidence of fair market value or, as the case may be, evidence that there is no fair market value for a particular type of property.
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> (emphasis added)

In *Walsh v. Chambers*, 2015 BCSC 67, the only evidence adduced at trial relating to the value of real property were property tax assessment notices, which were used to establish the historical value of excluded real property.[53] Because the parties did not adduce other evidence concerning the value of the house, Justice Rogers inferred that they agreed that the house need not be valued by reference to its fair market value.[54] Accordingly, since the 2015 assessment was the closest determination of value to the date of trial, it was chosen by the Court as the appropriate value to attribute to the house.

V. Expert Reports for Income

Support payments are driven by a determination of *Guidelines* income, but not all income sources are simple and, especially with high net-worth clients, income determinations can be exceptionally complicated. Some claimants have attempted to request joint experts to determine a party's income, like in *Janis*. However, a *Guidelines* income determination is not a "financial issue" as defined in Rule 13-3(1).[55] Nevertheless, parties are not left without options but are free to retain experts of their choosing and tender evidence to establish *Guidelines* income, subject to the regular rules of evidence and expert reports.[56]

When instructing experts, counsel should ensure that the expert does not opine on what the *Guidelines* income is, as that is the role of the court. Counsel's role is to provide the underlying facts and assumptions for the expert's opinion and to properly direct the expert with respect to issues that are legal in nature and therefore not the subject of the expert opinion. It is not unusual for the *Guidelines* income report of the financial expert to be largely comprised of calculations, such that the information is technically not opinion evidence at all. Where the income determination is complex, such illustrative calculations may nonetheless be beneficial to the court.

Each case requires a careful assessment of what is proper opinion evidence. In addition to being cost effective, this will avoid the prospect that the report, or portions of the report, will be struck at trial. Examples of legal issues that ought to be dealt with by underlying assumptions and not by the financial expert include:

(a) whether or not particular sources of income ought to treated as non-recurring pursuant to s. 17 of the *Guidelines* (such as capital gains/losses, severance payments, bonuses, etc.) in a particular year;

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53 *Walsh v. Chambers*, 2016 BCSC 67 at paras. 51-52 [*Walsh*].

54 *Walsh v. Chambers*, 2016 BCSC 67 at para. 52.

55 *Janis v. Janis*, 2013 BCSC 116 at para. 24.

56 *Janis v. Janis*, 2013 BCSC 116 at para. 24; specifically R. 13-2 and R. 13-6 of the *Family Rules* deal with expert reports for assets outside of Part 5 and Part 6 of the *FLA*.

(b) whether the principal portion of debt repayments are legitimate corporate expenditures and should be deducted from "income" otherwise available;[57]

(c) adjustments, if any, to be made to pre-tax corporate income pursuant to s. 18 of the Guidelines (though there may be elements of this assessment that may appropriately be the subject of opinion evidence);

(d) whether there should be a tax gross-up for personal expenses run through a corporation; and

(e) any other legal interpretation issues, including definitions of "income" and "money" as used in the *Guidelines* (for example in s. 18).

57 See *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 86 where one of the main differences between the parties' expert reports to be resolved by the court was the inclusion of principal repayment on debt.