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How to Cure Cancer: A review of the tools available to resolve missing financial disclosure issues, and knowing how and when to proceed to court without all of the information

presented by

Wendy Best
Dunphy Best Blocksom LLP

Kyra Bradley
Dunphy Best Blocksom LLP

Bailey Rivard
MNP LLP

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HOW TO CURE CANCER (IN FAMILY LAW)

A review of the tools available to resolve missing financial disclosure issues, and knowing how and when to proceed to court without all the information

by Wendy E. Best, KC (of DBB LLP)
Kyra Bradley (of DBB LLP)
Bailey Rivard, CPA, CA·IFA, CBV, CFE, CFF (of MNP LLP)[1]
for Presentation at the 2026 National Family Law Program

I. INTRODUCTION

A common and unfortunate problem that family law lawyers across Canada are faced with is the inability to obtain timely and proper financial disclosure (a.k.a. "The Cancer of Family Law"). This paper and the related presentation is intended to provide you with a variety of tools and practical tips to assist you in curing (or at least improving) this pervasive problem. To demonstrate how prevalent this issue is, we provide you with but a smattering of pithy quotes from various cases:

- Non-disclosure is the "cancer" in family law litigation: *Leskun v. Leskun*, 2006 SCC 25 at para 34 quoting *Cunha v. Cunha*, 1994 CanLII 3195 (BC SC) ("***Cunha***")

- Financial disclosure is "the linchpin of a just and effective family law system": *Colucci v. Colucci*, 2021 SCC 24 at para. 4

- The entire Guidelines regime relies upon "adequate, accurate and timely financial disclosure": *Colucci* at para. 48

- The duty to disclose financial information is "the most basic obligation in family law": *Roberts v. Roberts*, 2015 ONCA 450 at para. 11

- A payor's failure to make timely proactive and full disclosure undermines the policies underlying the family law regime and "the processes that have been carefully designed to achieve those policy goals" "Non-disclosure metastasizes and impacts all participants in the family law process": *Leitch v. Novac*, 2020 ONCA 257

- Payor parents "are subject to a duty of full and honest disclosure - a duty comparable to that arising in matrimonial negotiations": *Michel v. Graydon*, 2009 SCC 10 at para. 33 (referencing *Rick v. Brandsema*, 2009 SCC 10)

- Non-disclosure is the "Achilles Heel" of family litigation: *Wu v. Sun*, 2011 BCCA 239

[1] Author of Section II. THE "CURES", Part 7: Use of an Expert, and Section III. USE OF FINANCIAL EXPERTS

- A party who does not make early, voluntary and complete financial disclosure is not participating in the process and such parties must be assessed a game misconduct and ejected from the proceedings: *Manchanda v. Thethi*, 2016 ONSC 3776 at para 18; aff'd 2016 ONCA 909 (application for leave to appeal to SCC denied 2017 CanLII 23864 (SCC))

- "… disclosure in family law is a legal obligation, not a forensic technique": *Kantor v. Kantor*, 2023 ABCA 237 at para 28

As an aside, if you are met with the argument that s.15.2(5) of the *Divorce Act* prevents "misconduct" from being considered in a spousal support award, read *Kantor* at paras 15 to 18.

Unfortunately, despite the oft-repeated statements by courts across the country for literally decades about the importance and necessity of financial disclosure in family law files, this problem remains.

The Other Problem: Weaponizing the Disclosure Process

While every family law file requires proper financial disclosure, there are also files where one of the litigants seeks to have excessive and irrelevant disclosure for various reasons including being snoopy; delaying the resolution of the matter; forcing the other party to spend time and money; and sometimes not knowing when enough is enough. As the Alberta Court of Appeal has stated:

> "[P]arties ought not to be put to time-wasting, money-draining line-by-line justifications of every dollar that has been spent. In keeping with the foundational rules, pre-trial disclosure must not become a process that wholly consumes the very parental resources that otherwise would be available for child support": *Cunningham v Seveny*, 2017 ABCA 4 at para 35.

The Nova Scotia Court of Appeal in the case of *Laushway v. Messervey*, 2014 NSCA 7 at para 86 lays out ten criteria that should be considered in order to determine if a requested document must be produced. These criteria include Connection; Proximity; Discoverability; Reliability; Proportionality; Alternative Measures; Privacy; Balancing; Objectivity and Limits.

There are many cases that have dismissed requests for extensive disclosure. In the case of *Anthony v. Anthony*, 2024 NSSC 100 the judge considered the wife's request for extensive disclosure and after considering whether the requested information was relevant and whether the "cost, burden and delay of disclosing the requested documents was disproportionate to its likely probative value", partially dismissed the request noting the need for sufficient evidence. In *Brennan v Brennan*, 2024 ABCA 50 at paras 40 to 42, the Alberta Court of Appeal upheld a chambers judge's decision not to impute income to a mother on the basis of alleged non-disclosure, after the father had already expended "picayune and disproportionate" efforts to investigate $2,397 to $4,023 in annual business deductions from an income of approximately $30,000.

In *Zdyb v Zdyb*, 2017 ABQB 44 at para. 10, Graesser J noted that there is a significant difference between disclosure related to income and disclosure related to assets, with income-related disclosure relevant to support and asset disclosure generally only relevant to property division.

However, in certain circumstances, it may be open to parties to argue that assets and liabilities are relevant to the support analysis, such as in cases involving undue hardship and *Contino* analyses. For example, in *Ramachala (Holland) v Holland*, 2020 ABQB 432 at para 88, Feth J (as he then was) ordered the parties to exchange statements of income, assets and liabilities, household budgets, child expense budgets, and particulars of new partners' household contributions and incomes for the purposes of a *Contino* analysis.

see also: *Frost v. Frost*, 2024 ONSC 2594

McDonald v. McDonald (Mombourquette), 2023 NSSC 153

Chernyakhousky v. Chernyakhousky 2005 CanLII 6048 (ON SC)

Mullin v. Sherlock, 2018 ONCA 1063

II. The "CURES"

The problem is easy to identify. The various tools to try to solve the problem are varied and identified below.

1. Obtain a court order for disclosure

Obtaining a court order requiring disclosure should be the first step. While parties can rely on s. 21 of the Guidelines and provincial legislation to assert a demand for mandatory financial disclosure (e.g. s. 65 of the Alberta *Family Law Act*) or avail themselves of processes such as filing a Notice to Disclose, remedies are limited if the obligation is not confirmed in a court order.

Once a disclosure order is in effect, the Guidelines and various provincial statutes impose potential consequences for non-compliance. For example:

- Costs, adverse inferences, imputation of income, striking pleadings, contempt orders (ss. 22 to 24, FCSG and provincial child support guidelines);
- Order an employer, partner, or principal or any other person to provide the other party and/or the court any or all of the financial information prescribed by the regulations that is within the knowledge or shown on a record in the custody or under the control of the employer, partner, principal, or other person (s. 65(2)(c) *Family Law Act* (Alberta));
- Require a party to give security in any form that the court directs; order that that party pay all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution; order that a party pay an amount not exceeding $5,000 to or for the benefit of a party, spouse, or child whose interests were affected by the non-disclosure; or order a party to pay a fine not exceeding $5,000 (s. 213(2) *Family Law Act* (British Columbia); similar provisions in s. 58 *Family Law Act* (Manitoba)).

2. Obtain a court order for preservation of assets

If there has been a continued refusal or several refusals to provide the necessary court-ordered disclosure, one option is to seek a preservation order over all of the disobedient litigant's property. This can incentivize compliance due to the day-to-day impact on the respondent's activities, and help buy time to investigate further, while reducing the risk of that party dissipating assets or moving accounts from one financial institution to another.

Practical Tip: Such a court order should include reference to personal and corporate holdings (whether under the party's direct or indirect control), joint and sole holdings, and a prohibition from transferring money and property personally or between corporations. The preservation order should specifically reference any known third parties that hold assets and the order should be served on the third parties.

Examples of third parties who have been subjected to family law preservation orders have even included a party's friends (*Manjunath v Kuppa*, 2023 ONSC 6057).

Many provincial statutes provide for such an application (See, for example, s.21 *Family Property Act* (Manitoba); s.25 *Marital Property Act* (New Brunswick)).

The legal test for a preservation order is the tripartite interim injunction test, unless the legislation is more specific (*Holmes v Holmes*, 2023 ABKB 1 at para 52; *Price v Price*, 2016 ONSC 728 at para 6). The very high threshold required for a Mareva injunction does not apply in the context of family law preservation orders (*Price* at para 6; *Gale v Gale*, 2008 MBCA 134 at para 28).

3. Obtain a court order for production by a non-party related entity

You may have a file where a party resists the production of financial statements of a corporation owned by a discretionary trust, taking the position that the payor does not have "control" over the companies as he is not an owner, shareholder or director of any of the companies (but is a discretionary beneficiary).

The case of *Elhert v. Soiler*, 2023 ABCA 371 will be helpful. The Court of Appeal considered the issue of fundamental unfairness arising when a parent can divert or manipulate income through a corporate structure; acknowledged that the financial records could not be obtained by the payor and directed to the Trust to produce the requested financial statements.

Additionally, your local rules may provide some assistance in obtaining information from a corporation or partnership. For example, Alberta Rule 5.18 provides that if you are unable to obtain information from an officer or employee of a corporation or partnership that is a party adverse in interest, you may question a person who provided analogous services to the corporation or partnership.

4. Obtain a court order to allow a party or their expert to obtain disclosure directly from an independent third party

It is worth considering whether your purpose for pursuing remedies for financial non-disclosure by the opposing party is because you want evidence of a pattern of misconduct, or because you truly need the information therein to progress the matter or help your client's case. If it is the latter, a Norwich Order, also known as a third-party production order, may be the solution.

There are significant distinctions between requirements for parties and non-parties to provide financial disclosure (*Walby v Walby*, 2016 SKCA 121 at para 8). Non-parties are not presumptively affected by the proceedings, required to file Affidavits of Records, nor to submit to questioning.

Historically, third-party production orders were a creation of the common law imported from England and Wales. In recent years, the ability to seek an order that a non-party produce a record has been codified in statues and regulations including Rule 5.13 of the Alberta Rules of Court. In Alberta, such an order may be granted if:

1. The respondent affected by the application (i.e. the third party) is served with the application;
2. The record is under the respondent's control;
3. There is reason to believe that the record is relevant and material;
4. The respondent might be required to produce the record at trial; and
5. It is appropriate to order the respondent to produce the record.
   (Rule 5.13 and *CNOOC Petroleum North America ULC v 801 Seventh Inc.*, 2023 ABCA 97 at para 27)

   Saskatchewan Rule 5-15 is similar.

The Court may then order the party seeking the record to pay the respondent producing it such amount as the Court determines. A common example is a financial institution's statement copying fee and postage, or in Saskatchewan, the equivalent to conduct money for questioning (Rule 5-15(3)).

For the purposes of whether a record is under a party's control, they are considered to have control where there is a legal right to access the record (*Ehlert v Sailer*, 2023 ABCA 371 at para 26).

Whether a record is relevant and material is governed by Rule 5.2 in Alberta (*Terrigno v Butzner*, 2023 ABCA 124 at para 7).

In Saskatchewan, Rule 15-38 provides the court with the authority to require third parties residing with a party to file a financial disclosure statement if there is an issue of undue hardship and other criteria are met. There is no requirement to serve the third party in advance of the application for a Rule 15-38 order, although the third party has an opportunity to apply for an exemption following service of the order.

On a related note, often it can be useful to request that the opposing party execute authorization forms permitting you, your client, or an expert to obtain their disclosure directly from third parties such as financial institutions, particularly if they claim a document is not available or that they do not hold such an account. However, a litigant may claim that in executing release forms allowing the other party or their expert to obtain information directly from third parties fulfils his obligation to disclose. This argument has been rejected by the courts (*KJP v BSJG*, 2024 BCSC 167 at para 215). Regardless, the releases do not satisfy the disclosure obligations under the *Divorce Act, Matrimonial Property Act*, nor the *Rules* with respect to disclosure of relevant and material records.

5. Bring a court application for the appointment of a receiver

An unusual but potentially useful option is to seek the appointment of an investigative receiver in the face of repeated failures to provide disclosure and/or breaches of court orders.

See the case of *Boutin v. Boutin*, 2022 ONSC 3229 and 2022 ONSC 4776)

The case of *Giannelia v. Giannelia*, 2024 ABKB 344 is a good example of the use of a receiver, who was appointed as a result of the husband's refusal to cooperate with the court process. As a result of the court order appointing a receiver, his assets were frozen, his businesses were managed by the receiver and funds were only paid out with court approval.

Beware however that the receivers' fees can be substantial.

6. Bring a contempt application for breach of a court order

A court order is not a "suggestion"; it is required to be obeyed.

Although we have not reviewed the *Rules of Court* in every province, we are taking a leap and suggesting that virtually every province has a rule that allows for a finding of contempt if a litigant has failed to comply with a court order, in addition to the common law doctrine.

The Supreme Court of Canada confirmed the test for the common law doctrine of civil contempt in *Carey v Laiken*, 2015 SCC 17.

There are 3 essential elements to find civil contempt:

(a) the alleged contemnor must have actual knowledge of the order;

(b) the order must clearly state what should (or should not) be done; and

(c) the disobedience must be deliberate and wilful.

The elements of contempt above must be established beyond a reasonable doubt (*Carey* at para 31).

There has also been some back-and-forth by the courts as to whether or not "actual knowledge" of the order of which a party is alleged to be in contempt requires personal service. Based on *Morasse v Nadeau-Dubois*, 2016 SCC 44 at paras 94 to 97, and *Tornqvist v Shenner*, 2024 ABCA 285 at paras 17 and 35, it appears the answer is that it does not.

Similarly, we expect that all provinces' rules are similar to Alberta's, which allows a court (after finding a litigant in contempt) to order the following:

(i) imprisonment

Perhaps, unlike other provinces, an Albertan who disobeys a money order is not being contemptuous (Rule 10.52(3)(a)(i)). However, defaulting on a fine ordered as a sanction for civil contempt, or a failure to pay a support order registered with MEP does allow the possibility of imprisonment (Rule 10.53(1)(c); s. 30(1) *Maintenance Enforcement Act (*Alberta)).

Although imprisonment is an option when a party is in contempt, it is not primarily meant to punish but rather it is meant to persuade and enforce (*Alberta Health Services v Pawlowski*, 2022 ABCA 254 at para 35). It is a "sanction of last resort" (*College of Physicians and Surgeons of British Columbia v Ezzati*, 2021 BCCA 422 at para 59; *Stokes v Heck*, 2023 ABKB 58 at para 22).

A litigant that has been (or may be) found in contempt can purge their contempt by complying with the order or providing an explanation as to why it is not possible to comply.

(ii) a fine;

(iii) strike pleadings;

(iv) stay an action;

(v) dismiss a claim.

6(a). As a sanction for contempt, seek to strike the wrongdoer's pleadings

Each province's *Rules of Court* has provisions that allows a judge to strike a litigant's pleadings for non-compliance with court orders. While striking pleadings may seem at first glance to be unduly pedantic and unrelated to the issue of financial disclosure, it can result in important evidentiary and strategic consequences for the party whose pleadings remain validly before the court.

A party whose pleadings are struck for non-disclosure essentially loses standing in their proceedings (*Zivkovic v Zivkovic*, 2009 ABQB 542 at para 17). They can no longer adduce evidence (*Bujak v Bujak*, 2012 ABQB 458 ("***Bujak***") at para 1). The cause of action and facts alleged in the Statement of Claim are deemed to have been proven (*Yaremchuk v Haight*, 2001 ABCA 7 at para 5, *Klinck v Drinnan*, 1985 CanLII 1255 (AB QB) ("***Klinck***") at paras 22-24). The plaintiff is only left to establish the quantum they are entitled to recover (*Toerper v Hoard*, 2011 ABQB 85 at paras 2-4). The Supreme Court of Canada has approved the Alberta courts' practice of considering the facts set out in the claim to be admitted when the defendant is in default (*McElroy v Cowper-Smith*, 1967 CanLII 70 (SCC) at p. 88 cited in *Klinck*).

Other provinces have adopted an equivalent approach. In at least Ontario and British Columbia, a party whose pleadings have been struck is also treated as having admitted the truth of the facts in the statement of claim (*Steinberg v Ellis Entertainment Corp*, 2012 ONCA 362 at para 10; *Ngo v South Pacific Development Ltd. et al*, 2005 BCSC *1632* at para 7 (aff'd 2006 BCCA 182). The Ontario Family Law Rules (8.4) further codify these principles to state that a party whose pleadings are struck are subject to the following consequences unless the court orders otherwise: they are not entitled to further notice of steps in the case, they are not entitled to participate in the case in any way, the court may deal with the case in their absence, and the matter may be set for an uncontested trial.

The case of *Mullin v. Sherlock*, 2017 ONSC 6762 and 2018 ONCA 1063 is a leading authority on striking pleadings due to non-disclosure.

6(b). As a sanction for contempt, seek to restrict participation rights in a trial

Although a party in contempt or whose pleadings have been struck could be wholly excluded from the proceedings on the basis that they are not entitled to notice of subsequent proceedings such as default judgments, the Courts have also restricted their participation rights in other ways. The Court has wide discretion with respect to determining the extent of a party's participation rights following the striking of their pleadings or a finding of contempt.

A strong message is required to demonstrate that a litigant's misconduct cannot be countenanced by the Court. As described by Myers J of the Ontario Superior Court of Justice:

> "Requiring the less moneyed spouse to repeatedly come to court to try to slowly peel back the layers of the financial onion is still standard fare on motion days and in case conferences. And it has to stop."
>
> *Manchanda v Thethi*, 2016 ONSC 3776 ("***Manchanda***") at para 17, aff'd 2016 ONCA 909, leave to appeal to SCC denied).

In some instances, only some of a party's participation rights are restricted. In *Bujak*, while the husband could not adduce evidence, he was permitted to cross-examine opposing witnesses and present argument based on the other party's evidence. In *Mullin v*

Sherlock, 2018 ONCA 1063, the Ontario Court of Appeal permitted a husband whose pleadings had been struck to: (a) participate in a settlement conference; (d) receive notice of steps taken in the proceedings (c) attend any hearings as an observer; (d) make opening and closing submissions at trial; and (e) cross-examine the wife and her witnesses at trial. In *Jansen v DiCecco*, 2025 ONCJ 189 at para 8, the father whose pleadings were struck due to non-disclosure was restricted to being able to file an updated disclosure statement by a deadline, only rely on that evidence if it is filed on time, and make closing submissions limited to the issue of his annual income.

In *Boyer v Boyer*, 2024 ABKB 727, after the husband's pleadings were struck as a sanction for contempt, he was only permitted to participate in the trial by filing a pre-trial brief, making an opening statement, cross-examining the plaintiff and her witnesses, and making closing argument. He was prohibited from adducing evidence, unless it was evidence previously sought by the plaintiff which he was directed to but failed to provide.

In *Cambareri v Cambareri*, 2025 ABKB 396, the husband whose pleadings had been struck and whose contempt had not been purged in 9 years was similarly restricted to making submissions and cross-examining the wife and court-appointed expert.

In *Mullin v Sherlock*, the extent of the husband's non-disclosure centred on refusing to answer a few undertakings after providing extensive disclosure. The Court of Appeal in that case recognized that the limitation on participation rights must be "proportionate to the husband's actual non-disclosure" (para 55).

Purcaru v Purcaru, 2010 ONCA 92 ("***Purcaru***") upheld a trial judge's decision to prohibit a husband from participating at trial other than as an observer. In that case, following evidence on this preliminary issue, the husband's pleadings were struck at the opening of trial.

More recently, in *Dormon v Dormon*, 2025 ONSC 1023, the Court held that the respondent's "blatant disregard for court processes and court orders" had "caused significant expense, inconvenience, and distress for the applicant." As a result of his "clear intention not to participate in these proceedings" it was "fitting that he not be permitted to do so in the event that he changed his mind." The matter was directed to an uncontested trial without notice.

The Alberta Court of Appeal stated in *Schmidt v Wood*, 2012 ABCA 235 at para 7:

> It is especially dangerous to allow someone in contempt to invoke the court's aid when the contempt relates in some way to the same litigation. If it were not so, a litigant could pick and choose which parts of civil procedure or court orders he thought advantageous to himself. He could invoke the court's aid to enforce them, and seek final judgment. Those parts inconvenient to him he could just ignore. He might have to pay a fine or two for contempt (though not even that if he lacked visible assets). But he would litigate on a steeply tilted playing field. For example, that litigant could get full discovery and evidence, yet give none. And here the

> part of the contempt in question is refusal to give various kinds of disclosure.

In that case, the Court had granted leave for the Plaintiffs by Counterclaim to apply for judgment against the Plaintiff Schmidt whose Statement of Claim had been struck. Schmidt was prohibited from raising any of the claims within the Statement of Claim or otherwise challenging certain facts in the Counterclaim. Instead of arguing that contracts were invalid or unenforceable, Schmidt's argument was limited to their interpretation (*Schmidt v Wood*, 2012 ABQB 261 at para 16).

As aptly stated by Myers J in *Manchanda* at para 22:

> A refusal to disclose one's financial affairs is not just a mis-step in the pre-trial tactical game that deserves a two minute delay of game penalty. Failure to disclose is a breach of the primary objective. Especially if it involves breach of a court order, a party who fails to disclose evinces a determination that he or she does not want to play by the rules. It is time to oblige such parties by assessing a game misconduct to eject them from the proceeding.

6(c). As a sanction for contempt, seek to impose fines/penalties/costs

For several years in Alberta, there was a trend of ordering fines such as a $50 daily penalty payable to the other party until disclosure was provided (see, for example, *TL v RAC*, 2020 ABQB 781 at para 3(e); *Shamaeiirani v Ajamian*, 2024 ABKB 474 at para 4; *Olson v Olson*, 2022 ABQB 356, all referencing historical orders for daily fines). In *Mella v 336239 Alberta Ltd*, 2016 ABCA 226 at para 22, even the Court of Appeal seemed to endorse this approach, stating, "Sometimes, it is appropriate to direct payment of fines for contempt to other than the Clerk of the Court."

While the pre-2020 Alberta courts would occasionally deny an application for a fine or daily penalty payable to the non-contemptuous party (See, for example, *Empson v Findlay*, 2012 ABQB 757; Osborn v Gagne, 2017 ABQB 438 at para 3, there has been a recent shift back towards strict compliance with the concept that a "fine" is payable to the state while "costs" are payable to the other party.

As stated by Slatter JA in *Makis v Alberta Health Services*, 2020 ABCA 168 at para 66:

> "[...] Sanctions for contempt of court are directed at the public interest in the due administration of justice, not any private interest. Sanctions for contempt are as much to coerce compliance as they are to punish. A contempt sanction can be structured, for example, to make the sanction conditional upon remedial action being taken by the contemnor. However, if those efforts fail, any fine must be payable to the Provincial Treasurer."

Virtually all subsequent decisions on this issue have directed fines payable to the state or even vacated prior orders for daily penalties payable to the other party (*Carnwell v Carnwell*, 2024 ABKB 318 at para 85; *NCR v KKB*, 2025 ABKB 417 at para 46; *Marrazzo v Paruby*, 2025 ABKB 171 at paras 172 and 187).

Other provinces such as Ontario have long held that fines payable for contempt are payable to the state, not the other party, as is the case with fines for criminal offences (*SNC-Lavalin Profac Inc v Sankar*, 2009 ONCA 97 at para 16).

Enhanced costs in the context of non-disclosure and related misconduct are addressed below.

7. Use of an Expert

A financial expert may assist in identifying the relevant financial disclosure and alternative sources of information; acting as the party that obtains information directly from third parties through a court order as set out in Section II, part 4 above; and/or preparing expert reports that identify the scope limitations from non-disclosure, the required assumptions that result, and the potential range of findings to assist the Trier of Fact in light of the gaps in information.

Engaging with an expert early on can help counsel identify the relevant information required to address the financial matters at issue. This helps to streamline the disclosure process to ensure the requests are specific and proportionate to the issues and avoid what may be perceived as a "fishing expedition" for overly burdensome disclosure that may ultimately not be required. For example, the expert may identify accounting records that form the foundation for an analysis that can be relied upon in place of all supporting invoices, receipts, and business records that are more burdensome to disclose and have less utility in the expert's analysis, with only the specific business records requested following the expert's preliminary review.

In the cases of a financial expert obtaining information directly from third parties, such as financial institutions, it is important to note that ongoing support from the Courts is often required to the extent that new third parties or banks are identified; the third parties require Court direction in a different format or require cooperation from the non-disclosing party; or the time periods or other parameters change.

In some cases, a Court-appointment of a financial expert may assist by having the Court hear directly from the financial expert as to the information they are seeking, the relevance and importance of that information, and the assistance they require in obtaining information directly from third parties. The goal is to have sufficient information to allow the expert to complete a report that assists the Trier of Fact in determining the matters in dispute, so having the Court engage directly with the expert may help to streamline this process.

It is important to note the role of a financial expert is to act in an independent and objective manner. With significant scope limitations due to non-disclosure, this can create a challenge for an expert to issue a report that provides the Trier of Fact with an analysis and findings that are balanced and meet the expert's own professional standards.

Refer to the more detailed discussion of the issues related to the use of financial experts in Section III below.

8. Proceed to trial without all of the disclosure

Chronic non-disclosure makes the Court's role very challenging, but "there comes a point in a case where both the opposing party and the judge should end efforts to secure more or better disclosure, and instead forge a way to a hearing and decision" (*Donner v Donner*, 2021 NSCA 30 ("***Donner***") at para 42). An uncontested trial is still a trial. Thus, it requires the mustering of evidence to support a position, however there is no obligation to argue the other party's case. See *Irons v. Irons*, 2020 ONSC 1471.

Critically, a court cannot grant relief that has not been pled. Therefore, you must ensure that your pleadings are proper (and amended if necessary) before setting the matter for trial. See *Rodaro v. Royal Bank*, 2002 CanLII 41834 (ON CA).

See also *Frick v. Frick*, 2016 ONCA 799 where the Ontario Court of Appeal upheld a claim for the unequal division of property notwithstanding the absence of an explicit pleading because the FLA legislation contemplates the possibility of unequal division.

9. At the trial, seek to draw an adverse inference

There are tools to replace adequate disclosure such as "adverse inferences the judge might draw, credibility findings and evidentiary conclusions the judge might reach, and potential cost consequences that might be imposed on a non-disclosing party" (*Donner* at para 42).

A. Background of adverse inferences

In *Cunha,* Fraser J of the British Columbia Supreme Court encouraged courts to draw adverse inferences when one party conceals assets, as costs are seldom sufficient to remedy the effects of hiding assets.

In *Howard v Sandau*, 2008 ABQB 34, Wittman ACJ (as he then was) explained the rationale for drawing adverse inferences:

> "The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference that the party fears to do so; and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstance which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted." (para 39)

B. Requirement for some evidentiary basis for an adverse inference

While it is easy to request that the Court draw an adverse inference, identifying the specific inference you are seeking and the basis for it can be more challenging.

Many decisions have noted that there must be some evidentiary basis for an inference, as the Court cannot "make something out of nothing." For example:

The Alberta Court of Appeal has held that "the ability to make reasonable inferences or imputations is very much a contextual capacity and doing so is a contextual exercise" (*Khan v Khan*, 2022 ABCA 370 at para 6). The Court of King's Bench has interpreted this as a requirement that there be evidence of the factual context before the Court before it can impute income or make inferences (*Carnwell v Carnwell*, 2024 ABKB 318 at para 50).

In *Crosbie v Crosbie*, 2012 ONCA 516, the Ontario Court of Appeal stated at para 19:

> "While, the important task of imputing income is extremely difficult, the reasons should demonstrate that, notwithstanding the paucity of evidence, some degree of rigor has been applied in arriving at the amount. Here, given Mr. Crosbie was self-employed, the application judge should have indicated that he took other factors into account such as legitimate business expenses and taxable and non-taxable benefits."

In *Blatherwick v Blatherwick*, 2015 ONSC 2606, at para 331 the Court noted that the process of drawing inferences regarding property value and income in the absence of complete disclosure "does not involve mere speculation or guessing. Instead, it involves the drawing of reasonable inferences from the evidence [...]."

However, notwithstanding these statements, the current trend appears to be that the courts are increasingly willing to rely on creative contextual approaches to impute income or quantify hidden assets. The practical application of the principles above appears to be that courts are merely expected to offer an explanation, tied to some, even minimal, evidence for the inferences they are drawing against a non-disclosing litigant.

In dismissing an appeal of a decision imputing income to a non-disclosing payor of support, the Alberta Court of Appeal stated as follows:

> "As Lady Hale astutely observed (in another family law situation) ***In Re B (Children)***, (June 11, 2008) [2008] 4 All E.R. 1, [2008] UKHL 35 at para 55 that depending on the context, some inferences are more reasonable in one context than another. She mentioned an example an air-raid example used by Lord Browne Wilkinson in ***In re H***, [1996] AC 563 where, she noted, it was recognized that ordinarily it would have been difficult to conclude that an air raid was likely from nothing more than that five unidentified planes having been seen in the skies overhead. But in the example, England was at war. Air raids were frequent. The fact that there had been raids in the past would make it possible to draw the inference that there would be raids in the future."
>
> (*Khan v Khan*, 2022 ABCA 370 at para 33)

C. Categories and examples of adverse inferences

i. Adverse inferences as to evidence

A classic evidentiary inference relates to spoliation. If disclosure is not provided due to its intentional destruction, a rebuttable presumption arises that the evidence destroyed would have been unfavourable to the party who destroyed it. In *Fox v Fox*, 2017 ONSC 6509, the husband destroyed documents which would have shown the wife's work in support of her compensatory spousal support claim. The Court drew an adverse inference that the destroyed documents would have produced evidence that would not have been helpful to the husband, and it was another piece of evidence in support of the wife's compensatory claim. Likewise, in *Doust v Schatz*, 2002 SKCA 129, the husband destroyed records at the family farm of which he had exclusive possession which would have confirmed the number of mares, and therefore the Court was entitled to draw an adverse inference and accept the wife's estimated number instead.

Even in the absence of spoliation, adverse inferences are available due to gaps in the evidence due to one party's non-disclosure of records within their control. In *Smith v Smith*, 2016 ABCA 376 at paras 39 to 44, an appeal was allowed on the issue of the values of certain investments, where the trial judge simply accepted the husband's oral testimony as to a general value and economic reasons for the reduction in value of those accounts. The Court of Appeal agreed with the wife that best evidence as to their value was from limited historical account statements available, which showed a higher balance than was deposed to by the husband. The Court of Appeal stated at para 43:

> "However, rather than open his mail, access his computer or make any inquiry, the husband simply expressed an opinion as to the current valuation, one he was not qualified to express. His opinion that the current value was lower than that shown on the September 2014 statements should not have been admitted, much less relied upon for valuation purposes. It offended the rule against opinion evidence and did not fall within any recognized exception. In particular, it contravened the process prescribed in the *Rules of Court* regarding the tendering of expert opinion evidence, and offended the best evidence rule."

ii. Adverse inferences as to the quantum of family property

As held in *Wu v Sun*, 2011 BCCA 239 and *Tsang v Mok*, 2020 ABQB 17 ("***Tsang***"), the Court may infer value to hidden assets equivalent to the value of disclosed assets, to justify transferring all known assets to the aggrieved spouse, if there is a sound evidentiary basis for doing so. In *Cunha*, the Court inferred that based on the husband's non-disclosure and the fact that third party disclosure demands had been made of most banks in the province and not turned up the undisclosed assets, most of the non-disclosed assets were likely in stocks, bonds, mutual funds and similar investments, and therefore must be roughly equal to the $113,000.00 in such investments he was known to have. All of the known investments were subsequently ordered to be transferred to the wife, so that the husband's share would be the other, hidden half.

In *Tsang*, an amount of investment income on the wife's tax returns was a sufficient evidentiary basis to draw an adverse inference that undisclosed accounts did not hold funds already considered elsewhere and to infer that undisclosed accounts held at least $416,000.00, which would be the capital base required to earn that amount of income based on an interest rate of approximately 2.5%. The Court drew a further additional adverse inference that the size of the fund had not been reduced since.

In *Chandra v Chandra*, 2000 CanLII 28342 (NL SC), the Court inferred the value of offshore accounts based on estimated honoraria received by the husband, who took time off from his medical practice to perform other services, and based on the number of trips the husband took each year.

If the Court is not satisfied that there is a sufficient evidentiary basis to infer the values of undisclosed assets, non-disclosure is a relevant factor in considering whether an equal distribution of matrimonial property would be significantly unfair (*GKD v CSD*, 2021 BCSC 367 at para 221, citing *Singh v Singh*, 2020 BCCA 21 at paras 135-144). In British Columbia, the courts have found that non-disclosure can be considered under the legislation directing the Court to consider "any other factor…that may lead to significant unfairness", with "significant unfairness" being the standard required to displace the presumption of equal division. In Alberta, s. 8 of the *Family Property Act* permits the Court to consider "a prior order made by a court", and "any fact or circumstance that is relevant" in considering whether it "would not be just and equitable" to award an equal distribution, which is an even lower standard than "significant unfairness".

In *Cambareri v Cambareri*, 2025 ABKB 396, the Court drew various adverse inferences in relation to matrimonial property, including: (a) drawing an inference that the source of funds used by the husband to buy out the wife's interest in the former family home was matrimonial funds in the absence of evidence from the husband properly tracing the source of the funds used; (b) inferring that funds transferred into an account for which statements were never disclosed continued to exist in the full amount of the transfer; (c) inferring that the husband was the sole shareholder of a private corporation in which he was a director and officer but failed to disclose the identity of the shareholder(s); and (d) inferring that the husband received an amount contained within a known settlement offer for a civil litigation action, in the absence of evidence confirming the actual settlement outcome which was within his control to disclose.

iii. Adverse inferences as to credibility and reliability

The courts have long since doubted the credibility of a party who fails to produce relevant documents within their control to provide, or who selectively provides limited documents (See, for example, *Blatherwick v Blatherwick*, 2015 ONSC 2606 at paras 112-113; *Bradshaw v Stenner*, 2010 BCSC 1398 at para 188 (aff'd 2012 BCCA 296, leave to appeal to SCC dismissed 2013 CanLII 11302 (SCC))).

In *Carter v Carter*, 2026 ONCA 29 at para 20, the Ontario Court of Appeal elaborated on this principle as follows:

> The trial judge cited the well-established principle that where disclosure is inadequate and inferences are to be drawn, those inferences should be favourable to the party who must make sense of the incomplete financial disclosure and against the party in breach of their disclosure obligations: *Reyes v. Rollo* (2001), 2001 CanLII 28260 (ON SC), 24 R.F.L. (5th) 120 (Ont. S.C.), at para. 44. The trial judge found that he could not trust the accuracy or reliability of anything the appellant said. Accordingly, he decided to favour the respondent's evidence and "genuine" documentary evidence when it conflicted with the appellant's evidence and to draw reasonable inferences in the respondent's favour.

iv. Adverse inferences as to income

In *Colucci*, the Supreme Court of Canada recognized adverse inferences as one of the available tools to address the failure of a party to disclose income information (paras 52, 94, 110, 114). Some of the possible inferences for imputing income include:

(a) Inferring income based on past years' tax returns (See, for example, *SD v TD*, 2012 ONSC 503 at para 107, where the Court used the last year's tax return in a year where a party's tax return was not provided);

(b) Inferring income based on lifestyle (see below);

(c) Inferring income based on deposits on bank statements (*HMRT v SNS*, 2018 ABQB 843 at paras 55-56) or credit card payments for luxury items (*CRC v DAJC*, 2020 ABCA 143 at paras 27-28);

(d) Inferring income based on notional investment income based on known capital assets or even interest-free loans made to third parties (*Fleury v Fleury*, 2009 ABCA 43); and

(e) Inferring that a party's income is commensurate with the amount of support needed for the child (at least on an interim basis) (*Heuft v Bramwell*, 2021 ABQB 642 at para 72).

With respect to adverse inferences drawn as a result of a litigant's lifestyle, the basic idea is that "If he spends it, he must have it" (*Reyes v Rollo*, 2001 CanLII 28260 (ON SC) at para 62). Although lifestyle is not income, it is "evidence from which an inference may be drawn that the payor has undisclosed income that may be imputed" (*Kretschmer v Terrigno*, 2012 ABCA 345 at para 13, citing *Bak v Dobell*, 2007 ONCA 304 at para 43). Examples of this have included:

(a) An expert demonstrated from the husband's financial information that he was receiving income from an undisclosed source (*Davids v Davids*, 1998] O.J. No. 2859, 66 O.T.C. 321 (Gen. Div.),, cited in *Bak v Dobell*);

(b) A husband who previously earned $208,000 per year gave evidence that he planned to pay for private school fees in the amount of approximately $150,000

per year if the children were permitted to live with him, resulting in the inference that he must be earning well over $208,000 to afford such expenses (*Yenovkian v Gulian*, 2019 ONSC 7279 at paras 110 to 112);

(c) As it was unable to trust the husband's evidence as to his undocumented cash income, the Court inferred his income based on the cost of the family's expenses (*Iacobelli v Iacobelli*, 2020 ONSC 3625 at paras 101 to 113);

(d) Where a self-employed payor claimed he was earning approximately $67,000 per year, while residing in a luxury townhouse, driving a new BMW, and living a life of relative affluence, the Court inferred that his income remained in the range of approximately $100,000 per year based on the income imputed to him by a 10-year old order with respect to a child from another relationship (*Barbini v Edwards*, 2014 ONSC 6762 at paras 79 to 81).

However, there is always a risk of underimputing income for the non-disclosing party and therefore rewarding their non-disclosure. We note that the preferable approach is to overestimate their income, and then exercise caution in entertaining a future variation application by the payor. As noted in *Colucci* at para 63:

> Of course, a payor whose income was originally imputed because of an initial lack of disclosure cannot later claim that a change in circumstances occurs when he or she subsequently produces proper documentation showing the imputation was higher than the table amount for their actual income. The payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order (*Gray,* at paras. 33-34). This would "defeat the purpose of imputing income in the first place" and act as "a disincentive for payors to participate in the initial court process" (*Trang v. Trang*, 2013 ONSC 1980, 29 R.F.L. (7th) 364, at para. 53).

10. At the trial, argue dissipation

In general, the dissipation case law deals with the wasteful spending or improvident loss of the matrimonial property as it existed at the time of separation but valued at the date of trial. *Cox v Cox*, 1998 ABQB 987 is the leading case on dissipation. In *Metz v Metz*, 2004 ABQB 528 at para 37 the Court said "Dissipation is another word for waste. Merely disposing of property is not dissipation. It is well established that to show dissipation there must be an element of bad faith or neglect, foolish economic decisions, reckless or spiteful spending, pursuit of an illusory financial objective or squandering money on addictions."

The onus is on the spouse alleging dissipation with respect to 7(4) property to prove it: *Fleming v Fleming*, 2016 ABCA 88 at paragraph 30.

With respect to the undisclosed assets, in the event that the Court is not inclined to estimate the values of the litigant's financial assets by merely drawing adverse inferences, the Court would be at liberty to (a) either infer that the value of the undisclosed assets

must be equal to the value of the known assets of the same type as in *Wu v Sun* and *Tsang v Mok*, or (b) to infer that certain transfers of funds constituted dissipation.

In recent years, the Alberta courts have applied a more relaxed approach to the issue of dissipation. Even where ordinary expenses may not rise to the traditional level of dissipation, the courts have held on multiple occasions that it is appropriate to account for family property spent on living expenses, discretionary spending, and legal fees (*Cambareri v Cambareri*, 2025 ABKB 396 at para 123. citing *Savoie v Lambert*, 2024 ABKB 422 at para 145).

11. At the trial, seek terms that will enhance enforcement

To ensure that a property or support order is enforceable against a litigant who is vehemently opposed to fulfilling their legal obligations, a creative approach is required.

11(a). Corporate Enforcement

The Court has the authority to order that amounts found owing personally be enforced against non-arm's length entities in which that litigant is involved, including private corporations.

Although it is rare that orders for support or matrimonial property are enforceable against a litigant's companies, the courts have been inclined to do this in situations where the corporations have been used to obstruct claims. Piercing the corporate veil is potentially one of the only ways the recipient will receive any of the funds they are owed and allow justice to be served.

In *Aubin v Petrone*, 2020 ABCA 13 (leave to appeal to SCC denied), the Court of Appeal explored the relationship between corporate interests and family law rights:

> " [28] Assets held by a company belong to the company and generally remain behind the corporate veil. But the courts have seen numerous cases where a company was built on the direct and indirect contributions of two spouses while being legally controlled by one. This arrangement can work for everyone while the relationship is healthy, but is open to abuse when the marriage breaks down.
>
> [29] The spectre of such abuse is not new. One of the earliest protections the common law offered married women was dower rights, but a husband could defeat his wife's dower rights simply by forming a company to hold land, rather than holding it in his own name [citations omitted] …
>
> [31] Courts confronting the corporate veil in family law cases have recognized the potential for injustice and have responded by applying the Transamerica test in contextually suitable terms.
>
> [32] *Wildman v Wildman* (2006), 2006 CanLII 33540 (ON CA), 82 OR (3d) 401, 273 DLR (4th) 37 (CA), is the leading authority on point.

> Mr. Wildman had absolute control of several companies as sole shareholder, director and officer. The trial judge found that he used that control to determine when and how he received money from the companies, thereby avoiding his financial obligations to his children and ex-wife. The trial judge made orders for child support, spousal support and property equalization, and ordered that all amounts be secured and enforceable not only against Mr. Wildman personally but also against his companies.
>
> [33] Echoing the Transamerica test, the court at para 25 framed the central question as whether it is possible to disregard the separate legal personality of a corporation when it is in an individual's complete control and is being used as a shield for fraudulent and improper conduct. The court concluded that the answer is "a resounding 'Yes'".

In the lower court's decision which was upheld on appeal (*Aubin v Petrone*, 2018 ABQB 973), the Court granted a wife security interests in the husband's shares in a corporation, as well as in a building owned by the corporation. Khullar J (as she then was) explained that s. 9(3) of the MPA grants broad authority to "make any other order that in the opinion of the Court is necessary…to give effect to" a matrimonial property order. The *Judicature Act* gives the Court further broad powers to grant "all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim property brought forward by them in the proceeding" (Section 8).

This issue was further considered in: *Clark v Unterschultz*, 2020 ABQB 338, *Unterschultz v Clark*, 2020 ABQB 755 ("***Unterschultz***"), and *Barrett v Barrett*, 2004 ABQB 508.

11(b). At a trial for child or spousal support, seek imputation of income and a lump sum

Non-disclosure and imputation of income

Imputation of income for support purposes on the grounds of non-disclosure is a distinct basis from other reasons to impute income, such as intentional underemployment in s. 19(1)(a) of the *Guidelines*. S. 19(1)(f) of the *Guidelines* permits the Court to impute income in an amount "it considers appropriate in the circumstances" including where a spouse "has failed to provide income information when under a legal obligation to do so." S. 24(c) also provides the Court with another legal basis for imputing income to a spouse in breach of a disclosure order by drawing an adverse inference and imputing income to that spouse in any amount it considers appropriate.

The Alberta Court of Appeal has stated:

> Full and frank financial disclosure is fundamental to the court's exercise of the jurisdiction granted in those statutes. Ignoring that requirement corrodes the process, the judicial decisions, and ultimately confidence in the rule of law. It

> ought not to be countenanced. The court has powers and sanctions to rectify the situation and should resort to them when necessary. Parties who fail to disclose, thereby misleading their spouses and the court, do so at their peril. Most assuredly they should not be rewarded for having done so.
>
> (*Smith v Smith*, 2016 ABCA 376 at para 18).

As summarized by the Supreme Court of Canada in *Colucci v Colucci*, 2021 SCC 24 ("***Colucci***") at para 63, in circumstances of imputation of income for non-disclosure, the Court noted that courts must be wary of creating a disincentive for payors to participate in the court process. Otherwise, payors could ignore support applications, wait and see if income is imputed to them and in what amount, in hopes that it is lower than their actual income. If the imputed income is higher, they would then return to court with their disclosure to have the amount corrected. These sorts of antics are unfair to support recipients and place undue burdens on taxpayers and the judicial system. Income should be imputed at a sufficient level so as to not underestimate the actual income, bearing in mind that imputing income is necessary due to his intentional lack of disclosure and flouting of court authority.

The Court has wide discretion as to the amount of income to impute. As set out above, there must only be "some evidentiary basis" for imputing income, such as the drawing of adverse inferences from the evidence (*Heuft v Bramwell*, 2021 ABQB 642 at paras 49 and 52).

In s. 24 of the *Guidelines*, Parliament saw fit to warn parties that the Court may strike their pleadings, find them in contempt, proceed to a hearing where adverse inferences are drawn and income is imputed, and it can award costs up to full indemnity costs. It should not come as a surprise that these consequences inevitably follow a litigant's pattern of non-disclosure, and the court should not hesitate to avail itself of these available tools.

If a payor later has difficulty paying support based on an imputed income, the sentiment endorsed by the Supreme Court of Canada is that is his own problem as he is "largely the author of his own difficulties" (*Leskun* at para 34).

Underemployment and imputation of income

Pursuant to s. 19(1)(a) of the *Guidelines*, the Court may impute such amount of income as it considers appropriate in the circumstances if a "spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse."

If a payor suggests that his underemployment is involuntary due to the suspension of his driver's license by MEP, the courts have similarly rejected arguments from payors who rely on their own misconduct such as illegal activity or breaching orders to explain their underemployment (*CP v AP* at paras 78-88).

Quantum of income to be imputed

With respect to the quantification of imputed income under s. 19(1)(a), the court cannot choose an arbitrary number. There must be some "rational basis underlying the selection of any such figure…grounded in the evidence" (*Peters* at para 93). A specific formula is not necessary (*LeBlanc v LeBlanc*, 2013 NBCA 22 at para 31). While it is not ideal to impute income on the basis of circumstantial evidence, a party who is not forthcoming with their information takes the risk that such circumstantial evidence will be used against them (*Li v Wong*, 2010 ABCA 296 at para 10). The onus on the person entitled to support should not be overly burdensome given the informational disadvantage between the parties (*SM v JA*, 2023 NLCA 1 at para 167, citing *Colucci* at paras 49, 52-53).

Examples of evidentiary bases used to quantify imputed income include:

(a) Using a previously agreed amount from prior to the underemployment (*CP v AP*);

(b) Using the last available income from prior to the underemployment (*Peters* at para 21);

(c) Using the average salary from government statistics for that party's industry (*Yu v Zhu*, 2024 ABKB 154); or

(d) Basing income on the income of a former business partner who was called to give evidence (*Lamb v Hoffman*, 2000 CanLII 3655 (NS SC));

(e) Extrapolating income earned from 2-8 week projects to an annual income (*Horbas v Horbas*, 2020 MBCA 34).

(See above at 9(c)(iv) for further creative ways that the courts have imputed or attributed income in the absence of proper disclosure)

Quantum and duration of spousal support

As a brief comment on this issue, dissipation is relevant to the parties' condition, means and needs. A party cannot artificially increase "needs" by squandering assets (*JLH v RSW*, 2017 ABCA 98 at para 25).

Adjustment of the presumptive date of retroactivity

This presumptive date of retroactivity applies without the need to consider any other circumstances. The Court has discretion to depart from the presumptive date of retroactivity where the result would be unfair, having regard to the *DBS* factors.

The Supreme Court of Canada has stated that a failure to disclose a material increase in income deserves an earlier date of retroactivity, typically to the date of the increase in income, to compensate for the recipient's informational disadvantage and to disincentivize payors from withholding their disclosure (*Colucci* at paras 45, 114(d)).

DBS Factor #1: Delay

It is "untenable to suggest that a [spouse] who fails to provide financial disclosure can assume that the amount being provided is adequate because the recipient…has not brought a court application" (*Colucci* at para 43).

Furthermore, justifiable delay in obtaining a retroactive award is supported by other decisions of the Alberta courts, including:

(a) being unaware of increases in the payor's income due to non-disclosure (*Goulding v Keck*, 2014 ABCA 138; *St. Onge v Bozarth*, 2008 ABQB 130 at para 16; *Witwicki v Seifner*, 2013 ABQB 354 at para 22);

(b) a weak financial position and unsuccessful efforts to obtain financial disclosure (*Soloveoff v Soloveoff*, 2019 ABQB 561 at paras 22-29);

(c) intimidation, stalking, and abuse (*Larson v Larson*, 2014 ABQB 560 at paras 41-42);

(d) Focusing on other legal issues initiated by the payor (*KAW v MEW*, 2019 ABQB 563 at paras 35-37); and

(e) health issues (*Roseberry v Roseberry*, 2015 ABQB 75 at paras 57-59, appeal allowed on other grounds 2015 ABCA 218);

(All cited in *SMF v BWF*, 2019 ABQB 806 at para 35, aff'd 2020 ABCA 155).

A payor falsifying his income to achieve a lower amount of payments is a reason to grant retroactive support (*Ennis v Ennis*, 2000 ABCA 33 at para 31).

In *Bujak*, the husband tried to claim that his wife of over 30 years could only seek a retroactive award going back 5 years. The Court held that "given the large number of interim applications in this case, and Mr. Bujak's continuing intransigence and failure to disclose his financial situation, I find that Ms. Bujak is not precluded from claiming a full amount of retroactive support once a better picture of Mr. Bujak's financial situation began to emerge from third party sources" (para 3(c)). Seven years of retroactive support were ordered, back to the date of the parties' separation.

DBS Factor #2: Blameworthy conduct

Blameworthy conduct is "anything that privileges the payor's own interests" over the "right to an appropriate amount of support" (*DBS* at para 106). The Courts have been directed to take an expansive view of what constitutes blameworthy conduct (*DBS* at para 106). Intentional deception or evasion are not necessary; "mere passivity" and "taking the path of least resistance" can suffice (*Colucci* at para 41). The payor's subjective intentions are rarely relevant (*Colucci* at para 101, citing *Goulding v Keck*, 2014 ABCA 138 at para 44).

Examples include:

(a) Hiding income increases, misleading the recipient into believing support obligations are met when they are not (*DBS* at para 106; *Colucci* at para 41);

(b) Ignoring, avoiding or diminishing support obligations (*DBS* at para 107);

(c) Lulling the recipient into a mistaken belief that further litigation would be fruitless and expensive (*Schick v Schick*, 2008 ABCA 196 at para 13);

(d) Support payments being far lower than what should have been paid had proper disclosure been made (*Bujak* at para 3(c)); and

(e) Failing to make appropriate disclosure by providing misleading disclosure and concealing assets (*Turanich v Noyen*, 2019 ABQB 596 at para 63).

DBS Factor #4: Hardship

In *Goulding*, the Court of Appeal held that "hardship…is not an abstract or impressionistic concept to be asserted by a payor in an effort to avoid a retroactive award" (para 57). The payor must prove "real facts" suggesting a retroactive award would case "serious hardship" rather than a mere "bald or vague assertion". To pay support at the *Guideline* amount for a prior period is not a hardship (para 57). Hardship would not negate the support owing, but could lead the Court to use its discretion to mitigate the hardship through the payment arrangements (para 58). Excessive legal fees incurred by a payor who took unwise litigation positions are insufficient (*Auer v Auer*, 2021 ABQB 584, aff'd 2022 ABCA 376). Hardship claims are also not available to payors who fail to provide a budget, disclose their new partner's income, or provide any other evidence at all to support their claim (*Edden v Foley*, 2023 ABKB 364; *SMF* at para 50).

Lump-sum support

The courts have held that lump sum support may be appropriate where there is a "history of non-compliance with court orders, resistance to disclosure, resistance to the concept of spousal support, and clear animosity towards [the wife]" (*Turanich v Noyen*, 2019 ABQB 596 at paras 71-76. The likelihood of problems with enforcement also supports a lump-sum format (*Kohan v Kohan*, 2016 ABCA 125 at para 41). If lump-sum support is ordered, the Court is not required to provide a "minute detailed accounting" of how it arrived at that particular amount so long as it is supported by reasons (*Moge*; *Kohan* at para 45).

While ordering prospective spousal support payable as a lump sum is an unusual remedy, courts have done so where there are concerns that the payor may move to a non-reciprocating jurisdiction (*Nand v Nand*, 2011 ABQB 324; *DPR v LLR*, 2015 BCSC 2317), where the payor refuses to disclose his location and income, is in arrears, and fails to appear in court while the recipient is destitute (*WPB v DMB*, 2006 ABQB 333), and where the payor has a history of sporadic support payments, outstanding arrears, and significant debt (*KEW v CRM*, 2005 ABQB 426).

Security for support is particularly important where a payor does not participate in the proceedings and does not comply with court orders, especially if there are pre-existing jurisdictional and enforcement barriers to obtaining support, it is appropriate to secure support (*Postans v Davidson*, 2021 ABQB 30 **[Tab 62]** at paras 60-63). Methods of securing support can include charges on property or ordering the transfer of an interest in property.

11(c). Enforcement of Property Division as Support

Cure: Convert a property award into a lump sum of spousal support. It is not uncommon that if a litigant refuses/fails to provide disclosure, any property judgment may also be hard to collect on. If such a litigant declares bankruptcy after a property award is granted, an order for discharge of bankruptcy releases a bankrupt from any liability to pay the family property equalization. However, pursuant to Section 178(1)(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, any liability under a family support and maintenance order is not discharged.

Section 17 of the *Divorce Act* permits a court to vary a spousal support order, retroactively or prospectively, if there has been a change in the condition, means, needs or other circumstances of either former spouse since the making of the spousal support order.

Several cases have held that the bankruptcy of a payor that resulted in a property equalization payment not being made constitutes a material change in circumstances.

See: *Lipinska v. Lipinski, 2011 ONSC 653*

Ruja v. Ruja, 2018 ONSC 4930

Sim v. Sim, 2009 CanLII 6835 (ON SC)

AAG v. JLG, 2022 ABKB 818

Note: In all of the above cases there had been an order for division of family property and an order for spousal support. Because there had been no evidence that the payor was considering bankruptcy, each judge found that constituted a material change of circumstances, allowing a subsequent support variation order.

If the payor references the possibility of bankruptcy or if the payor's financial circumstances are "iffy", a trial judge can also grant an order that automatically converts a property payment into a lump sum spousal support award in the event of a future bankruptcy.

See: *Darby v Darby*, 2015 ABQB 582

Unterschultz v. Clark, 2022 ABCA 335 at para 65

Cambareri v. Cambareri, 2025 ABKB 396

See also the case of *Cousin v Cousin*, 2020 ABQB 636. In the face of a standard *Miglin* type spousal support release in a final agreement together with a court order for money to reimburse the wife for debts he was supposed to pay, the husband made an assignment in bankruptcy, the result of which allowed him to avoid paying the wife and allowed him to keep his pension (an exempt asset under the *BIA Act* Section 67(1)). The wife commenced an application for spousal support. The justice agreed that the spousal support release was conditional on the husband paying the wife and ordered the husband

to pay to the wife lump sum spousal support in the amount of the debts she paid on his behalf and costs incurred along the way.

In *Darby v Darby*, 2015 ABQB 582 the self-employed husband had a history of manipulating corporations and their assets, liquidating business assets, transferring assets out of the jurisdiction, and breaching a preservation order, among other shortcomings that resulted in his imprisonment for contempt. As many matrimonial assets had been transferred out of the jurisdiction, Erb J was concerned that an order for the transfer of those assets to the wife would be unenforceable. Instead, relying on ss. 9(3)(a) and (j) of the *MPA* and s. 1(1)(d) of the *Maintenance Enforcement Act*, she directed that the wife's share of matrimonial property be payable as "maintenance" in the amount of $10,000 per month until the equalization payment owing of $2,140,761.27 is fully satisfied or 20 years of full and timely payments passes, whichever comes first. The Court ordered that this amount would be enforceable by Maintenance Enforcement due to its characterization as "maintenance" within the definition of s. 1(1)(d) of the *Maintenance Enforcement Act*.

Similarly in *Unterschultz*, the Court upheld an arbitration award which provided that any of the $1,229,911.48 equalization payment remaining unpaid by a certain date would convert to an award of further retroactive spousal support to be enforced by MEP.

On a related note, the trend of the courts resisting litigants' efforts to evade their non-property-related obligations through insolvency continues to develop through creative means. A body of case law has developed, at least in Alberta, with respect to the characterization/apportionment of costs or other awards following a debtor party's commencement of insolvency proceedings. For example, in *DM v TK*, 2026 ABKB 245, which summarized earlier cases on the same issue, Malik J apportioned a percentage of his previous costs award as "maintenance" under the *Maintenance Enforcement Act* in order for that sum to survive the respondent's consumer proposal. In *AAG v JLG*, 2022 ABKB 818, a trial judge confirmed that she was not *functus officio* as the Rules of Court permitted her to make any further order necessary to give effect to her original intention. Since the husband commenced bankruptcy proceedings with respect to his equalization payment, the Court found that a material change in circumstances had occurred such that lump sum spousal support in an equivalent amount was owing instead, and apportioned 70% of the previous trial costs as "maintenance".

12. At the trial, seek pre-judgment interest if your jurisdiction permits

Pre-judgment interest is particularly warranted in family property cases where a spouse is deprived of the use of their share of family assets over a period of several years and is required to incur costs to replace that property (for example, to rent another home) while the spouse in possession has the use and benefit of the other's share (*Crane v Crane*, 1996 CanLII 19870 (AB KB) ("***Crane***")). In support cases, the goal of awarding pre-judgment interest is to recognize the impact of inflation and the recipient being denied the opportunity to utilize the funds at the time they were due (*Shears v Shears*, 2019 NLCA 40 at para 131).

In Alberta, pre-judgment interest can be awarded from the date of separation pursuant to the *Judgment Interest Act* on a spouse's share of matrimonial property (*Chateauvert v Chateauvert*, 2018 ABQB 2 at para 403; *Crane* at paras 2-3). In other cases, the Court fixed the amount of interest at a set percentage rather than following the fluctuating legislated rates. For example, in *Welsh v Welsh*, 2000 ABQB 869, interest was ordered at 5% per annum and in *Friesen v Friesen*, 2020 ABQB 305 at para 58, the Court awarded lump-sum pre-judgment interest of $20,000 on an award of $485,0000 following an 11-year separation. In *BAS v GDS*, 2000 ABQB 105 at paras 40 and 53-55 and *Haisman v Haisman*, 1994 ABCA 249, the Courts ordered payors to pay pre-judgment interest on arrears of support.

In Ontario, pre-judgment interest is presumptively applicable to retroactive child and spousal support awards pursuant to s. 128(1) of the *Courts of Justice Act* (see *Tadayon v Mohtashami*, 2015 ONCA 777 at para 62).

In Manitoba, s. 20(3) of the *Family Property Act* specifically contemplates that the Court may order a spouse or partner to pay interest on all or a portion of an amount awarded for the accounting of assets, at a rate fixed by the court and calculated from a date on or following the valuation date. The Manitoba Court of King's Bench has implied that while the "KB Rates" would be the starting point there may be room for enhanced interest rates in extraordinary cases of blameworthiness and litigation misconduct (*Kruk v Kruk*, 2025 MBKB 17 at paras 111 to 120).

In British Columbia, while the language of the *Court Order Interest Act* is imperative that the Court "must" order pre-judgment interest subject to exceptions in s. 2, the British Columbia Court of Appeal has clarified that in family property cases, pre-judgment interest is not available unless the asset has been wrongly taken or used by the other party (*Todd v Freeman*, 2005 BCCA 519 at paras 96 to 101). However, in the years that have followed, many BC decisions have awarded pre-judgment interest on retroactive support payments. In *LAB v MLB*, 2025 BCSC 2160, the Court recently opined that there may be a question of whether a child support award is in fact a pecuniary judgment attracting pre-judgment interest, and whether the COIA is the appropriate basis for awarding same, but ultimately whether it applies in a family law context will depend on the facts of the case and any existing order or judgment (paras 167 to 185).

In Saskatchewan, the Court of Appeal has held that an award under the *Matrimonial Property Act* or retroactive child support does not fall within the definition of a "judgment for damages" nor for the "recovery of a debt" and therefore the *Pre-judgment Interest Act* does not apply (*Deyell v Deyell*, 1991 CanLII 2761 (SK CA); *Wouters v Wouters*, 2005 SKCA 71 at paras 1 and 3). Nova Scotia has followed this approach (*Wintrup v Adams*, 2023 NSCA 19 at para 72; *McCrate v McCrate*, 2016 NSSC 6 at paras 69 to 71).

Where pre-judgment interest under general judgment interest legislation presumptively applies to family property or support awards, the Court typically retains discretion to decline to award pre-judgment interest (e.g. *Judgment Interest Act* (Alberta) s. 2(3); *Judgment Interest Act* (Newfoundland and Labrador) at s. 3(3)). Most importantly for

cases involving non-disclosing parties, the onus usually lies on the party opposing an award of pre-judgment interest to demonstrate that the circumstances are such that it would be inappropriate to award pre-judgment interest for all or part of the time period at issue.

13. Seek punitive damages

Another remedy related to misconduct is punitive damages. While the case law regarding punitive damages in the family law context is not extensively developed, it is not unheard of for the courts to consider and in rare instances, award punitive damages to a party who has been exceptionally wronged by the other's non-disclosure, hiding of assets, and conspiring with third parties to defeat family law claims.

In *Manjunath v Kuppa*, 2023 ONSC 6057, the Court granted $1.7 million in punitive damages where the husband colluded with third parties to subject the wife to "tremendous expense, a serious delay in obtaining her family law entitlement..." while it was "also highly likely substantial family assets will never be recovered" due to the husband's non-disclosure.

In *Helmy v Helmy*, 2000 CanLII 22452 (ON SC), the husband hid his lottery winnings from his former wife. The court held that the wife was entitled to damages for conspiracy plus punitive damages of $50,000.

Full indemnity costs and punitive damages are not necessarily mutually exclusive (*Jackson v Trimac Industries Ltd.*, 1993 CanLII 7031 at para 32 (aff'd 1994 ABCA 199)).

14. After the trial, seek an enhanced Costs award

If the conduct of a trial or application has been seriously impeded and frustrated by inadequate financial disclosure, a potential solution to at least partially compensate the wronged party is to seek enhanced costs, based on the misconduct of the other party.

In *AGS v RNS*, 2024 ABKB 280, even though the equalization judgment "might appear modest…. The path to determination of equalization was difficult and inefficient given the Defendant's misconduct." Thus, the costs award was roughly equivalent to the wife's solicitor-client costs.

The ABCA has confirmed that solicitor-client costs may still include 100% of fees and disbursements "if they are all reasonably necessary within the four corners of the litigation" (*Vaillancourt v Carter*, 2024 ABCA 65 at para 29). The ABCA confirmed that "Elaborate steps to avoid a judgment may reasonably give rise to elaborate steps to collect."

The courts have recognized that family law litigants may be those most in need of timely and efficient processes, especially where legal costs cannot be written off or considered a cost of doing business, but rather come out of the budget of families who need the money

for their own wellbeing. Accordingly, "the courts and the bar must therefore discourage time and money consuming process which does not aid in achieving fair and just process." (*MYW v DTW*, 2021 ABQB 713 ("*MYW*") at para 10 [Tab 15], citing *Jivraj v Jivraj*, 2014 ABQB 307 at paras 16-17.

In *Brown v Silvera*, 2010 ABQB 224 ("***Brown v Silvera***") (trial judgment aff'd 2011 ABCA 109), Moen J granted solicitor-and-own-client costs plus another set of solicitor-client costs in a matrimonial property dispute. The applicant in that case obtained a significant matrimonial property award after protracted litigation which could not be considered "an honest difference between the parties but rather an attempt by [the respondent] to keep [the applicant] from what was rightfully hers" (para 44).The respondent in that case had deceived and misled the applicant with respect to his financial circumstances and values of his assets, failed to appear at questionings, and refused to disclose relevant documents.

In *JWS v CJS*, 2021 ABQB 411 ("***JWS***") (aff'd 2022 ABCA 63), a wife was awarded $424,000 in solicitor-client costs (89.4% of all fees). Other examples of courts granting full indemnity or similar costs following contempt, non-disclosure, and similar conduct include *Richards v Richards*, 2013 ABQB 484; *Foley v Leavitt*, 2021 ABQB 875; *Kim v Kim*, 2006 BCSC 1508; *MYW*; and *Laurence v Ross*, 2025 ABKB 292. In *SLT v AKT*, 2008 ABQB 450 (cited with approval in *JWS*), the Court accepted that if the courts do not take steps to stop the "unnecessary waste of a litigant's money and the waste of Court resources by making cost awards on a solicitor-client basis to reflect the Court's displeasure", the courts become complicit.

In *Manjunath v Kuppa*, 2023 ONSC 6057 (aff'd 2024 ONCA 668), a husband and two third party defendants were jointly and severally liable to pay full indemnity costs. The full extent of the family property was unknown due to the husband's failure to comply with disclosure obligations, and what property was known had been dissipated. The wife was awarded over $310,000 in outstanding and new costs awards. The Court also awarded punitive damages of $1,700,000.

15. Response if the Non-Discloser Reports You to the Law Society of Your Expert to their Professional Body

Unfortunately, a litigant that refuses to comply with court orders, is also often a litigant that will make accusations of "bad behaviour" against the other party; the lawyers (including their own lawyer); the experts and the judge(s). There is little that you can do to prevent complaints being made to the Law Society or your expert's governing regulator, other than maintaining good records of the steps you are taking. However, the cases below may provide you with some comfort.

The courts have remarked that filing numerous complaints can be considered "reprehensible" and "designed to harass and pressure" the other party into not pursuing their legitimate claims (*Kim v Kim*, 2006 BCSC 1508 at para 17). As described by Lee J in *MES v DAS*, 2001 ABQB 1041, such conduct indicates a party:

> Has not acted in a manner consistent with bringing matters to a resolution, and [he] appears to want to perpetuate the conflict indefinitely. The Defendant pursues complaint processes against everyone and anyone involved in an effort to simply discourage those people from continuing their involvement (para 47).

Allegations that the Court or opposing counsel are corrupt are "egregious" and "undermines essential attributes of our justice system" (*Pillar Resource Services Inc. v PrimeWest Energy Inc.*, 2017 ABCA 19 at para 125).

In *Armstrong v Coupland*, 2021 ONSC 8186, the Ontario Superior Court held that disrespectful conduct targeted at opposing counsel such as insults, threats to make a report to the Law Society, and accusations that counsel are trying to perpetuate the family conflict to pad their bank account can constitute "family violence" within the meaning of the *Divorce Act*. Such communications are "threatening, coercive and controlling behaviour" towards the opposing party which are designed to "destroy a solicitor client relationship that [that party] considers to be critical to ensure [her] safety and wellbeing" (para 39).

III. USE OF FINANCIAL EXPERTS

The financial disclosure an expert requires will depend on the issues in dispute in any case, as well as the level of due diligence required for a spouse to gain comfort over the completeness of the family property to be divided and/or income available for support purposes. In most cases involving corporations or other business or trusts interests, the standard financial disclosure required in your jurisdiction will not be sufficient for an expert to complete their analysis and reporting. This is also the case where there are more complicated property issues, such as the tracing of family property exemptions or exclusions, dissipation of family property, complex organizational structures or trust relationships, and/or concerns over potential hidden or diverted assets. Finally, the level of trust (or distrust) between the spouses is often a factor in how much supporting documentation is requested to corroborate explanations provided.

Most financial experts have a duty to comply with professional standards with respect to the information reviewed and relied upon and assumptions made in coming to their conclusions. This is also a factor that may guide the level of financial disclosure requested.

1. Define the Legal Issues

The financial disclosure required will depend on the specific issues to be addressed by the expert. For example, the level of detailed information required for a Guideline Income determination or business valuation will be more extensive than the standard disclosure for a business owner. The expert will require a sufficient level of understanding and

information about the business which may include some or all of the following: the reasonableness of expenses and any non-recurring or non-arm's length party payments; the operations and required reinvestment and the impact on earnings available; key shareholder and financing terms and any related restrictions; the value of corporate assets; historical operations and holdings compared to expectations for the future; and other key drivers to the business earnings and value.

The type and extent of disclosure required will depend on the ownership structure, the type of business, the industry, and the level of corroboration required to address client concerns and meet professional standards as discussed below.

Where family property exemptions/exclusions are at issue, specific information is required to quantify the original excluded property value and to the extent the original assets no longer exist or were commingled, to trace that original value into the otherwise divisible family property and identify any associated change in value, as applicable. The specific information needed varies depending on the jurisdiction and the treatment of family property exemptions or exclusions.

In some cases, where clients have concerns about the dissipation of family property or potentially undisclosed assets or income, the required financial disclosure to address those issues can be significant. Extensive historical information may be required for real property transactions; corporate reorganizations; personal, corporate, and trust bank, investment, and credit accounts; and other items relevant to a tracing. In these cases, it is important to clearly understand the nature of the client's concerns, define the relevant time periods, and identify the information required to address those concerns. Requests for information often take a phased approach and evolve depending on the preliminary results of the analysis.

2. Professional Standards

The financial expert's professional standards will be one of the guiding factors in the level of information requested and what is deemed to be sufficient to support an expert opinion. To the extent the expert is not provided with the information they consider necessary to support their opinion, these represent scope limitations and result in more assumptions than may otherwise be required. If these limitations are pervasive, they may result in a qualified valuation or expert opinion which is less reliable for a Trier of Fact.

While not exhaustive, the following are professional standards that are applicable for CBVs (Chartered Business Valuators) and forensic accountants in Canada as of January 1, 2026.

<u>Chartered Business Valuators (CBV) - Business Valuations</u>

The CBV Institute Practice Standards 100, 110, 120, and 130 guide the requirements for a CBV issuing an independent and objective conclusion of value for shares, assets, liabilities, or any other business interest. The Valuation Practice Standards are a minimum requirement to develop and communicate a valuation conclusion that is credible and properly supported. Specifically, the independent valuation standards include:

- Standard 100 - Valuation Conclusions and Valuation Reports
- Standard 110 - Valuation Report Disclosure Standards
- Standard 120 - Scope of Work Standards
- Standard 130 - File Documentation Standards

Valuation Reports may be issued in one of three levels of valuation conclusions, which recognize the different purposes and situations for which valuation reports are prepared as well as the availability and reliability of information available. The three levels of valuation reports (Calculation at the lowest level, Estimate at the mid-level, and Comprehensive at the highest level) differ in the scope and depth of work that has to be undertaken by the CBV, based on the specific facts and circumstances of the matter; however, all valuation reports must be credible and properly supported by an appropriate scope of work.

CBV Institute Practice Bulletin No. 3, Guidance on the Levels of Valuation Conclusions, assists a CBV in (i) determining the depth of the scope of work that is required for each level of valuation report, including the extent of review, inquiry, analysis, and independent corroboration; (ii) determining the suitability of each level of valuation report for its purpose; and, (iii) assessing the impact of the availability and reliability of information on the level of valuation report issued. Paragraph 4 of Bulletin No. 3 sets out some of the considerations relevant to assessing the suitability of a particular level of report and the related scope of work, including the following:

(i) ***Extent of reliance*** *– the extent of reliance on the Valuation Conclusion will vary based on the circumstances* (examples excluded as unrelated to family law matters)*;*

(ii) ***Significance of the matter to the user*** *– the degree of significance to the user might increase the degree of due diligence (level of Valuation Conclusion) and thus impact the Scope of Work that is required;*

(iii) ***Preliminary nature of the matter*** *– a user might require a Valuation Conclusion that is based on a limited Scope of Work for the purpose of making a preliminary or interim assessment in the course of an extended matter;*

(iv) ***Number of users of the report*** *– when there is more than one intended user, there might be an increase in the required Scope of Work and disclosure as the implications of a more limited Scope of Work might not be properly understood by all users or the users might have interests that are not aligned;*

(v) ***Public availability*** *– if the Valuation Conclusion will be disclosed or referred to in a public document (such as a securities filing), there would typically be an increased need for a more extensive Scope of Work as the implications of a more limited Scope of Work might not be properly understood by all potential users;*

(vi) ***Contentious nature of the matter (or potential for being contentious)*** *– if the matter is (or has the potential for being) contentious, this increases the likelihood*

that the Valuation Conclusion will be used as expert evidence and might be the basis for a settlement, or judgment by a trier of fact (e.g., judge, arbitrator), which would typically increase the Scope of Work that is required; and,

(vii) ***Regulations or agreements*** *– regulatory authorities or relevant contracts/ agreements (e.g., a shareholders' agreement) might prescribe a certain level of Valuation Conclusion and the nature of the Valuation Report.*

Paragraph 6 of Practice Bulletin No. 3 states that *"One of the considerations in determining the level of Valuation Conclusion and Valuation Report is the availability and reliability of information on which to base a conclusion, relative to the information that exists and/or would typically be available in the circumstances. The inability of the Valuator to have access to certain pieces of relevant information could lead the Valuator to determine that it is not possible to prepare, say, an Estimate Valuation Conclusion but that the Valuator could still prepare a Calculation Valuation Conclusion."* Paragraph 7 of the same bulletin goes on to state that *"Determining the impact of the availability or reliability of information on the level of Valuation Conclusion to be issued is a matter of professional judgment that takes into account all of the relevant facts and circumstances including the purpose of the Valuation Conclusion and Report, the Scope of Work agreed upon by the client and the Valuator, and the significance of the unavailable and/or missing information to the conclusion."*

Typically the contentious nature of a family law matter, and in particular cases where there are issues of non-disclosure, will oftentimes lead a CBV to conclude that a more detailed scope of work is required to support an Estimate Valuation Report. This may be an issue, however, if there is not sufficient reliable information to support that scope of work and the limitations impact the CBV's ability to complete the valuation analysis with the appropriate level of review and corroboration.

While not exhaustive, Standard 120 requires the following independent Valuation Scope of Work Standards specifically related to the scope of work and other implications related to non-disclosure issues:

3(B) ***The work must be adequately planned, properly executed, and performed with due care and an objective state of mind.***

3(D) ***The Valuation Conclusion must be based on sufficient and appropriate information given the intended purpose and intended user(s).*** *(Explanatory comments: paragraph 3 Q below sets out the requirements for supporting significant inputs and assumptions.)*

3(E) ***The Valuator must assess the reliability of external sources and tools, such as opinions of other experts or specialists (e.g., real estate appraisers), artificial intelligence, or other sources of data or technology.*** *(Explanatory comments: the Valuator must use professional judgment to assess any external sources or tools that they rely upon to form their Valuation Conclusion. As appropriate under the circumstances, this assessment might involve the investigation and corroboration*

of the information extracted from the source. Alternatively, the Valuator should consider the source's reputation, competence, relevance, quality, and objectivity. Paragraph 3 S below sets out additional requirements for when the Valuator is considering the necessity of engaging a specialist or relying upon the work of a specialist hired by the client.)

3(F) ***The Valuator must consider the extent to which the Scope of Work has been limited. If any scope limitations are significant to a degree that they jeopardize the credibility of the Valuation Conclusion, the Valuator must not render a Valuation Conclusion.*** *(Explanatory comments: A scope limitation is any limitation on the nature and extent of the Valuator's work, including any limitation in review, inquiry, analysis, or independent corroboration of significant relevant information of the business, its industry, and any other factors relevant to the valuation and necessary to achieve a credible and properly supported Valuation Conclusion. Determining whether a scope limitation exists, and how significant it is, is a matter of professional judgment. Scope limitations might exist for every level of Valuation Conclusion (Comprehensive, Estimate, Calculation). A scope limitation occurs when significant relevant information is denied by the client or some other party or otherwise unavailable to the Valuator, limiting the ability of the Valuator to perform an appropriate Scope of Work. A scope limitation might also occur if the Valuator considers the quality of the information to be inadequate and/or unreliable. Examples of potentially significant scope limitations include, but are not limited to: unavailable financial statements, unavailable data or key documents, or an inability to speak to management about relevant aspects of the business.)*

3(H) ***Obtain a sufficient understanding of the subject of the valuation (e.g., shares, units).*** *(Explanatory comments: to obtain this sufficient understanding, interviews with key management might be conducted, along with a review of documentation such as: articles of incorporation, share certificates stating the features and/or terms and conditions of the various classes of shares, and/or summaries thereof.)*

3(I) ***Obtain a sufficient understanding of the underlying business operations and other information relevant to the valuation.*** *(Explanatory comments: this requirement pertains to entity-specific non-financial information, such as: ownership, history of the business, relevant capital transactions, key management, divisions or segments, product and/or services offerings, geographical scope of operations, impacts of regulation, material agreements or contracts.)*

3(J) ***Obtain sufficient financial information to appropriately understand the subject being valued, including past results, future prospects and present financial position.*** *(Explanatory comments: such information will typically include relevant historical and current financial statements, corporate income tax returns, and future oriented financial information such as budgets, forecasts and projections, if available. For example, this might include obtaining an understanding of specific assets, liabilities, working capital, operating cash flows, capital structure, and other significant balances.)*

3(M) ***Obtain relevant prior or current valuations or indicators of value of the business or the subject of the valuation.*** *(Explanatory comments: such information might consist of valuations by other Valuators or analysts, market trading prices, equity transaction details, formal offers involving the subject being valued, etc.)*

3(Q) ***Determine appropriate inputs and assumptions. Inputs and assumptions must be reasonable and appropriate for the intended purpose and intended use(s) of the Valuation Conclusion. Regardless of the level of Valuation Conclusion, significant inputs and assumptions must be supported. Significant inputs and assumptions that cannot be supported must be disclosed as a scope limitation.*** *(Explanatory comments: significant inputs and assumptions are those that could have a significant impact on the Valuation Conclusion and therefore require a higher Scope of Work by the Valuator. Determining which inputs and assumptions are significant is necessarily a matter of professional judgment, which should be made in light of the facts and circumstances of the valuation engagement. The Valuator must use professional skepticism when considering reliance on assumptions provided by their client.)*

Standard 110 at paragraph 5 states that *"...The content and level of detail of a Valuation Report must be appropriate for the engagement (based on professional judgment and given its purpose and the nears of the intended users), subject to the minimum disclosure requirements in this Practice Standard.* ***The Valuation Report must provide the intended user(s) with a clear understanding of how the Valuator arrived at the Valuation Conclusion and include all information necessary to provide the intended user(s) with clear description of the Scope of Word performed, information relied upon, professional judgments made, significant inputs and assumptions and the basis for conclusions reached****..."* Standard 110 requires the following independent Valuation Report Disclosure Standards specifically related to the scope of work and other implications related to non-disclosure issues:

9(E) ***The significant inputs to the Valuation Conclusion and identification of the source or explanation of how the inputs were developed.*** *(Explanatory comments: determining which inputs are "significant" is necessarily a matter of professional judgment. Judgments about significance should be made in light of the facts and circumstances of the valuation engagement and the nature of the interest being valued. Inputs of a valuation are considered significant if their impact on the Valuation Conclusion could reasonably be expected to impact the decisions of the intended users of the Valuation Conclusion. The Valuator must explain in the Valuation Report the source of significant inputs (whether they were independently developed or provided by management) and, if applicable, the work that the Valuator performed to corroborate the significant inputs. The Valuator should consider identifying and listing significant inputs in a standalone section of the Valuation Report for the benefit of the users.* (Examples of significant valuation inputs are provided but not included in this paper).

9(G) ***The significant assumptions made in arriving at the Valuation Conclusion and the basis for making each assumption.*** *(Explanatory comments: The Valuator should consider listing significant assumptions in a standalone section of the Valuation Report for the benefit of the users. Examples of significant assumptions include, but are not limited to:*

- *the Fair Market Value of capital assets or real estate,*
- *market compensation for positions held by shareholders or related parties,*
- *key or significant normalizing adjustments, such as discretionary expenses,*
- *the assumption that information in financial statements is fairly presented,*
- *assumptions regarding the existence and/or measurement of highly uncertain liabilities, such as litigation, environmental claims, etc.)*

10 ***The Valuation Report must contain a scope of review section that clearly identifies the specific information (e.g., documents, data, interviews) the Valuator relied upon to arrive at the Valuation Conclusion.*** *(Explanatory comments: scope of review is the information obtained and reviewed by the Valuator, including the documents and data reviewed. Scope of review is not the same as the Scope of Work (refer to Practice Standard No. 120); however, Scope of Work includes a review of the information summarized in the Valuation Report's scope of review section.)*

11 ***When a scope limitation exists, the Valuation Report must contain a scope limitations section, identifying any scope limitation(s) and adequately explaining each limitation, setting out the reasons for the limitation and its possible impact(s) on the Valuation Conclusion.*** *(Explanatory comments: A scope limitation occurs when significant relevant information is denied by the client or some other party or otherwise unavailable to the Valuator, limiting the ability of the Valuator to perform an appropriate Scope of Work. A scope limitation may also occur if the Valuator considers the quality of the available information to be inadequate and/or unreliable. Determining whether a scope limitation exists, and how significant it is in the context of the engagement, is a matter of professional judgment. Scope limitations may exist for every level of Valuation Conclusion (Comprehensive, Estimate, Calculation). Understanding and disclosing scope limitations is important to provide transparency to the intended user(s) because such limitations can affect the reliability of the Valuation Conclusion.)*

12 ***If any scope limitations are significant to a degree that they jeopardize the credibility of the Valuation Conclusion, the Valuator must not render a Valuation Conclusion.***

The CBV Institute Practice Standards 310, 320, and 330 relate to Expert Reports and set the minimum requirements for a CBV "retained as an expert to provide their independent professional opinion as to the quantum of a financial gain/loss or any conclusion of a financial nature in the context of a litigation or a dispute." The Expert Report standards apply to any report with a financial conclusion prepared by a CBV other than a business valuation, which includes Guideline Income determinations. Specifically, the independent Expert Report standards include:

- Standard 310 - Report Disclosure Standards and Recommendations
- Standard 320 - Scope of Work Standards and Recommendations
- Standard 330 - File Documentation Standards and Recommendations

While not exhaustive, Standard 320 requires the following independent Expert Report Scope of Work Standards:

4(C) ***Sufficient evidence shall be gathered by such means as inspection, inquiry, computation and analysis to ensure that the Expert report and the conclusion(s) contained therein are property supported. When determining the extent of evidence necessary to support the Expert Report, the Expert shall exercise professional judgment, considering both the nature of the Expert Report and the expected use to which it will be put.***

4(E) ***When access to essential information is denied by the client or some other party or is otherwise unavailable to the Expert, any conclusion expressed by the Expert in the Expert Report shall be qualified and the limitation(s) on the scope of work clearly set out in the Expert Report.***

5(B) ***When planning the extent of scope of work for and performing a particular engagement, the Expert shall obtain:***

I. ***Sufficient understanding of the subject of the Expert Report;*** *(examples - a business interest, shares, financial gain/loss, etc.) (Explanatory comment: The Expert should obtain and review all material documentation, including pleadings, agreements, contracts, and letters of understanding, letters of intent, correspondence, etc. which bear on the subject of the Expert Report.) ...*

IV. ***Sufficient financial information relating to the dispute and/or claim*** *(Examples: financial statements, financial projections, forecasts, tax returns, sales journals, etc.).*

5(D) ***The Expert shall consider key assumptions used and determine the reasonableness and appropriateness of key assumptions.*** *(Explanatory comment: The Expert is not required to determine the reasonableness and appropriateness of assumptions that fall outside the Expert's area of expertise. These assumptions may include facts to be proven in court and non-financial information presented by other specialists).*

Standard 310 sets out the following independent Expert Report Disclosure Standards with respect to the Report Scope of Review (Section 8) and Report Disclosure (Section 9):

8.1 ***The Expert Report shall contain a detailed scope of review that clearly identifies the specific information upon which the Expert relied to arrive at a conclusion.*** *(Explanatory comment: such information might consist of the documents reviewed, the individuals interviewed, the facilities visited, other expert reports (including future-care cost studies, Valuation Reports, management consulting studies, etc.), management representations concerning budgets, projections and interim financial statements).*

8.2 ***Where the conclusion is qualified by a scope limitation, the limitation shall be explained, setting out the reasons for the limitation and disclosure of the potential impact on the Expert's conclusion.*** *(Explanatory comment: to the extent that the scope of review has been significantly restricted, or information provided is substantially incomplete, the Expert shall determine if any unqualified conclusion can be provided. If the Expert Report is qualified because of a scope limitation, the details shall be fully disclosed).*

9.1 ***The Expert Report should provide sufficient information to allow the reader to understand how the Expert arrived at the conclusions expressed.*** *(Explanatory comment: the amount of information included is a matter of professional judgment, baked on the scope of review, the purpose for which the Expert Report is intended).*

9.2(E) ***Assumptions used and the procedures followed to determine the reasonableness and appropriateness of key assumptions.*** *(Explanatory comments: the Expert should classify the assumptions used as: (i) those assumptions that the Expert is directed to take, that are not within his/her area of expertise; (ii) those assumptions made by the Expert, within his/her area of expertise and based on scope of work executed by him/her; and (iii) those assumptions that the Expert is directed to take on matters that are within his/her area of expertise, but where the Expert was not provided opportunity to execute a scope of work appropriate to add assurance to the assumption).*

Chartered Business Valuators (CBV) - Other Guidance

CBV Institute Practice Bulletin No. 6, Guidance on Disclosure of Reliance on Financial Statements and Other Information, at paragraph 2 states that *"Valuators/Experts routinely rely upon a wide range of quantitative and qualitative information, including financial statements, in preparing valuation or expert reports. In the conduct of a valuation engagement the nature of the information relied upon and the extent to which such information is corroborated goes in part to the type of Valuation Report that is issued (i.e. Comprehensive, Estimate or Calculation Report). It is a matter of professional judgement, taking into account the importance of the information to the conclusion arrived at in the context of the type of report to be issued, as to the nature and extent of*

the procedures and the Valuator/Expert undertakes to determine the veracity of information relied upon".

Practice Bulletin No. 6 at paragraph 4 states that *"Practice Standards 110, 210 and 310 require disclosure of the scope of review such that the report clearly identifies the specific information on which the Valuator/Expert relied to arrive at a conclusion. Regardless of whether disclosure of a scope limitation is made, it is important that users of reports have sufficient information to be able to understand the nature of the information that was relied upon, including any inherent limitations it may have."*

Forensic Accountants

The Chartered Professional Accountants of Canada (CPA Canada), through the legacy body the Chartered Accountants of Canada, have Standard Practices for Investigative and Forensic Accounting (IFA) Engagements that are applicable to any Chartered Accountant, now Chartered Professional Accountant (CPA). While the IFA Alliance that created the standards is no longer formerly in place, the Standard Practices continue to be applied as the standard for IFA engagements in Canada as the "gold standard" and more explicitly in some provinces. These standards largely overlap with other professional standards, including the CBV rules for Expert Reports as discussed above.

While not exhaustive, the following are some of the key Standard Practices that are relevant when an IFA expert needs to assess the information required to complete their work, evaluate the impact from any limitations, and make assumptions:

300.02 Each IFA engagement is unique; accordingly, the planning for each engagement should be customized and evolve as the engagement progresses, requiring the repeated application of professional judgment:

… (d) identifying any limitation of scope where access has been denied or information cannot be obtained or provided…

300.03 When planning the extent of the scope of work for a particular IFA engagement, IFA practitioners should consider:

… (b) identifying the approach(es), procedures and techniques that will allow the practitioners to meet the engagement objectives within the constraints of time, cost and availability of information;

(c) identifying the financial and other information relevant to the engagement, and developing a strategy to acquire such information …

400.01 IFA practitioners should use an investigative mindset in the identification, pursuit, analysis and evaluation of information relevant to each IFA engagement, contemplating that it may be biased, false, unreliable and/or incomplete.

400.05 IFA practitioners should identify, analyze, assess and compare all relevant information, assess substance over form, and develop and test, as needed, hypotheses for the purpose of evaluating the issues in the IFA engagement.

400.10 IFA practitioners should evaluate the reasonableness and consistency of all estimates and assumptions having regard to the IFA practitioners' competence, expertise and other available relevant information.

400.11 Where IFA practitioners receive estimates and assumptions that are outside of their competence and expertise, and IFA practitioners intend to rely on such estimates and assumptions, they should consider the reasonableness of those estimates and assumptions.

400.12 IFA practitioners should review all information received during an IFA engagement, and consider its relevance, reliability, reasonableness, completeness and consistency with other known engagement information.

400.13 IFA practitioners should consider and address reasonable alternative theories, approaches and methodologies that may be relevant to their work.

600.03 Prior to the issuance of the report, IFA practitioners should be satisfied that there is sufficient support for the content of the report, including any findings and conclusions reached.

600.06 IFA practitioners should consider all relevant information that could impact their findings and conclusions.

600.10 Where different approaches adopted yield different results, the report should include the range of such results and, where possible, provide information to facilitate a conclusion.

600.11 When relevant information is unavailable or relevant analyses are unable to be performed, the limitation(s) on the scope of the work, the reasons for the limitation(s), and the potential impact on the findings and conclusions, any any other qualifications, should be disclosed in the report.

The American Institute of Certified Public Accountants (AICPA) has a partnership with CPA Canada to bind professionals working as forensic accountants with a Certified in Financial Forensics (CFF) designation to their professional standards. Section 6 of the CFF Standards includes general rules including *"Sufficient relevant data. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed."*

3. Implications in Family Law Matters

An independent expert's role in family law proceedings is to complete their work in an objective and unbiased manner. In order to assist the Trier of Fact, the expert's reports must be based on the best available information and be reliable and reasonable with respect to the information relied upon and assumptions made. To the extent that the report is subject to scope limitations and/or qualifications, the expert's report will be of less use for the Trier of Fact in making a legal determination.

The expert must make efforts to obtain the information necessary to complete their report to the extent possible; however, this can result in a challenge as to "where to draw the line." In cases with significant disclosure issues, at some point there needs to be a decision that the cost of pursuing additional information outweighs the benefit of doing so; however, this ultimately has to be a determination made by legal counsel working with their client and considering the impact on the expert's report. Without sufficient disclosure, the expert's report must set out the limitations, resulting assumptions, and the potential impact on their conclusions; however, the impact of these variables are not always known and make the Trier of Fact's job much more difficult.

While counsel may decide to argue an adverse inference or proceed to trial with the lack of disclosure not addressed, this puts the financial expert in a difficult position as the analysis and conclusions must be supported by underlying information and the report cannot be prepared to advance one side's position. Ultimately, the independent expert's duty is to the Trier of Fact. Where the lack of disclosure is significant, a financial expert may prepare alternate calculations based on different potential findings by the Trier of Fact or otherwise be available to assist in navigating the disclosure issues and the impact on the questions before them.

IV. CONCLUSION

Our final tip: an early diagnosis is essential for determining the appropriate treatments. While we acknowledge that we have not "cured" the cancer of family law (as it is likely impossible for this issue to be eradicated), we are hopeful that we have given you strategies for successful treatments, resulting in remission and management of this problem.