

## **TAB 3**

### **Valuation Issues in Closely Held Family Businesses**

**Avra Rosen**

*Law Offices of Avra Rosen*

**Neil L. Maisel, CA•CBV CFE**

Partner

*Soberman LLP*

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



The Law Society of  
Upper Canada | Barreau  
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**CONTINUING LEGAL EDUCATION**

**Courts of Justice Act**  
**ONTARIO REGULATION 114/99**  
**Amended to O. Reg. 89/04**  
**FAMILY LAW RULES**

***(EXCERPTS OF RULES 13, 19, 20 AND 22)***

**RULE 13: FINANCIAL STATEMENTS**

**ADDITIONAL FINANCIAL INFORMATION**

1. (11) If a party believes that another party's financial statement does not contain enough information for a full understanding of the other party's financial circumstances,

(a) the party shall ask the other party to give the necessary additional information; and

(b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement. O. Reg. 114/99, r. 13 (11).

**UPDATING FINANCIAL STATEMENT**

(12) Before any case conference, motion, settlement conference or trial, each party shall update the information in any financial statement that is more than 30 days old by serving and filing,

(a) a new financial statement; or

(b) an affidavit saying that the information in the last statement has not changed and is still true. O. Reg. 202/01, s. 3 (2).

**MINOR CHANGES**

(12.1) If there have been minor changes but no major changes to the information in a party's past statement, the party may serve and file, instead of a new financial statement, an affidavit with details of the changes. O. Reg. 202/01, s. 3 (2).

**TIME FOR UPDATING**

(12.2) The material described in subrules (12) and (12.1) shall be served and filed as follows:

1. For a case conference or settlement conference requested by a party, the requesting party shall serve and file at least seven days before the conference date and the other party shall serve and file at least four days before that date.

2. For a case conference or settlement conference that is not requested by a party, the applicant

shall serve and file at least seven days before the conference date and the respondent shall serve and file at least four days before that date.

3. For a motion, the party making the motion shall serve and file at least seven days before the motion date and the other party shall serve and file at least four days before that date.

4. For a trial, the applicant shall serve and file at least seven days before the trial date and the respondent shall serve and file at least four days before that date. O. Reg. 202/01, s. 3 (2).

#### QUESTIONING ON FINANCIAL STATEMENT

(13) A party may be questioned under rule 20 on a financial statement provided under this rule, but only after a request for information has been made under clause (11) (a). O. Reg. 114/99, r. 13 (13).

#### NET FAMILY PROPERTY STATEMENT

(14) Each party to a property claim under Part I of the *Family Law Act* shall serve and file a net family property statement (Form 13B) or, if the party has already served a net family property statement, an affidavit saying that the information in that statement has not changed and is still true,

(a) not less than seven days before a settlement conference; and

(b) not more than 30 days and not less than seven days before a trial. O. Reg. 114/99, r. 13 (14).

#### CORRECTING AND UPDATING STATEMENT OR ANSWER

(15) As soon as a party discovers that information in the party's financial statement or net family property statement or in a response the party gave under this rule is incorrect or incomplete, or that there has been a material change in the information provided, the party shall immediately serve on every other party to the claim and file the correct information or a new statement containing the correct information, together with any documents substantiating it. O. Reg. 114/99, r. 13 (15).

## **RULE 19: DOCUMENT DISCLOSURE**

### **AFFIDAVIT LISTING DOCUMENTS**

19. (1) Every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,

- (a) relevant to any issue in the case; and
- (b) in the party's control, or available to the party on request. O. Reg. 114/99, r. 19 (1).

### **ACCESS TO LISTED DOCUMENTS**

(2) The other party is entitled, on request,

- (a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; and
- (b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a). O. Reg. 114/99, r. 19 (2).

### **ACCESS TO DOCUMENTS MENTIONED IN COURT PAPERS**

(3) Subrule (2) also applies, with necessary changes, to a document mentioned in a party's application, answer, reply, notice of motion, affidavit, financial statement or net family property statement. O. Reg. 114/99, r. 19 (3).

### **DOCUMENTS PROTECTED BY LEGAL PRIVILEGE**

(4) If a party claims that a document is protected by a legal privilege, the court may, on motion, examine it and decide the issue. O. Reg. 114/99, r. 19 (4).

### **USE OF PRIVILEGED DOCUMENTS**

- (5) A party who claims that a document is protected by a legal privilege may use it at trial only,
  - (a) if the other party has been allowed to examine the document and been supplied with a copy, free of charge, at least 30 days before the settlement conference; or
  - (b) on the conditions the trial judge considers appropriate, including an adjournment if necessary. O. Reg. 114/99, r. 19 (5).

### **DOCUMENTS OF SUBSIDIARY OR AFFILIATED CORPORATION**

(6) The court may, on motion, order a party to give another party an affidavit listing the documents that are,

- (a) relevant to any issue in the case; and
- (b) in the control of, or available on request to a corporation that is controlled, directly or indirectly, by the party or by another corporation that the party controls directly or indirectly. O. Reg. 114/99, r. 19 (6).

### **ACCESS TO LISTED DOCUMENTS**

(7) Subrule (2) also applies, with necessary changes, to any document listed in an affidavit ordered under subrule (6). O. Reg. 114/99, r. 19 (7).

### **DOCUMENTS OMITTED FROM AFFIDAVIT OR FOUND LATER**

(8) A party who, after serving an affidavit required under subrule (1) or (6), finds a document that should have been listed in it, or finds that the list is not correct or not complete, shall

immediately serve on the other party a new affidavit listing the correct information. O. Reg. 114/99, r. 19 (8).

#### ACCESS TO ADDITIONAL DOCUMENTS

(9) The other party is entitled, on request,

(a) to examine any document listed in an affidavit served under subrule (8), unless it is protected by a legal privilege; and

(b) to receive, free of charge, a copy of any document that the party is entitled to examine under clause (a). O. Reg. 114/99, r. 19 (9).

#### FAILURE TO FOLLOW RULE OR OBEY ORDER

(10) If a party does not follow this rule or obey an order made under this rule, the court may, on motion, do one or more of the following:

1. Order the party to give another party an affidavit, let the other party examine a document or supply the other party with a copy free of charge.
2. Order that a document favourable to the party's case may not be used except with the court's permission.
3. Order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order.
4. Dismiss the party's case or strike out the party's answer.
5. Order the party to pay the other party's costs for the steps taken under this rule, and decide the amount of the costs.
6. Make a contempt order against the party.
7. Make any other order that is appropriate. O. Reg. 114/99, r. 19 (10).

#### DOCUMENT IN NON-PARTY'S CONTROL

(11) If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,

(a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and

(b) order that a copy be prepared and used for all purposes of the case instead of the original. O. Reg. 114/99, r. 19 (11).

## **RULE 20: QUESTIONING A WITNESS AND DISCLOSURE**

### **QUESTIONING — PROCEDURE**

20. (1) Questioning under this rule shall take place orally under oath or affirmation. O. Reg. 114/99, r. 20 (1).

### **CROSS-EXAMINATION**

(2) The right to question a person includes the right to cross-examine. O. Reg. 114/99, r. 20 (2).

### **CHILD PROTECTION CASE — AVAILABLE AS OF RIGHT**

(3) In a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) by questioning the other party, in which case the party shall serve the other party with a summons to witness (Form 23) by a method of special service set out in clause 6 (3) (a); or

(b) by affidavit or by another method, in which case the party shall serve the other party with a request for information (Form 20). O. Reg. 114/99, r. 20 (3).

### **OTHER CASES — CONSENT OR ORDER**

(4) In a case other than a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) with the other party's consent; or

(b) by an order under subrule (5). O. Reg. 114/99, r. 20 (4).

### **ORDER FOR QUESTIONING OR DISCLOSURE**

(5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.

2. The information is not easily available by any other method.

3. The questioning or disclosure will not cause unacceptable delay or undue expense. O. Reg. 114/99, r. 20 (5).

## **RULE 22: ADMISSION OF FACTS**

### **MEANING OF ADMISSION THAT DOCUMENT GENUINE**

**22. (1)** An admission that a document is genuine is an admission,

(a) if the document is said to be an original, that it was written, signed or sealed as it appears to have been;

(b) if it is said to be a copy, that it is a complete and accurate copy; and

(c) if it is said to be a copy of a document that is ordinarily sent from one person to another (for example, a letter, fax or electronic message), that it was sent as it appears to have been sent and was received by the person to whom it is addressed. O. Reg. 114/99, r. 22 (1).

### **REQUEST TO ADMIT**

**(2)** At any time, by serving a request to admit (Form 22) on another party, a party may ask the other party to admit, for purposes of the case only, that a fact is true or that a document is genuine. O. Reg. 114/99, r. 22 (2).

### **COPY OF DOCUMENT TO BE ATTACHED**

**(3)** A copy of any document mentioned in the request to admit shall be attached to it, unless the other party already has a copy or it is impractical to attach a copy. O. Reg. 114/99, r. 22 (3).

### **RESPONSE REQUIRED WITHIN 20 DAYS**

**(4)** The party on whom the request to admit is served is considered to have admitted, for purposes of the case only, that the fact is true or that the document is genuine, unless the party serves a response (Form 22A) within 20 days,

(a) denying that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine; or

(b) refusing to admit that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine, and giving the reasons for each refusal. O. Reg. 114/99, r. 22 (4).

### **WITHDRAWING ADMISSION**

**(5)** An admission that a fact is true or that a document is genuine (whether contained in a document served in the case

## Valuation Issues in Closely Held Family Businesses

### Disclosure and How to Get It

#### **1(7) Matters not Covered in Rules**

If these rules do not cover a matter adequately, the court may give directions, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the case and, if the court considers it appropriate, by reference to the Rules of Civil Procedure.

#### **1(8) Failure to Follow Rules or Obey Order**

The court may deal with a failure to follow these rules, or a failure to obey an order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate, including,

- (a) an order for costs;
- (b) an order dismissing a claim made by a party who has wilfully failed to follow the rules or obey the order.

#### **7(3) Persons who must be Named as Parties**

A person starting a case shall name,

- (a) as an applicant, every person who makes a claim;
- (b) as a respondent,
  - (i) every person against whom a claim is made, and
  - (ii) every other person who should be a party to enable the court to decide all the issues in the case.

#### **13(6) Full Disclosure in Financial Statement**

A party who serves and files a financial statement shall,

- (a) make full and frank disclosure of the party's financial situation;
- (b) attach any documents to prove the party's income that the financial statement requires;
- (c) follow the instructions set out in the form; and
- (d) fully complete all portions of the statement.

#### **13(7.1) Income Tax Returns**

Income tax returns attached to a party's financial statement are not required to be filed in the continuing record unless the court orders otherwise.

#### **13(11) Additional Financial Information**

If a party believes that another party's financial statement does not contain enough information for a full understanding of the other party's financial circumstances,

- (a) the party shall ask the other party to give the necessary additional information; and
- (b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement.

### **13(13) Questioning on Financial Statement**

A party may be questioned under rule 20 on a financial statement provided under this rule, but only after a request for information has been made under clause (11)(a).

### **13(17) Failure to Obey Order to File Statement or Give Information**

If a party does not obey an order to serve and file a financial statement or net family property statement or to give information as this rule requires, the court may,

- (a) dismiss the party's case;
- (b) strike out any document filed by the party;
- (c) make a contempt order against the party;
- (d) order that any information that should have appeared on the statement may not be used by the party at the motion or trial;
- (e) make any other appropriate order.

### **19(1) Affidavit Listing Documents**

Every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,

- (a) relevant to any issue in the case; and
- (b) in the party's control, or available to the party on request.

### **19(2) Access to Listed Documents**

The other party is entitled, on request,

- (a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; and
- (b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a).

### **19(6) Documents of Subsidiary or Affiliated Corporation**

The court may, on motion, order a party to give another party an affidavit listing the documents that are,

- (a) relevant to any issue in the case; and
- (b) in the control of, or available on request to a corporation that is controlled, directly or indirectly, by the party or by another corporation that the party controls directly or indirectly.

### **19(11) Document in Non-Party's Control**

If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,

- (a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and
- (b) order that a copy be prepared and used for all purposes of the case instead of the original.

### **20(5) Order for Questioning or Disclosure**

The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.
2. The information is not easily available by any other method.
3. The questioning or disclosure will not cause unacceptable delay or undue expense.

### **20(7) Questioning About Affidavit or Net Family Property Statement**

The court may make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit or net family property statement.

### **20(8) Questioning or Disclosure -- Preconditions**

A party who wants to question a person or obtain information by affidavit or by another method may do so only if the party,

- (a) has served and filed any answer, financial statement or net family property statement that these rules require; and
- (b) promises in writing not to serve or file any further material for the next step in the case, except in reply to the answers or information obtained.

### **20(9) Notice and Summons to Non-Party**

The court may make an order under this rule affecting a non-party only if the non-party has been served with the notice of motion, a summons to witness (Form 23) and the witness fee required by subrule 23(4), all by special service (subrule 6(3)).

### **20(14) Questioning Person Outside Ontario**

If a person to be questioned lives outside Ontario and will not come to Ontario for questioning, the court may decide,

- (a) the date, time and place for the questioning;
- (b) how much notice the person should be given;
- (c) the person before whom the questioning will be held;
- (d) the amount of the witness fee to be paid to the person to be questioned;
- (e) the method for recording the questioning;
- (f) where necessary, that the clerk shall issue,
- (i) an authorization to a commissioner (Form 20A) who is to supervise the questioning outside Ontario, and
- (ii) a letter of request (Form 20B) to the appropriate court or authorities outside Ontario, asking for their assistance in getting the person to be questioned to come before the commissioner; and
- (g) any other related matter.

### **20(15) Commissioner's Duties**

A commissioner authorized under subrule (14) shall,

- (a) supervise the questioning according to the terms of the court's authorization, these rules and Ontario's law of evidence, unless the law of the place where the questioning is to be held requires some other manner of questioning;
- (b) make and keep a copy of the record of the questioning and, if possible, of the exhibits, if any;
- (c) deliver the original record, any exhibits and the authorization to the clerk who issued it; and
- (d) notify the party who asked for the questioning that the record has been delivered to the clerk.

### **20(16) Order to Bring Documents or Things**

An order for questioning and a summons to witness may also require the person to bring any document or thing that is,

- (a) relevant to any issue in the case; and
- (b) in the person's control or available to the person on request.

## Scope of disclosure

### Murano

10 The March 7, 2001 order required that Mr. Murano deliver a "fresh, complete Financial Statement", and that he provide "all supporting documentation" relating to any entry concerning assets and liabilities on his Financial Statement, within 14 days. It also required Mr. Murano to provide 22 specific categories of information and documents within 21 days. The documents and information to be produced included the following:

- tax returns and notices of assessment from 1985 to 2000 (but excluding 1993- 1997);
- details and records of all businesses in which he had an interest from 1985 onward including any transfers of interest;
- complete disclosure of how the proceeds of the Bank of Montreal judgment were distributed, including documents relating to tracing funds;
- cheque registers and bank books for the last five years;
- details of any positions as officer or director of a business that he held within the last five years;
- details concerning the status of any litigation in which he or any of his businesses were currently involved;
- documents and information relating to assets he had dissipated since January 1, 1998;
- documents and information relating to the nature of his employment and rate of remuneration for the last five years, together with disclosure of the nature of his work for 1324657 Ontario Ltd.;
- documents and information concerning any agreements he had entered into for the acquisition of real estate or business interests on behalf of himself or a third party; and
- documents and information relating to any guarantees that he had given within the last five years.

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# Valuation Issues in Closely Held Businesses

**Neil Maisel, Partner**  
**Business Valuation and Litigation Support**

# Valuation Issues in Closely Held Businesses

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## Disclosure and How to Get It

- What kind of valuation is needed:
  - Quick and Dirty (often referred to as valuation calculation)
  - Middle of the road (often referred to as valuation estimate)
  - Full Blown (often referred to as comprehensive valuation)

# Valuation Issues in Closely Held Businesses

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Minimum disclosure for quick and dirty for a private operating company would include

- Year end financial statements for the last 5 fiscal year ends
- Corporate income tax returns for the last 5 year ends
- Shareholder/partnership agreements in force at V-day
- Interim financial statements (with prior period comparatives) for the month end closest to the V-day
- Previous valuations/appraisals prepared in last 5 years
- Details of all share transactions in the last 5 years
- Sales by month for the 5 years leading up to V-day
- Banking covenants over the last 5 years

## Valuation Issues in Closely Held Businesses

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### Minimum Disclosure for quick and dirty for an operating company would include

- Detailed information about the following on a fiscal year basis for the last 5 fiscal years:
  - Management wages, bonuses, fees, commissions, etc.
  - Wages, bonuses and other payments paid to related parties (i.e., spouses, children, parents) and an estimate of the value of the work performed by these related parties
  - Discretionary expenses (i.e., vehicle, entertainment and promotion, professional fees, travel, etc.)
  - Unusual or non-recurring income or expense items (i.e., moving expense, lawsuit, flood, etc.)
  - Other, as required

# Valuation Issues in Closely Held Businesses

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## Additional disclosure required for full blown valuation opinion

- Access to minute book
- Access to financial books and records for the last 5 years, including bank statements, cancelled cheques, credit card statements, invoices, etc.
- Access to accountants' working papers for the last 5 years
- Attendance at corporate premises
- Meeting with management
- Other, as required

# Valuation Issues in Closely Held Businesses

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## Interim financial statements

- Assume year end December 31, 2003, V-day August 31, 2004
- Preparation of August 31, 2004 financial statements involves an additional cost for the client as interim financial statement would, in many cases, not “normally” be prepared
- Particularly needed where business operations have seen dramatic increase or decrease since last year end (i.e., since January 1, 2004 in our example) or nature of business has changed
- Reasons for dramatic increase/decrease might include:
  - Gain/loss of major customer
  - Gain/loss of product line
  - External economic forces
- Also needed where there are multiple companies in a corporate group with different year ends.
- Must get “standstill” snapshot of all companies in the group at or around V-day
- Trial balances at (say) August 31, 2004 are a poor second choice to interim financial statements

# Valuation Issues in Closely Held Businesses

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## Estate Freezes

- What is an estate freeze and why is it done?
  - Pass on future growth to others
  - Part of estate plan
  - Tax reasons

# Valuation Issues in Closely Held Businesses

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## Classic Estate Freeze

- Step 1
  - Dad (sole shareholder) values company at point in time (say December 31, 1992)
- Step 2
  - Value of company at December 31, 1992 is determined to be \$3,000,000
- Step 3
  - Dad gives up his “old” common shares and takes back redeemable, retractable voting preferred shares having a value of \$3,000,000
- Step 4
  - “New” common shares issued from Treasury for \$1 each equally to kids (Johnny and Louise). Johnny and Louise each subscribe for 10 shares and pay \$10
  - Growth in value of company above the \$3,000,000 accrues equally to Johnny and Louise

# Valuation Issues in Closely Held Businesses

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## Classic Estate Freeze

- Johnny gets separated August 31, 2004
- Value of overall company August 31, 2004 is (say) \$5,000,000
- Must deduct value of Dad's preferred shares of \$3,000,000
- Value of "new" common shares is therefore \$2,000,000 (\$5,000,000 - \$3,000,000)
- Johnny's 50% share is worth \$1,000,000
- Technically, since Johnny **purchased** his 10 common shares for \$10, the value of his common shares is NOT excluded from his Net Family Property

Query

- Would the ability to exclude the property change if:
  - a) Johnny was an absentee shareholder
  - b) Johnny was the driving force in the increase in value

# Valuation Issues in Closely Held Businesses

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## New and Improved Estate Freeze

- Has been around since 1986 when the Family Law Act came in
  - Steps 1, 2, and 3 same as those used in a Classic Estate Freeze
  - But Step 4 different
  - Step 4, under the new and improved estate freeze
    - Dad buys 20 “new” common shares from treasury for \$20
    - Dad then **gifts** 10 common shares to each of Johnny and Louise
  - Technically, Johnny’s shares represent property gifted to him during the course of the marriage and ARE considered to be excluded property in determining his Net Family Property
- Query
- Can Johnny be able to exclude the shares from his Net Family Property if:
    - a) Johnny was an absentee shareholder
    - b) Johnny was the driving force in the increase in value

## Valuation Issues in Closely Held Businesses

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Case of Putting all the  
Eggs in the Excluded  
Property Basket

# Valuation Issues in Closely Held Businesses

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## Shareholder Loan Accounts and Similar Accounts

- When valuator values share of a company, he/she considers all assets and liabilities of the company
- This would generally include receivables from the shareholders (assets of the company) and payables to the shareholders (liabilities of the company)
- Balance of shareholder loan account at V-day should be determined from interim financial statements
- If valuator has valued company shares taking into account shareholder loans, then shareholder's Net Family Property Statement should reflect an asset (receivable) or liability (payable) as the case may be

# Valuation Issues in Closely Held Businesses

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## Shareholder Loan Accounts and Similar Accounts

- Similar accounts (i.e., accounts reflected in the value of the shares of the company that may require separate consideration on the Net Family Property Statement include:
  - a) Bonuses payable to the shareholder
  - b) Wages payable to the shareholder
  - c) Director loans
  - d) Other

# Valuation Issues in Closely Held Businesses

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## Inter-Corporate Issues

- Multiple corporations cause multiple headaches for business valuers
- If have multiple corporations, with differing year ends, obtain interim financial statements at common date (V-day)
- If don't have interim financial statements, then must ensure that there is no "leaking" between year ends of the respective companies
- Watch transfer pricing issues between corporations
- Consider "non-arms length" transactions
- Ensure if Company A reflects a debt owing to inter-company, related accounts agree. For example, that related Company B reflects a corresponding asset of \$1,000,000 on its financial statements. If not, must investigate.

# Valuation Issues in Closely Held Businesses

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## Example of leakage due to different corporate year-ends

- Holding Company (Holdco) year end November 30
- Operating Company (Opco) year end February 28
- V-day March 3, 2000
- No interim financial statements prepared
- Husband hires well known reputable valuation firm
- They use February 28, 2000 financial statement to value the Opco
- They (the valuers) are advised by the accountants for the companies that there was no significant activity in the Holdco between December 1, 1999 and March 3, 2000 (often called stub period)
- Accordingly, they rely on November 30, 1999 financial statements of Holdco in preparing their valuation

## Valuation Issues in Closely Held Businesses

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### Case of leakage-different corporate year-ends

- After reviewing accountants working papers, we note that there was a \$400,000 management fee accrued by the Opco to the Holdco at Opco's February 28, 2000 year end
- Thus, Opco's financial statement at February 28, 2000 reflects a \$400,000 liability (accounts payable) made via journal entry which reduced its value at V-day
- However, Holdco's balance sheet at November 30, 1999 did not reflect the corresponding asset
- Conclusion, other valuator revised value of Holdco up by \$400,000 (net of tax)
- Accountant had incorrectly advised valuator that there was no significant activity in Holdco between December 1, 1999 and March 3, 2000

# Valuation Issues in Closely Held Businesses

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## Minority Shareholdings

- |              |   |
|--------------|---|
|              | <ul style="list-style-type: none"><li>• Can be more difficult to value</li><li>• Must value company as a whole first</li></ul>  |
| Query        | If company valued at \$10,000,000 is 10% interest worth \$1,000,000?  |
| Answer       | <ul style="list-style-type: none"><li>• Maybe</li></ul>   |
| Issues       | <ul style="list-style-type: none"><li>• Is there a shareholder agreement that protects the minority shareholder from a minority/liquidity discount?</li><li>• Who owns other shares (related or unrelated parties)</li><li>• What is the past history of company (have they always paid out all earnings as dividends?)</li><li>• Statutory relief (OBCA)</li></ul> |
| CRA position | <ul style="list-style-type: none"><li>• Where a taxpayer is part of a family control group, no minority discount is appropriate (Rebuttable Presumption)</li></ul>  |

# Valuation Issues in Closely Held Businesses

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## Shareholder/Partnership Agreements

- Can be determinative in establishing value
- Example of engineering company
  - Buy in - do not pay for goodwill
  - Retire - do not get paid for goodwill
  - Die - do not get paid for goodwill
  - Disabled - do not get paid for goodwill
  - Prior shareholder transactions both pre and post V-day (none include payment for goodwill)
- Valuation conclusion – no goodwill inherent in share interest
- Must obtain shareholder/partnership agreement in all cases

# VALUATION OF CLOSELY HELD FAMILY BUSINESSES

## *Cases of Interest*

### **RULE 19(11) OF FAMILY LAW RULES**

Securing disclosure from non-party

*Noik v. Noik* (2001), 14 R.F.L. (5<sup>th</sup>) 370 (Ont. Sup. Ct.)

### **MINORITY INTEREST IN FAMILY BUSINESS**

*Balcerzak v. Balcerzak* (1998), 41 R.F.L. (4<sup>th</sup>) 13 (Ont. Gen. Div.)

Discount for minority shareholders should not be high where other shareholders held similar minority interests and where shareholders were close family unit that worked together for many years and would probably continue to do so.

*Ganson v. Ganson* (1996) CarswellOnt 4073 (Ont. Gen. Div.)

Where company equally owned by spouse and his parents, no minority discount applied as all three shareholders acted as a control block.

### **ESTATE FREEZE**

Courts have held that where shares in family business had been transferred to spouse as an estate freeze during marriage, could not later allege at separation that what had been structured as a transfer was now a gift.

*Dalgleish v. Dalgleish* 2003 CarswellOnt 2758 (Ont. Sup. Ct.)

*Karakatsanis v. Georgiou* (1991), 33 R.F.L. (3d) 263 (Ont. Gen. Div.)

*Black v. Black* (1988), 18 R.F.L. (3d) 303 (Ont. H.C.)

*Leslie v. Leslie* (1987), 9 R.F.L. (3d) 82 (Ont. H.C.)

*Rosenthal v. Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.)