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FACTORS IN THE DETERMINATION OF THE VALUATION OF PRIVATE BUSINESS INTERESTS

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I. INTRODUCTION

This paper discusses certain aspects of a study conducted by the authors of the judicial process as it relates to the determination of valuation of private business interests.[1] The study had two principal parts:

1. To examine the various business valuation variables within the cases which appear to discriminate the decisions in order to further describe the judicial process and the court's reaction to the area of business valuation; and,
2. To describe the numerical distribution of the court decisions and, to investigate whether various factors such as size of valuation, level of tribunal, member of Tax Review Board or Justice of the Federal Court hearing the case, type of case under examination and time period have any effect upon the determination of the judicial value.

This paper concerns mainly the first part of the study—an examination of some of the variables which appear to discriminate business valuation cases. Six variables were chosen: general valuation principles, valuation of goodwill, minority interests, restrictive agreements, expert evidence and the burden of proof. The results of the second part of the study are contained in the Appendix.

This study examined all cases relating to the valuation of private business interests for federal tax purposes which have been reported in the *Canada Tax Cases* for the period 1917-1979 inclusive. In order to further isolate cases relating to the valuation of private business interests, the indexes for *Dominion Tax Cases*[2] were also examined and additional relevant cases included. In this search, 121 cases were identified, involving the valuation of 125 business interests. Where a case was appealed, it was included at each level as a separate observation unless valuation was not an issue.

II. GENERAL VALUATION PRINCIPLES

There have been no published guidelines to assist judicial tax tribunals in Canada in the determination of the fair market value of private business

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[1] A "private business interest" is one that is defined to be "(a) the net assets of either an unincorporated or an incorporated privately owned business, or (b) the shares of a private corporation."

[2] *Canada Tax Cases and Tax Appeal Board Cases, Consolidated Index, 1917-1975* and [1976-79] *Canada Tax Cases.*

interests. Therefore the courts have relied on principles developed in the field of accounting and specific valuation publications. Where a particular issue in a case was not dealt with in the literature or in previous decisions, the courts were often forced to make an arbitrary judgment which then formed the basis for future decisions. For example, regarding the amount of discount to be allowed for shares which are to be placed in escrow, if required, Mr. Justice Thurlow stated in 1976: "As I find nothing in the evidence to guide me in assessing what such a discount should be, it must, it seems to me, be fixed more or less arbitrarily. On that basis, I think it should not be less than 5% and I shall fix it accordingly."[3]

The use of financial statements in the valuation of business interests has long been recognized by the courts.[4] In 1954, Fordham indicated the main factors that he thought should be considered in the valuation of shares of businesses: book value or adjusted book value, past earnings, estimated maintainable profits with reference to past results, earnings value and dividends value and whether a majority or minority holding is involved.[5]

The valuation of par value shares issued for consideration other than cash has been an issue in many cases. The question arises whether par value shares received as consideration for property transferred or services rendered should be assigned a fair market value equal to their par value or the value of the consideration received. The argument that the shares are worth their par value relates to the approval by the directors of the transaction and their assignment of a value to the related asset or service received in terms of the number of par value shares issued.[6] The value of assets received being equal to the par value of shares issued has been reported in a number of cases,[7] but subsequent court and board decisions have attempted to limit the application of this principle. For example, Fordham stated: "There is no magic in incorporation. Shares thus created do not thereby acquire an unvarying value that should always be attributed to them."[8] Subsequent cases, involving redeemable preferred shares and otherwise, were left with the principle that shares were worth their par value only by coincidence where no other objective evidence as to their value existed.[9]

With regard to specific areas of business valuation, the courts have had

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[3] *Corlite Petroleums* v. *The Queen*, [1976] C.T.C. 766 at 773, 76 D.T.C. 6450 at 6455 *per* Thurlow J. (F.C.T.D.).

[4] *Robson* v. *M.N.R.*, [1951] C.T.C. 201 at 205, 51 D.T.C. 500 at 502 *per* Sidney Smith D.J. (Ex.), *aff'd* [1952] S.C.R. 560.

[5] *No. 179* v. *M.N.R.* (1954), 11 Tax A.B.C. 76 at 78 (Fordham).

[6] *Kanasewich* v. *M.N.R.* (1961), 26 Tax A.B.C. 20 at 23-24 (Boisvert).

[7] *E.g., Tuxedo Holding Co.* v. *M.N.R.* (1957), 17 Tax A.B.C. 166, *aff'd* [1959] C.T.C. 172, 59 D.T.C. 1102 (Ex.).

[8] *Moyniham* v. *M.N.R.* (1962), 28 Tax A.B.C. 293 at 296 (Fordham). Other cases where the fair market value was found not to be equal to the par value include: *Walker* v. *M.N.R.* (1962), 29 Tax A.B.C. 174; *Segal* v. *M.N.R.* (1961), 26 Tax A.B.C. 93; *Wise* v. *M.N.R.* (1961), 26 Tax A.B.C. 6; *Piercy* v. *M.N.R.* (1956), 15 Tax A.B.C. 56; *Levitt* v. *M.N.R.*, [1976] C.T.C. 2307 (T.R.B.).

[9] *Inland Resources Co.* v. *M.N.R.*, [1965] Ex. C.R. 313, [1964] C.T.C. 393, 64 D.T.C. 5257; *No. 267* v. *M.N.R.* (1955), 13 Tax A.B.C. 135.

to decide on the appropriateness of an earnings multiple (discount rate), the period of earnings to be included to project future results and so on. Such decisions are necessarily arbitrary, and can only be made by comparison with the litigants' contended value. For example, with regard to the earnings multiple to be used in a particular set of circumstances, Fordham stated in 1958 that:

> seven or eight times earnings... is too high where a private company is concerned and would be more appropriate if we were considering some public corporation, the stock of which is readily marketable. In the present instance, I think that five times the earnings may be regarded as the proper proportion....[10]

Although many judicial decisions may be arbitrary, either due to lack of evidence in a particular case or the subjective nature of business valuations themselves, a number of guidelines within which judicial decisions may be made have been established. Regarding capitalization rates or earnings multiples, Flanigan J. stated that:

> I think it is generally accepted that the factors affecting the choice of a proper multiple earnings ratio are numerous. They depend on certain well-established principles and these include, as I have said, whether or not the business is a high-risk business, what the interest rates might be at material times, what the future economic outlook is for the general area, the question of competition and the matter of repayment of the purchase price....[11]

In order to arrive at a notional valuation at a prior point in time, the use of hindsight is not normally permitted, that is, subsequent actual earnings cannot be used as an indication of the value of the business at the prior date.[12] Where appropriate, projected earnings may be used.[13] The general principle is, consequently, that hindsight is not admissible to determine a value at a time in the past; however, it is not considered to be hindsight to use subsequent events to evaluate the reasonableness of projections made of future income. As well, future events may be used to assess facts which would have been available at the time for which the valuation is sought.[14] For instance, it has been held that succeeding events may be used to assess whether or not the goodwill had any value at the date of the valuation:

> Learned counsel for the respondent pointed out that there was no guarantee that Crandall would stay, or that business would stay if Crandall left, but the fact is that Crandall did stay, and as we look back now we see that the business has prospered. The question is: Am I entitled to take advantage of hindsight in arriving at my decision? I think I am.[15]

III. VALUATION OF GOODWILL

Cases involving the valuation of goodwill are basically of two types: those where a business is transferred not at arm's length such as upon in-

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[10] *No. 513* v. *M.N.R.* (1958), 19 Tax A.B.C. 242 at 248.

[11] *Seto Holdings Ltd.* v. *M.N.R.*, [1974] C.T.C. 2347 at 2349 (T.R.B.).

[12] *Brunelle* v. *M.N.R.*, [1977] C.T.C. 2506 at 2511 (Cardin) (T.R.B.).

[13] In *Connor* v. *The Queen*, [1978] C.T.C. 669 at 678 (F.C.T.D.), Mahoney J. stated that "[t]he reasonableness of projected earnings may be measured against the yardstick of actual results without arriving at those projections by application of hindsight."

[14] *Simard & Cie.* v. *M.N.R.*, [1964] C.T.C. 461 (Ex.).

[15] *Crandall* v. *M.N.R.*, [1974] C.T.C. 2289 at 2293 *per* Flanigan J. (T.R.B.).

corporation and those involving the allocation of the total purchase price among the component assets of the business. In both types of cases there has been an attempt to define the nature of goodwill, the conditions under which it may have commercial value and the methods by which its value may be established.

Consolidated Laundry & Cleaning Services Ltd. v. *M.N.R.*,[16] involving the allocation of the sales price of a business between depreciable assets and goodwill, indicated that goodwill could be valued either directly or on a residual basis as the total consideration less the value of the tangible assets. There first had to be, however, an indication that goodwill was in fact an asset that had been transferred before any value would be attributed to it.

References to accounting authorities provided definitions of goodwill more susceptible to determination: "only in the presence of an anticipated income in excess of a normal rate of tangible resources to be employed can a value be found in excess of the fair appraised value of the existing tangible assets."[17] Following this residual approach to the valuation of goodwill, the question arises as to how the tangible assets are to be valued. In 1959, Fordham held that tangible assets should be valued at their worth to the purchaser, not the vendor.[18] The result of this method is that goodwill, as calculated on a residual approach, will also be the value to the purchaser and not the vendor. Given the same business and different purchasers then, the allocation of the total purchase price among the component assets may be different.

A number of cases have involved the use of rule-of-thumb methods to determine the value of goodwill or the total value of the business. Such attempts to use these methods have met with little success primarily because of the rule that the existence of goodwill must have been established before it can be arbitrarily valued. This has been the major point of divergence between the judicial notion of goodwill and that of a number of accounting practitioners.[19] Rule-of-thumb methods have been accepted but only in situations where they represent the method which was actually used by the parties to the transaction.[20]

The courts have held that commercially saleable goodwill must be shown to exist before it can be assigned or sold in non-arm's length transfers, such as the incorporation of a proprietorship or a partnership. This is particularly difficult where the businesses of professionals are concerned, as it is hard to separate the earnings that attach to the personal goodwill of the professionals

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[16] (1958), 21 Tax A.B.C. 168.

[17] Pafon, *Accountant's Handbook* (3d ed. New York: Ronald Press, 1948) as referred to in *No. 295* v. *M.N.R.* (1955), 14 Tax A.B.C. 81 at 84.

[18] *No. 636* v. *M.N.R.* (1959), 22 Tax A.B.C. 171. A subsequent case at the Exchequer Court level follows the same argument. See *Herb Payne Transport* v. *M.N.R.*, [1963] C.T.C. 160.

[19] *Rabow* v. *M.N.R.* (1961), 26 Tax A.B.C. 445 at 446.

[20] *Dominion Dairies Ltd.* v. *M.N.R.*, [1966] Ex. C.R. 397, [1966] C.T.C. 1, 66 D.T.C. 5028; see also *Butler* v. *M.N.R.*, [1967] 1 Ex. C.R. 425, [1967] C.T.C. 7, 67 D.T.C. 5019.

(and cannot be sold or transferred) from earnings that relate to goodwill based on location, product or service, or general business goodwill. In 1974, Flanigan J. stated the criteria for acceptance of the transfer of professional goodwill:

> — reputation for reliable work in a variety of problem areas;
> — ability to attract and maintain a large group of clients;
> — a staff of professionals capable of handling divergent problem areas;
> — nature of the work—whether recurrent or nonrecurrent;
> — nature of the clientele and their likelihood to introduce further business;
> — trend of profits.[21]

In non-arm's length situations, the residual approach of valuation cannot be easily used since the total value is not known. A capitalized-earnings approach has been adopted: "[a] well-recognized method of evaluating goodwill is to ascertain the net earnings of the business, allow a conservative rate of return on the capital cost of its acquisition and attribute any surplus to goodwill."[22]

Judges or members have recognized that the valuation of a business, and consequently the determination of goodwill, is subjective. Some members have expressed doubt as to their ability to determine the precise value of goodwill.[23]

IV. MINORITY INTERESTS

A minority interest in a company is that which does not represent *de jure* voting control. Current literature indicates that discounts ranging from zero to fifty percent[24] from "en bloc" values are often suggested to take into account the additional lack of liquidity associated with minority shareholdings. The courts appear to have approached the valuation of a minority interest in this manner, that is, to apply a discount rate to rateable value, in a number of cases. Fordham stated in 1967: "In view of the fact that only one of the shareholders was not related to the deceased, but was a corporation, I think that 10%, instead of the more usual 20%, would be an appropriate allowance to make to the minority interest held."[25] In an earlier decision, Fordham had stated that "[t]here is no generally-accepted yard stick or rule of thumb for gauging the value of minority shareholdings in relation to majority shareholdings."[26]

In *No. 513* v. *M.N.R.*,[27] Fordham compared a dividend yield at six percent to the valuation of a minority interest on an earnings basis in order to assess the reasonableness of the valuation decision made. A recent case provides further evidence that, in some instances, the courts favour a direct

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[21] *Supra* note 15, at 2291-92.

[22] *Plouffe* v. *M.N.R.*, [1965] 1 Ex. C.R. 781, [1964] C.T.C. 580 at 596, 64 D.T.C. 5351 at 5359.

[23] *Neuls* v. *M.N.R.*, [1975] C.T.C. 2215 at 2219 (Flanigan J.) (T.R.B.); *Peters* v. *M.N.R.* (1959), 22 Tax A.B.C. 402 at 406 (Snyder).

[24] Campbell, *Canada Valuation Service* (Toronto: De Boo, 1977) Sec. 7 at 71.

[25] *Taylor Estate* v. *M.N.R.*, [1967] Tax A.B.C. 555 at 560.

[26] *Supra* note 5, at 79.

[27] *Supra* note 10.

valuation of a minority shareholding over an arbitrary discount applied to the rateable value.[28]

V. RESTRICTIVE AGREEMENTS

The issue with respect to restrictive agreements is whether or not such agreements affect the fair market value of a business or share by restricting the market in which they may be transferred; whether all they affect is the price at which the shares or business will in fact be sold subject to some previously imposed condition or whether a hypothetical purchaser is not subject to previously imposed obligations.[29]

In *Barber Estate* v. *M.N.R.*,[30] the question hinged on whether shares having voting control should be entitled to a greater proportion of the value of the company upon liquidation than that provided by the letters patent of the company. It was held that such voting control would have allowed the holder to appropriate all assets to his benefit even though this was not allowed by the company's letters patent: "[T]he [deceased] was at liberty to change, alter, or amend, at will, what he had caused to be created in the first instance. The mere fact that the restrictive provisions governing Margot's shares had been recorded in letters patent in Ottawa did not render such provisions immutable."[31] This decision should be compared to the decision in *Fiddes Estate* v. *M.N.R.*,[32] which seems to indicate an increasing awareness of the rights of minority shareholders. In *Beament Estate* v. *M.N.R.*,[33] the question of restrictive agreements regarding the transfer of shares arose again. President Jackett of the Exchequer Court explained the problem:

> If therefore, as of the time of his death or later, the shares were for sale on terms that they would continue, in some way, to be subject to the obligations assumed by the deceased under the contract, no person using reasonable judgment would have paid more for them than [the redemption amount]... The other view of the matter... is... that the "fair market value" of the shares as of the date of the death of the deceased is what a hypothetical willing purchaser would pay to a hypothetical willing vendor for the shares on the basis that the purchaser would not be in any way subject to the obligations that the deceased had assumed by the contract.[34]

It was held by the Exchequer Court that the fair market value of the shares

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[28] *Carruthers* v. *M.N.R.*, [1979] C.T.C. 3150 (T.R.B.).

[29] In IT-140R2, Revenue Canada indicated that for the purposes of determining the fair market value of property immediately before death in a non-arm's length situation, the provisions of a buy-sell agreement are to be disregarded. This bulletin would appear to be in conflict with the principles developed in the *Beament* case although they can, perhaps, be reconciled by the fact that the provisions of the *Income Tax Act* provide for a deemed disposition immediately prior to death, while the *Estate Tax Act* (under which the *Beament* case was decided) dealt with the fair market value of property at death. See *Beament Estate* v. *M.N.R.*, [1969] 1 Ex. C.R. 407, [1968] C.T.C. 559, 69 D.T.C. 5016, *rev'd* [1970] S.C.R. 680, 11 D.L.R. (3d) 237, [1970] C.T.C. 193, 70 D.T.C. 6130.

[30] (1966), 41 Tax A.B.C. 27.

[31] *Id.* at 32.

[32] [1970] Tax A.B.C. 156.

[33] *Supra* note 29.

[34] *Beament Estate* v. *M.N.R.*, [1969] 1 Ex. C.R. 407 at 413, [1968] C.T.C. 558 at 563-64, 69 D.T.C. 5016 at 5020.

should be valued without reference to the contract, although it was stated that if the provisions requiring winding-up had been in the constitution of the company then they would have determined the value. On appeal to the Supreme Court of Canada, this decision was reversed:

> Once it appears that on the death of the deceased the company had to be wound up, it seems to me that the fair market value of the 2,000 shares must be the same whether that winding-up takes place under the compulsion of an enforceable contract or pursuant to a mandatory provision in the letters patent.[35]

This case established the authority that restrictive agreements should be considered in the determination of the fair market value of the related shares. This principle was confirmed in a 1975 case.[36]

VI. EXPERT EVIDENCE

In business valuation cases, both the taxpayer and the Minister of National Revenue assert a value which they contend to be the fair market value of the shareholding or business in question. Each party has been assisted, in the majority of cases, by testimony given by an expert witness. In the cases surveyed in this study, it was found that taxpayers most often called chartered accountants as their expert valuators. The minister most often called a valuator in his employ. Recent cases indicate, however, that departmental valuators and chartered accountants may not be accepted as experts unless certain conditions apply.

In *Schaefer Brothers Inc.* v. *M.N.R.*,[37] Tremblay indicated that to be an expert witness in business valuation matters, it is necessary, in most circumstances, that the witness be a member of the Canadian Association of Business Valuators.[38] In *Lauder* v. *M.N.R.*,[39] a principle developed in a real estate valuation case, *Friedman* v. *M.N.R.*,[40] was applied regarding the independence of the expert:

> Notwithstanding the witness's knowledge in the field of evaluation, I believe that [the departmental valuator] though undoubtedly acting in good faith, has disqualified himself as an expert witness by admitting to having attempted to negotiate

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[35] *Beament Estate* v. *M.N.R.*, [1970] S.C.R. 680 at 688, 11 D.L.R. (3d) 237 at 242-43, [1970] C.T.C. 193 at 199, 70 D.T.C. 6130 at 6134.

[36] *Smith Estate* v. *M.N.R.*, [1974] C.T.C. 317, 74 D.T.C. 6291 (F.C.T.D.), *aff'd* [1975] C.T.C. 335 (F.C.A.).

[37] [1979] C.T.C. 2379 (T.R.B.).

[38] There is no reason in 1978 that one can testify as appraisal expert [*sic*] without being member of an association of appraisers. The policy of the Board during the former years by [*sic*] accepting as expert a person who was not a member of an association of appraisers, was only a temporary policy. It is the Board's opinion that to give an expert opinion there is a presumption: only the members of an appropriate profession are qualified to testify in court.

Because of the evolution of the appraisal science in Canada during the last seven years and the incorporation of appropriate associations, an appraisal report must be given in court by a member of an association of appraisers. It would be exceptional and on a [*sic*] strong evidence of very great experience that this rule be infringed. [*Id.* at 2387 (Tremblay), translated from his decision in *Les Meubles de Maskinonge* v. *M.N.R.*, [1979] C.T.C. 2028 at 2042 (T.R.B.).]

[39] [1979] C.T.C. 2911 (T.R.B.).

[40] [1978] C.T.C. 2809 at 2813, 78 D.T.C. 1599 at 1601 (T.R.B.).

> a fair market value of the subject property with the appellants, an activity which, in my opinion, is not consistent with my concept of the role of an expert witness.[41]

Consequently, the expert employed by either litigant should not have been involved in negotiations prior to preparing his valuation report if his testimony is to be accepted as that of an expert.

VII. THE BURDEN OF PROOF IN VALUATION CASES

The burden of proof in income tax cases is not stated in the *Income Tax Act*.[42] The Supreme Court of Canada decided in 1948, by a majority of the Justices, that the onus is on the taxpayer to disprove the assessment:

> [T]he proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of the law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be ... dealt with by these persons unless questioned by the appellant .... Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.[43]

The fair market value of a property at a given point in time is presumed to be a question of fact. As such, the taxpayer must, according to this decision, demonstrate that the facts upon which the Minister of National Revenue has relied are in error. This principle is evident in two subsequent decisions.[44]

There is a presumption in our tax system, then, that the valuation made by Revenue Canada is correct until proven otherwise. Two recent cases, however, have shed doubt on the validity of this rule:

> Success is divided. Both parties took, and maintained throughout, extreme positions which were entirely dissociated from reality. While the defendant ought to have recognized that the HPL shares had some significant fair market value on December 31, 1971, the plaintiff, an experienced businessman, ought to have recognized that the value did not remotely approach that claimed by him. There were, of course, experts for hire willing to support those extreme positions. . . .[45]
>
> I do believe the appellant has valued his shares on a very optimistic basis and has reached a value in excess of their Valuation Day value. The valuator for the respondent has been too conservative and pessimistic. . . .[46]

Both cases, accusing the litigants of asserting extreme values, were heard in 1978. The findings may explain the statement by Tremblay in 1979 indicating that a compromise decision may be justified by the Board:

"As the two valuators are honest and intelligent, the Board would not make an error by totaling up the figures retained by the two valuators . . . and by dividing by two the . . . totals. . . ."[47] This proposition is illustrative of the arbitrary nature of business valuations, as recognized in a number of court decisions:

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[41] *Supra* note 39, at 2913.

[42] R.S.C. 1952, c. 148, as am. by S.C. 1970-71-72, c. 63.

[43] *Johnston* v. *M.N.R.*, [1948] C.T.C. 195 at 202, 203 (S.C.C.).

[44] *MacDonald Estate* v. *M.N.R.* (1959), 1 Tax A.B.C. 250 at 250; *Losey* v. *M.N.R.*, [1957] C.T.C. 146 at 153-54, 57 D.T.C. 1098 at 1102 (Ex.).

[45] *Connor* v. *The Queen*, [1978] C.T.C. 669 at 680, 78 D.T.C. 6497 at 6505 (F.C.T.D.).

[46] *Kaufman* v. *M.N.R.*, [1978] C.T.C. 2201 at 2208 (Dubrule) (T.R.B.).

[47] *Stanfield* v. *M.N.R.*, [1979] C.T.C. 2093 at 2096 (T.R.B.).

> One point regarding goodwill on which everyone agrees is that there is no exact rule to be used in determining its value.[48]
> I cannot say, since the rate of capitalization to be used is a judgement call, that either expert is clearly wrong.[49]
> The personal goodwill indeed is not commercial and transferable. The problem is to state a percentage. The Board thinks it is equitable to value personal goodwill of the appellant at least at 40%.[50]

VIII. SUMMARY

Over time, the courts have developed a number of principles regarding the interpretation of the law but have been unable to refine some of the arbitrary aspects of business valuation. Since the courts have been given little guidance from legislators, they have relied on accounting authorities and the opinions of expert witnesses. In this regard, they have stated that only qualified appraisers will be accepted as experts. Where two experts' opinions differ, one member of the Tax Review Board felt justified in making a compromise decision. A compromise decision clearly leads to injustice in our taxation system as there is no opportunity for the better argument to win.

The courts have held that the burden of proof in valuation decisions that involve questions of fact is on the taxpayer. It seems to have been difficult for the taxpayer to discharge the onus of disproving the valuation of Revenue Canada. The study suggests that a possible reason for this difficulty is that valuations are in part arbitrary; consequently, the taxpayer is unable to disprove Revenue Canada's valuation to the extent it is based on an arbitrary assumption in the valuation model.

APPENDIX

The tribunal-determined valuations are examined and presented by means of a frequency distribution. The range of the frequency distribution is the taxpayer's contended value and Revenue Canada's contended value. The tribunal decisions have been standardized over a range from 0.000 to 1.000 with the lower boundary representing the taxpayer's value and the upper boundary indicating Revenue Canada's value. This standardization removes size as a variable. Throughout this appendix, the transformation of the tribunal-determined value will be referred to as the "standardized judicial value". For each observation the standardized judicial value is calculated as follows:

$$\text{Standardized Judicial Value} = \frac{JV - TP}{RC - TP}$$

where:

JV = the tribunal-determined value
TP = the taxpayer's contended value
RC = Revenue Canada's contended value

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[48] *Ducharme* v. *M.N.R.*, [1978] C.T.C. 2562 at 2582 (Tremblay) (T.R.B.).
[49] *Mersereau* v. *M.N.R.*, [1977] C.T.C. 2412 at 2420 (Dubrule) (T.R.B.).
[50] *Cameron* v. *M.N.R.*, [1978] C.T.C. 3148 at 3153 (Tremblay) (T.R.B.).

The standardized judicial value represents the ratio of the difference between the tribunal's value and the taxpayer's value to the total range of the dispute. For example, assume:

Taxpayer's contended value = $1,000
Revenue Canada's contended value = $2,000
Tribunal-determined value = $1,500

Substituting these amounts in the above formula yields:

$$\text{Standardized Judicial Value} = \frac{1{,}500 - 1{,}000}{2{,}000 - 1{,}000} = \frac{500}{1{,}000} = .5$$

This is midpoint on the frequency distribution and represents a compromise decision. If the decisions are clustered around a value of 1.000 it indicates that the taxpayers' values are not being accepted by the courts and may imply that taxpayers are unable to discharge the burden of proof placed upon them by the courts. If the decisions are clustered around a value of 0.000 it will indicate that the tribunals are confirming the taxpayers' valuations.

TABLE 1

FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE OVER RANGE OF DIFFERENCE BETWEEN TAXPAYER'S CONTENDED VALUE AND REVENUE CANADA'S CONTENDED VALUE

Standardized Judicial Value	Number	Percentage	
0.00 – 0.05[a]	33	26.4	
0.06 – 0.15	3	2.4	
0.16 – 0.25	1	0.8	33.6
0.26 – 0.35	2	1.6	
0.36 – 0.45	3	2.4	
0.46 – 0.55[b]	4	3.2	
0.56 – 0.65	3	2.4	
0.66 – 0.75	7	5.6	
0.76 – 0.85	8	6.4	63.2
0.86 – 0.95	5	4.0	
0.96 – 1.00[c]	56	44.8	
Totals	125	100.0	

[a] In all 33 valuations the tribunal's value equalled the taxpayer's value.
[b] In 3 valuations the tribunal's value equalled the compromise value of 0.5.
[c] In 55 valuations the tribunal's value equalled Revenue Canada's contended value.

This table indicates that in the majority of the cases observed, the tribunal-determined value was closer to Revenue Canada's contended value than the taxpayer's contended value.

TABLE 2

RELATIVE FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE BY SIZE OF INCOME INCLUSION*

	Standardized Judicial Value						
Income Inclusion	0.00-0.10 %	0.11-0.25 %	0.26-0.75 %	0.76-0.90 %	0.91-1.00 %	Row %	Totals
less than $15,000	34.8	–	21.8	–	43.4	100.0	(23)
$15,000 – $30,000	29.2	–	8.3	8.3	54.2	100.0	(24)
$31,000 – $50,000	47.8	4.3	8.7	4.3	34.9	100.0	(23)
$51,000 – $75,000	10.5	–	26.3	15.8	47.4	100.0	(19)
$76,000 – $200,000	31.6	–	10.5	10.5	47.4	100.0	(19)
greater than $200,000	12.5	–	18.8	12.5	56.2	100.0	(16)
Total Survey	29.0	0.8	15.3	8.1	46.8	100.0	(124)[a]

*Income inclusion has been defined as the change in taxable income (including future years), change in gift amount (gift tax), or increase in assessed value of estate (estate tax and succession duties).

[a] One decision had insufficient data to determine the amount of income inclusion.

This table indicates that the chance of a taxpayer's success is small where the income inclusion is greater than $200,000. This may result from a taxpayer's willingness to dispute a large assessment (perhaps without the benefit of strong evidence supporting his valuation) because the litigation costs are small compared to the potential benefits.

TABLE 3

RELATIVE FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE BY LEVEL OF TRIBUNAL

	Standardized Judicial Value						
Level of Tribunal*	0.00-0.10 %	0.11-0.25 %	0.26-0.75 %	0.76-0.90 %	0.91-1.00 %	Row %	Totals
S.C.C. and F.C.A.	33.3	–	–	33.4	33.3	100.0	(6)
Ex. and F.C.T.D.	32.2	–	10.7	7.1	50.0	100.0	(28)
T.R.B. and I.T.A.B.	27.5	1.1	17.5	8.8	45.1	100.0	(91)
Total Survey	28.8	0.8	15.2	9.6	45.6	100.0	(125)

*The following abbreviations have been used:

S.C.C. = Supreme Court of Canada
F.C.A. = Federal Court of Appeal
Ex. = Exchequer Court of Canada
F.C.T.D. = Federal Court, Trial Division
T.R.B. = Tax Review Board
I.T.A.B. = Income Tax Appeal Board

It appears that a greater proportion of the results favour Revenue Canada's position in the higher courts (that is, in the standardized judicial value range from 0.76 – 1.00).

TABLE 4

RELATIVE FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE BY JUSTICE OR MEMBER

Justice or Member	Standardized Judicial Value 0.00-0.10 %	0.11-0.25 %	0.26-0.75 %	0.76-0.90 %	0.91-1.00 %	Row %	Totals
With 5 or more valuations:							
A	33.3	4.8	33.3	4.8	23.8	100.0	(21)
B	30.0	–	–	20.0	50.0	100.0	(10)
C	44.4	–	–	–	55.6	100.0	(9)
D	11.1	–	11.1	44.5	33.3	100.0	(9)
E	37.5	–	12.5	–	50.0	100.0	(8)
F	–	–	20.0	20.0	60.0	100.0	(5)
G	40.0	–	–	–	60.0	100.0	(5)
H	40.0	–	–	–	60.0	100.0	(5)
Group Totals	30.6	1.4	13.9	11.1	43.0	100.0	(72)
All Others	26.4	–	17.0	7.5	49.1	100.0	(53)
Total Survey	28.8	0.8	15.2	9.6	45.6	100.0	(125)

It is difficult to generalize from these results due to the limited number of cases heard by each judge or member. It would appear, however, that some judges or members often choose a value between the range of the two contended values while others tend to choose one contended value or the other.

TABLE 5

RELATIVE FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE OVER TIME

Time Interval	Standardized Judicial Value 0.00-0.10 %	0.11-0.25 %	0.26-0.75 %	0.76-0.90 %	0.91-1.00 %	Row %	Totals
1949 – 1954	16.7	–	16.7	–	66.6	100.0	(6)
1955 – 1959	17.6	5.9	17.6	11.8	47.1	100.0	(17)
1960 – 1964	40.9	–	13.7	4.5	40.9	100.0	(22)
1965 – 1969	25.0	–	20.0	–	55.0	100.0	(20)
1970 – 1974	40.7	–	11.7	7.5	40.7	100.0	(27)
1975 – 1979	21.2	–	15.2	21.2	42.4	100.0	(33)
Total Survey	28.8	0.8	15.2	9.6	45.6	100.0	(125)

It is again difficult to draw any conclusions regarding the change in valuation decisions over time. There is a possible trend towards discounts from Revenue Canada's contended value. Perhaps this is due to the existence of the "family control" concept that existed under the *Estate Tax Act*, S.C. 1958, c. 29, as am. by S.C. 1970-71-72, c. 43. That is, minority discounts were not allowed when valuing companies or shares for estate tax purposes if the company was controlled by persons related to the deceased. Since these provisions have not been carried over to the *Income Tax Act*, R.S.C. 1952, c. 148, as am. by S.C. 1970-71-72, c. 63, some of the decisions relating to the *Income Tax Act* may reflect minority discounts from Revenue Canada's valuation.

TABLE 6

RELATIVE FREQUENCY DISTRIBUTION OF STANDARDIZED JUDICIAL VALUE BY TYPE OF CASE

Type of Case	Standardized Judicial Value						
	0.00-0.10 %	0.11-0.25 %	0.26-0.75 %	0.76-0.90 %	0.91-1.00 %	Row %	Totals
Valuation of Shares:							
Restrictive Agreements	42.9	–	–	–	57.1	100.0	(7)
Received for Services or Property	40.0	–	13.3	–	46.7	100.0	(15)
Minority Interests	31.2	6.2	25.0	18.8	18.8	100.0	(16)
Upon Sale – Payment for Shares or Services	80.0	–	–	–	20.0	100.0	(5)
Price Adjustment Clauses	–	–	–	25.0	75.0	100.0	(4)
General Valuation	8.3	–	16.7	20.8	54.2	100.0	(24)
Valuation of Businesses:							
Goodwill on Purchase	42.1	–	21.1	–	36.8	100.0	(19)
Goodwill on Sale	17.9	–	14.3	10.7	57.1	100.0	(28)
Partnership Goodwill	40.0	–	–	–	60.0	100.0	(5)
General Valuation	50.0	–	50.0	–	–	100.0	(2)
Total Survey	28.8	0.8	15.2	9.6	45.6	100.0	(125)

As indicated in Table 6, the type of case seems to have a major role in whether or not the tribunal's value approximates either Revenue Canada's or the taxpayer's contended values. It should be noted that the greatest number of decisions where appeals were allowed *in part* occurred in the areas of the valuation of minority share interests, general valuation of shares and general valuation of businesses. A large portion of cases dealing with the value of shares received for services or property (either upon receipt or sale) were decided in favour of the taxpayer.