Minority Report: A Deeper Dive

These materials were prepared by Jane M. Reid of Jenkins Marzban Logan, Lucas Terpkosh CPA, CA, CBV, of Blair Mackay Mynett, and Todd R. Bell of Basran Robin & Bell (Vancouver) for presentation at CLE Advanced Financial Issues in Family Law conference on May 19, 2022. This paper was also made possible with the assistance of Caitlin C. Heit and Shannon Beebe.

I. Introduction

Picking the exact minority discount that everyone can agree on every single time is as easy as having a room of people agree to what amount of salt is perfect every time. It is art, loosely based on science. There is an element of subjectivity in play. And, of course, the certified business valuator (the "CBV") enjoys a great deal of discretion in selecting the appropriate discount in accordance with their experience and knowledge.

In this paper, we seek to comprehensively cover the issues relating to minority discounts from the perspective of the CBV, CRA and family law counsel.

In executing this task, we have looked to the CBV to opine, considered CRA bulletins, and referenced case law.

We hope the following is helpful.

II. Overview from the CBV's Perspective

A. The Concept and Purpose of Minority Discounts

Where less than a controlling interest (i.e., 50% or less of the voting entitlement) in the shares of a company or interest of a partnership is being valued, it is often appropriate to provide a discount from the pro rata or ratable value to reflect the disadvantages of owning other than a controlling interest in an entity. Specifically, a minority owner cannot usually (i.e., unilaterally):

1. Control the operations and strategic direction of a business;
2. Sell, liquidate, dissolve or recapitalize the business;
3. Declare distributions to owners;
4. Change key documents such as the articles of incorporation or bylaws;
5. Hire or fire management and establish management compensation;
6. Have the business purchase or divest assets.

Given the lack of control, an arm's length purchaser will usually require a reduction to the pro-rata *en bloc* value of an entity in order to purchase a minority interest. The quantum of a minority discount depends on many factors including, but not limited to, the following:

1. Applicable incorporating statutes. A company's articles of incorporation and bylaws can contain any number of possible provisions that can impact the relative degree of control, or lack of it, for any stock or partnership interest. For example, a company may include

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

the requirement for supermajority approval for certain actions in their articles of incorporation, instead of simple majority.

2. Existence and provisions of shareholder, partnership, co-owner and similar agreements. These agreements can contain any number of possible provisions that can impact the relative degree of control, or lack of it, for any ownership interest. For example, the agreements could include a clause that prevents any ownership interest from being sold to a third-party without the prior written consent of the other owners, which may be withheld for any reason.

3. Size of the ownership interest being valued relative to the size of the other ownership interests. For example, a minority discount for a 40% interest can vary significantly depending on whether the remaining 60% is owned by a single shareholder or three different shareholders each owning a 20% interest.

4. Relationships between the existing owners and how those relationships impact the price that a notional purchaser acting at arm's length would be willing to pay for the ownership interest in question.

5. History and quantum of distributions paid out of the entity being valued. For example, regular distributions increase the liquidity of an investment as the owner is able to receive a return on their investment over and above any appreciation in the underlying ownership interest.

6. Whether group or family control exists.

7. Various other factors.

In general, any provisions contained in a shareholder, partnership or joint venture agreement that reduce the restrictions and limitations attached to a less-than-a-controlling interest will result in a smaller minority discount than would otherwise be the case. In addition, the size of the various ownership interests of an entity may give rise to special interest purchasers. For example, two special interest purchasers likely exist in the case of three owners each having equal ownership interests: the acquisition of a 1/3rd ownership interest by either of the other two owners would result in the acquirer gaining control of the entity (i.e., the acquirer's ownership interest would increase from 1/3rd to 2/3rds, thus resulting in a control position). The foregoing could result in a "bidding war" for the subject shares, thus decreasing (or even eliminating) the quantum of the minority discount to be applied.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

III. Overview from CRA's Perspective

A. Minority Discounts – From the Perspective of the Canada Revenue Agency

The Canada Revenue Agency's Information Circular 89-3 entitled "Policy Statement on Business Equity Valuations" includes a discussion of factors to consider when preparing valuations of closely-held corporations for income tax purposes and assessing whether family or group control exists.

Family Control

According to IC 89-3, persons who are common-law partners or persons who are connected by blood relationship will be considered to have group control, provided there is no contrary evidence that they did not act in concert. In a situation where the existence of family control is recognized, the Canada Revenue Agency will employ a ratable valuation for each family group member's shares (i.e., no discount).

Group Control

According to IC 89-3, with regard to control by a group of shareholders dealing at arm's length, the criteria necessary for acceptance of claims of group control will include:

1. A written agreement under which all the shareholders in the group relinquish their rights to vote and to sell their shares independently at all times; or

2. Provision in the corporate letters patent, memorandum of association or the bylaws restricting individual rights to vote and to sell their shares independently at all times; or

3. Permanent release of the individual shareholder's rights by giving of an irrevocable proxy to a designated person to vote and to sell the shares as he/she sees fit on behalf of all the shareholders in the group; or

4. A pattern of conduct to demonstrate that the shareholders acted collusively in all matters relating to the control of the corporation.

In order to determine whether a certain pattern of conduct is indicative of collusive action in all matters relating to control, the following actions may be undertaken individually or in any combination:

1. Shareholders' and directors' minutes may be examined to determine the extent of consultation among the group.

2. A review of remuneration may be made to ensure that all members of the group were treated fairly.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

3. Interviews with members of the group may be held to determine the role played by each member.

4. Details of actual purchases and/or sales made by the claimants may be examined.

Where the Canada Revenue Agency is satisfied that the documentation provided indicates a consistent pattern of group control, it will apply a ratable valuation for each member's shares, and not apply a minority discount.

IV. Overview from the Lawyer's Perspective: Key Decisions on Minority Discounts

While similar to the factors that the CBV might look at, there are subtle differences the lawyer considers.

A. The Factors

The key concepts that counsel often look to in first exploring the issue of the minority discount – whether the smaller or greater discount is favourable to the client – should be as follows[1]:

1. The size of the shareholding compared to other shareholders. Generally speaking, the greater the size of the minority shareholding, the lower the discount. The CBV is not normally called upon to determine beneficial vs. legal interest, so as a first step there must be a determination of the actual interest in issue, with secondary calculations if necessary, through the addition of further extraordinary facts and assumptions.

2. The relationship between the shareholders. The relationships between shareholders can affect the extent of the minority discount. For example, if the company is controlled by a group of minority shareholders who act in concert in voting matters, it may be argued that there should be no minority discount applied to the value of the shares of a member of that group if the group collectively controls the corporation. Clearly, this arises often where a spouse is but one shareholder amongst others within a family held company. Special consideration ought to be given to the manner in which the group acted prior to separation as well as post.

3. Impact of provisions of the shareholder's agreement. If there are provisions in the shareholders' agreement that provide for liquidity of a minority interest (such as the option to sell the shares to existing shareholders or back to the company), the discount is reduced, all else equal.

[1] Taken from (in parts verbatim), and credit due to, the helpful website of the people at Fuller LLP (Toronto).

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

4. Provisions in the articles of incorporation and statutory rights providing protection to the minority interest. These protections represent reduced risk, and therefore reduce the discount.

5. Discounts implicit in prior sales of shares in the corporation. Prior sales can set precedents as to the appropriate discount for minority shares. This comes up in sales to other arm's length investors but also often where there have been inter-generational holdings. In the latter case, what generation one (gramps, or G1) was bought out for by Dad (G2), will inform the way son (spouse in this fact pattern, or G3) will likely be treated.

6. Past history of dividends paid on the shares. A greater payment history of dividends indicates both a return on investment and a reduction of risk associated with the shares, and therefore lowers the discount.

7. The shareholder's involvement in the business. If a minority shareholder is involved in the business (e.g. on the management team, member of the Board of Directors, etc.), the discount is generally reduced.

8. Court decisions regarding oppressed shareholders. When the Court finds that a minority shareholder has been oppressed by the majority (meaning the court has found that the controlling shareholder has acted against the interests of the minority shareholders), a minority discount is typically not applied.

B. The Case Law in British Columbia

Minority discounts have long been recognized in family court as a proper deduction to consider. However, as is the usual way, they are treated within the contextual milieu of the family law proceeding. Often, the shareholding arises in situations where other family members are the other shareholders.

In this paper we open with ***Halpin v. Halpin***, [1996] B.C.W.L.D. 2930, and then survey the cases of note since.

In ***Halpin,*** a dispute about drug stores or at least the shares of corporations which operated them, the Court of Appeal made the common-sense comment that minority discounts were to be considered on a case-by-case basis having regard to the facts surrounding the acquisition and ownership of the shares:

> 32 The question as to whether to apply a minority discount in particular circumstances is a question of fact. The trial judge explained his refusal to apply a minority discount, saying that "[s]uch a discount would permit [Mr. Halpin] to pay less than the fair market value while acquiring the outstanding interest and retaining de facto control" (at 21). This is a correct statement with regard to the shares of CHHL and THHL, but not when it is the value of the shareholdings of those companies that are being considered. Mr. Halpin was

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

> not acquiring de facto control of the companies that operate the drugstores, either directly or indirectly. After the acquisition of Ms. Nicholson's interest in the holding companies, he and Mr. Smith were, in effect, equal partners in the four drugstores. Neither had control.

And, unsurprisingly, the court requires some evidentiary basis upon which to make the finding. It is not open to the court to make assumptions: see ***Santelli v. Trinetti***, 2019 BCCA 319 at para. 91. In ***Santelli,*** the court was not provided any evidence about the nature of the shareholdings vis-à-vis the larger context of other shareholders. The offending comment by the trial judge appears to have been a comment that was not based upon a submission from either party but rather an independent observation from the bench.

That is not to say the evidence must be perfect. In ***Drinkall v. Drinkall***, 2019 BCSC 1025, the court received expert evidence from a CBV but who had been provided information from the parties, including their oppositional views on the value of the underlying assets held by the company. Nevertheless, the court was able to make a conclusion on both the values of the underlying assets and the appropriate minority discount. In both cases, less so on the issue of the minority discounting, the "split the difference" approach appears to have been the least unfair and was thus used by the judge.

Building upon the comment in ***Halpin*** that each case turns on its own facts, ***Parton v. Parton***, 2018 BCCA 273 delivers that concept and its application in spades. It also serves as a sobering reminder to ensure that the proper evidence is adduced.

Parton turned on intention, specifically the future intention of Doug Parton, and his (alleged) plans to hold onto the shares and eventually gift them to his nephew. Given that (alleged) plan, Mr. Parton argued that a steep minority discount of 35% ought to apply.

Justice Butler (then of the trial court) disagreed, as canvassed below and upheld by the Court of Appeal:

> **Valuation of Family Property and Excluded Property**
>
> 17 The first issue the judge addressed was the value of Mr. Parton's WPA shares. The parties had jointly retained an expert, who opined the WPA shares had a fair market value of $602,000 with no minority discount applied and a fair market value of $391,000 with a 35 per cent minority discount applied. The valuation of the WPA shares with no minority discount was based on the assumption that Doug Parton wants to sell his interest in WPA. The valuation with a minority discount was based on the assumption that Doug Parton does not want to sell his WPA interest.
>
> 18 The judge summarised the expert evidence and Mr. Parton's position that a 35 per cent minority discount should apply based on Doug Parton's evidence that he did not want to sell his WPA shares and intends to give them to Spencer Parton. However, he rejected this position for three reasons. First, he concluded, Doug Parton would be willing to sell his WPA shares if it would benefit him. Second, the sale of the WPA assets or shares would be in Doug Parton's best interests. Third, the possibility of the Parton family holding on to WPA depended on Mr. Parton successfully

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

arguing that his WPA shares would be reapportioned entirely in his favour, which argument the judge later rejected.

19 In explaining his reasoning, the judge commented unfavourably on Doug Parton as a witness. He did not accept any of Doug Parton's evidence at face value and found that he had no settled intention to give his WPA shares to Spencer Parton. Based on the whole of the evidence, he went on to find Doug Parton would make decisions based on his own interests, which would be to sell his WPA shares, noting that WPA is an unprofitable business "by quite a large magnitude". He also noted that Doug Parton's share of WPA's value could be used for some other productive purpose.

20 Taking into account the foregoing, the judge concluded that a minority discount did not apply, the current value of Mr. Parton's WPA shares was $602,000, and their value in 1998, when they were gifted to him, was $179,000, which, by reason of s. 85(1)(b.1) of the Family Law Act, was excluded property. He decided there was no unfairness that required division of the $179,000 in excluded property and valued Mr. Parton's WRPC shares at $211,000, of which $76,000 is excluded property. He also identified other excluded property, including Mr. Parton's shareholder's loan of $409,304, some RRSPs, banks accounts and a car, as well as a portion of Ms. Parton's RRSP earned prior to commencement of the relationship.

21 Overall, the judge found there was approximately $1,500,000 in non-RRSP family property for division. In addition, there was approximately $200,000 in family property RRSPs, which the judge later equalized.

* * *

Did the judge err by failing to apply a minority discount to Mr. Parton's WPA shares?

49 Mr. Parton submits that the judge failed fully to consider whether Doug Parton agreed to give his WPA shares to Spencer Parton and, therefore, whether a minority discount should apply to their valuation. In particular, he says, the judge failed to consider the fact that Ms. Parton's lawyer did not challenge Doug Parton's evidence of an agreement; failed to consider Spencer Parton's corroborating evidence regarding the agreement; and drew inferences unsupported by facts regarding Doug Parton's future conduct. According to Mr. Parton, each of these errors contributed to the judge's decision not to apply a minority discount in valuing his WPA shares, which was a palpable and overriding factual error. In his submission, given the importance of the minority discount to their valuation, it was incumbent upon him to account for all of the relevant evidence on the point, but he failed to do so.

50 In advancing this submission, Mr. Parton concedes that the alleged agreement between Doug Parton and Spencer Parton is not legally binding. Nevertheless, he says, properly considered, the evidence does not support the judge's conclusion that Doug Parton would sell his WPA shares if, and when, it is in his financial interest to do so. Rather, given the family history and the informal agreement, as well as the appreciating value of the ICBC Autoplan licence, he submits, the only reasonable conclusion available was that Doug Parton would not sell his WPA shares regardless of what he (Mr. Parton) did with his own WPA shares. He goes on to submit that, had the judge made this finding, as he should have, a minority discount would apply to their valuation.

> 51 I see no merit in this submission.
>
> 52 The judge's findings that Doug Parton would sell his WPA shares if, and when, it would benefit him and that selling them would be in Doug Parton's best interests are amply supported on the evidence for reasons the judge clearly and fully articulated. Among other things, as he pointed out, Doug Parton testified only about possibilities, did not describe any settled intention regarding his future dealings with his WPA shares and did not say that he would give them to Spencer Parton. Faced with this testimony, there was no need for Ms. Parton's counsel to challenge Doug Parton's bald assertion that he had an oral agreement with Spencer Parton. In substance, he made no such claim warranting a direct challenge. Accordingly, the "rule" in *Browne v. Dunn* [(1893), 6 R. 67 (U.K. H.L.)] requiring counsel to give notice to a witness whom the cross-examiner intends later to impeach on a point was not engaged: see *North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2018 YKCA 6 (Y.T. C.A.) at paras. 15-25.
>
> 53 Nor is there any reason to believe the judge ignored Spencer Parton's evidence with respect to his alleged agreement with Doug Parton. The fact that a judge does not discuss all of the evidence adduced on a point does not mean that he or she ignored it. A judge is not obliged to identify and discuss every piece of evidence related to factual deliberations in reasons for judgment. Rather, a judge must show that he or she grappled with the substance of the live issues and, on appeal, the reasons will be considered in the context of the record: *Kakavelakis v. Boutsakis*, 2017 BCCA 396 (B.C. C.A.) at para. 46.
>
> 54 In my view, the judge's reasons clearly demonstrate that he grappled with the live issue of whether Doug Parton did not want to sell his WPA shares because he intends to give them to Spencer Parton. Doug Parton did not testify to this effect and nothing in the surrounding circumstances compelled such a conclusion. Considering the absence of any formal arrangement to implement the alleged agreement, the unprofitable nature of WPA and the underlying value of the ICBC Autoplan licence, the inference that Doug Parton would want to sell his WPA shares if, and when, it would benefit him was available on the evidence and entirely reasonable. Spencer Parton's personal beliefs and expectations on the matter were of little, if any, relevance.
>
> 55 Mr. Parton's position that a minority discount should apply to his WPA shares is premised on a finding that Doug Parton would not want to sell his WPA shares because he intends to give them to Spencer Parton. Given that the judge made no such finding and seeing no error in this regard, I would not give effect to this ground of appeal.

For another example of a close look at the inter-familial dynamics informing the court's decision, see ***A. (B.J.) v. A. (W.A.)***, 2008 BCSC 1319.

If your client simply disagrees with the expert finding on the minority discount and believes that the mere fact of being a minority shareholder will turn the tide, consider a short review of ***Hill v. Hill***, 2016 BCSC 2248 wherein a speculative future dispute went nowhere:

> 105 Mrs. Hill argues that as she owns only one of three common shares she does not have a controlling interest. She argues that the other two shareholders could be unwilling to purchase her interests or might be unwilling to join her in sale of the shares as a block. These considerations are speculative. There is no evidence that the shareholders are deadlocked. There are three equal

> shareholders. Thus, Mrs. Hill is not a minority shareholder in a company with a single majority shareholder who controls the company.

Reid v. Reid, 2014 BCSC 1691 (Verhoeven) is a good example of the appropriate expert evidence, supported by the logical evidence of the parties, properly defending a minority discount:

> a) Minority Discount
>
> 192 Collectively, the parties held 21% of the shares of Cityfone. PwC applied a 20% minority discount in determining the value of those shares. The shares were therefore discounted by $104,000. Ms. Reid says that should not have been done.
>
> 193 The Court of Appeal in *Halpin v. Halpin* (1996), 27 B.C.L.R. (3d) 305, 26 R.F.L. (4th) 30 (B.C. C.A.), has said that whether a minority discount should be taken is a matter of fact to be assessed in each case.
>
> 194 Mr. Boyer made the obvious point that the reason for applying the minority discount was because a notional purchaser would not necessarily pay the full rateable value of the shares because the shares would not provide control of the company. I note that Mr. Payne made no comment on the appropriateness of the minority discount.
>
> 195 While the sale of the company was always an exit strategy, at the time of the separation agreement no buyer was waiting in the wings and no sale was imminent. The financial position of the company was not rosy: it had a modified going concern warning on the audited financial statements. A minority discount was applied to the strike price of the options granted.
>
> 196 I do not think that the minority discount was inappropriate under the circumstances.

Trevison v. Hellekson, 2008 BCSC 1560 is an example of the concept of minority discounting being applied to the value of a real property interest. Quoting *Todd v. Freeman*, 2005 BCCA 519, the court confirmed such an approach was permissible but that it must be supported by some expert evidence.

> B. Should Ms. Trevison's interest in the property be valued at one-quarter of the appraised fair market value or should it be discounted?
>
> 68 Ms. Trevison argues that what is to be valued is the fair market value of her one-quarter interest in the property. She says that that interest would be subject to a "minority discount" (using the terminology from corporate law) because anyone who buys Ms. Trevison's interest would be sharing ownership with her family.
>
> 69 Mr. Hellekson argues that the *Partition of Property Act*, R.S.B.C. c. 347 should notionally be applied. That Act, it is argued, would allow the wife to obtain an order for the sale of the whole property. Therefore, there should be no discount applied.
>
> 70 That argument was rejected by the Court of Appeal in *Todd v. Freeman*, 2005 BCCA 519 (B.C. C.A.). The Court of Appeal upheld the trial judge's application of a discount when valuing

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

an undivided interest in a piece of real estate owned by the wife and her brother as tenants in common.

71 However, in *Todd v. Freeman* the expert opinions specifically addressed the discount to be applied whereas the appraisal reports adduced by Ms. Trevison in the case at bar do not.

72 Further, no evidence was led as to whether Ms. Trevison's family might be interested in buying her interest.

73 Given the absence of evidence I do not think a discount should be applied. Therefore Ms. Trevison's interest in the Camp Lourdes property should be valued at one-fourth of the $1.1 million appraised value for the property, namely $275,000.

McKinney v. McKinney, 2008 BCSC 709 is a good example of the court wrestling with many factors in play simultaneously: approving the approach taken by one expert over the other yet still adjusting based on disagreement with the discretion exercised by the expert.

vi) Shares in MEL

96 Mr. McKinney is a registered 30 percent shareholder in MEL. The parties each called an expert regarding valuation of these shares. The significant difference between the opinions of the two experts was the appropriate size of the minority discount.

97 Ms. McFarlane, who testified at the request of the plaintiff wife, valued Mr. McKinney's shares at $173,000, using a minority discount of 7.5 percent. She thought the appropriate range for the minority discount was zero to 15 percent.

98 Mr. Barbour, who testified at the request of the defendant husband, valued Mr. McKinney's shares at $43,650. He applied a 75 percent minority discount.

99 Mr. Barbour testified that the usual minority discount for a 30 percent shareholding is 30 percent to 50 percent. In his opinion, a 75 percent discount is appropriate on the basis of the following factors:

(a) James McKinney has de facto control;

(b) MEL has not distributed any excess cash to its shareholders despite advice to the contrary;

(c) any prospective purchaser of the 30 percent interest will not achieve control, and consequently cannot compel MEL to make any distributions of earnings;

(d) as a practical matter, Mr. McKinney's 30 percent interest is likely unsalable at any price to any arm's-length purchaser;

(e) there is not a special purchaser over the shares; and

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

> (f) MEL has poor economic performance and has an adverse tax position as a result of not paying out the excess cash.
>
> 100 While neither Doris nor William McKinney could obtain a controlling interest by buying Mr. McKinney's shares, if they worked together they could obtain a controlling interest.
>
> 101 The selection of the amount of an appropriate minority discount is a difficult exercise of judgement. In my view, the factors described by Mr. Barbour demonstrate that a substantial minority discount is appropriate, but 75 percent is too extreme. In the circumstances, a minority discount of 50 percent is appropriate.

Finally, see ***Meyers v. Meyers***, 72 A.C.W.S. (3d) 319 (Low, J.) for an example where the shareholder's agreement was determinative. ***Williams v. Williams***, [1985] B.C.W.L.D. 3573 is a further example of where the mere fact of a minority holding is an insufficient basis for the discount, which is earlier but similar reasoning to that in ***Hill***, *supra*.

V. Review of the Treatment of Minority Discounts by Courts in Other Provinces <u>Not</u> Involving Family Businesses (See "Family Businesses" below)

A. <u>The Focus Elsewhere</u>

The other provinces are generally aligned with ours, but a review of them allows for the observation of:

1. The language used by the appellate courts;
2. Interesting factual issues which became material; or
3. A surprising approach on what seemed to have been the obvious answer.

Authority	Principle/Reasoning
Alberta	
Chateauvert v. Chateauvert, 2018 ABQB 2	**Principle**: Minority discounts in AB are typically 20-40%, which seems high compared to the 5-20% in BC (cf. *Earl-Barron*) **Related discounts with potential for impacting minority discount**: reduced liquidity (ease of share sale) and valuation method – ex. Net book value is used where the governing sale document (ex. Shareholder agreement) provides no value for goodwill, reducing the FMV of the shares. [360] Ms. Pisko noted that if fair market value were to be used to value Mr. Chateauvert's minority shareholdings, a valuator would need to consider whether a minority discount would apply, which is typically in the range of 20% to 40% off the *pro rata* value of the shares, although it could be either

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260
500 – 1155 West Pender Street
Vancouver, BC V6E 2P4
www.cle.bc.ca

	higher or lower. Other forms of discount that can reduce fair market value include a liquidity discount, which refers to the ease with which shares can be sold. While shares can be hypothecated and used as security for financing, in her experience, banks are reluctant to loan money on the strength of shares. She has been involved in matrimonial property negotiations in which the Net Book Value of shares was the valuation approach used for the purposes of share transmission. This usually occurs when there is a unanimous Shareholder's Agreement, Dealer's Agreement or Franchise Agreement where no value is provided for goodwill… [364] … Ms. Pisko opined that there is a restricted market when the transfer is of a minority shareholding and in this case the Shareholders' Agreement permitted BMW Monarch to repurchase Mr. Chateauvert's shares at any time at their Net Book Value. Also, a minority shareholder discount recognized the minority shareholder's inability to influence company operations, elect the Board and control the distribution of dividends. However, Ms. Pisko agreed that if the shares were valued on the basis of a notional *en bloc* sale, there would be no minority shareholder discount given that as a minority shareholder, Mr. Chateauvert would have received his *pro rata* share of the sale proceeds… [372] While Mr. Lawritsen agreed with Ms. Pisko's calculation of the Net Book Value of the shares as at BMW Monarch's 1995 and 1996 year-ends, he maintained that this was not an appropriate method to determine the value of the shares for the purpose of a matrimonial property distribution. However, he acknowledged under cross-examination that Mr. Chateauvert acquired his shares at their Net Book Value in 1987 and that the Share Purchase Agreement contained no reference to good will or "fair market value".
Saskatchewan	
Frank v. Linn, 2014 SKCA 87 (no control group)	Deference given: 46 He considered and distinguished *Halpin v. Halpin* (1996), 83 B.C.A.C. 241, [1997] 2 W.W.R. 745 (B.C. C.A.) and *Ganson v. Ganson* (1996), 17 O.T.C. 340 (Ont. Gen. Div.), where trial judges refused to apply a minority discount. In Halpin, the Court found that the shareholders would act in concert to obtain the best price. In Ganson, the husband was part of a family control group. The trial judge in the within appeal found no evidence that a control group would exist, once the shares were sold (see para. 85). This supported his conclusion that some minority discount should be applied to arrive at the proper share value.
Kassian v. Kassian, 2019 SKCA 101	74 The determination of fair market value of any particular piece of family property is a question of fact: *Ackerman* at para 25. A trial judge's determination that he prefers the opinion of one properly qualified expert over the opinion of another properly qualified expert with regard to that value is accorded great deference on appeal. The standard of review is palpable and overriding error: *Stelter v. Stelter*, 2012 SKCA 117 (Sask. C.A.) at para 31, (2012), 405 Sask. R. 63 (Sask. C.A.). 75 In this matter, the trial judge was faced with conflicting opinion evidence from two properly qualified experts. After considering those opinions, he determined he

	preferred Ms. Kassian's expert opinion that there should be no minority discount. In my view, the trial judge did not commit a palpable and overriding error in making this determination. This Court cannot interfere with the trial judge's refusal to apply a minority discount.
Waller v. Waller, [1998] 8 W.W.R. 96 (re: interest in a law firm)	51 Belmont Holdings Ltd. functions exclusively to provide management services and rental equipment to the partnership. Both experts assigned a 1980 value of $6,000 for the petitioner's interest in this company. As to the 1993 value of the shares, Mr. Schofield was $12,000 higher assigning a value of $116,000 versus $104,000 by Mr. Turnquist. The discrepancy, according to Mr. Turnquist, was due to the fact that Mr. Schofield relied on internally-generated statements. Some questions were directed to the fact that Mr. Turnquist didn't allow for a minority discount when the petitioner held only a minority interest in the company reflective of his partnership interest. In any event, Mr. Schofield did not factor in a minority discount either. In my view it was appropriate to ignore the minority discount in the circumstances, especially since Tom Waller testified that insofar as the partnership was concerned the partners made decisions by consensus, that is by the unanimous consent of the partners, notwithstanding differences in their respective interests.
Rosenau v. Rosenau, 2004 SKQB 275 (re: brutal shareholder agreement)	79 Mr. Turnquist did not consider the unanimous shareholders agreement when determining the value of the respondent's interest in Mid-Nite Sun Transportation Ltd., and disagreed with Mr. Ballantyne's opinion that the agreement was comparable to a minority shareholder discount. Mr. Turnquist endeavoured to estimate the fair market value having regard to the highest price attainable and did not assume that the respondent would sell or otherwise dispose of his interest in the company to obtain that value. He did, however, concede that there would be a very limited market for the sale of a one-sixth interest in the company. If, in an open market, someone was to express an interest in purchasing the respondent's shares, a minority discount would be expected. Mr. Turnquist's estimate of value could only be obtained if the respondent's shares were sold to a family member or, alternatively, if all of the shares in the corporation were sold *en bloc*. 80 When asked whether, absent the existence of the unanimous shareholders agreement, a minority shareholder discount would be appropriate in the case of the respondent's interest in Mid-Nite Sun Transportation Ltd., Mr. Ballantyne agreed that it would be a relevant consideration. There would be many pertinent factors to be taken into account including the percentage of ownership, the historical conduct of the shareholders acting in concert or otherwise, the relationship of the shareholders, as well as the relative age of the shareholders. While the range of such a discount is difficult to evaluate, Mr. Ballantyne was of the view that 20-30% would not be unreasonable. 81 The petitioner submits that for the purpose of this proceeding under *The Family Property Act*, the unanimous shareholder's agreement is not relevant. Although I agree that a 50% discount, based solely upon the provisions of the agreement is not appropriate, the existence of the agreement when taken together with the limited liquidity of the respondent's interest leads me to the conclusion that some discount should apply. The respondent cannot dispose of his shares without the consent of the other shareholders and even were that consent forthcoming, the market for a one-sixth interest in a family held corporation is small. The respondent can only attain the

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

	estimated value of his interest upon an *en bloc* disposition or upon a sale to another family member. 82 Accordingly, I have concluded that the value of the respondent's interest in Mid-Nite Sun Transportation Ltd., as determined by Mr. Ballantyne, should be discounted by 20%. This results in the value of the respondent's interest being $578,494 as of December 31, 2000 and $353,826 as of December 31, 1992.
Manitoba	
Lev v. Lev, [1992] W.D.F.L. 725 (no immediate sale)	**3. The Judge Erred in Confirming the Portion of the Reference that Minority Discount Applied to the Valuation of Certain Assets from 33.333% to 8.325%** 9 In reaching his decision, the master accepted that minority discounts are often appropriate, but also observed that each case must be looked at based on its own facts. He noted that in the open market in which Mr. Lev operated, the latter had never shown a loss by virtue of a minority interest ownership. Notwithstanding, he allowed a minority discount of 8.325 per cent, stating: "an open market while being objective must not be blind to the realities of the local conditions that make up that open market." The husband's expert insisted that there should be a 33.333 per cent discount applied to all of the underlying real estate assets in Jegray. The trial judge concluded that this finding was not consistent with the evidence of past experience and further held (34 R.F.L., at p. 419): "[T]here was no evidence that the husband would be required to sell any of his properties ... The possibility of the husband being forced to sell his properties is merely speculative." I agree. No error has been demonstrated in the decision to allow a minority discount rate of 8.325 per cent. Indeed, the weight of the evidence is against there being an allowance for any discount, but since no appeal was taken from this finding, the appeal on this point is simply dismissed.
R.R.A.G. v. S.N.G., 2000 MBQB 207 (Master on a reference)	**Principle**: Per authority from the MBCA in 1983, no minority discount should be applied to a 50% interest *where the purchaser already owns part of the company*, as the purchaser would then be obtaining a majority interest and should be expected to pay FMV. This is perhaps trite, but is appropriate to include here lest counsel conclude that a proper majority, i.e., >50% is required. Even where both experts recommended a minority discount be applied, the court found as a matter of law that a MD was inappropriate where the purchaser already owned 50% and was buying the wife's 50% interest (para. 82). Further despite the fact that the business was having difficulties (para. 69 – finding a high capitalization rate ameliorated this issue), the judge ruled that pursuant to the binding MBCA authority, no minority discount could be applied – although other MBQB judges had done so in 1992 and 1994, applying discounts of 5% and 8.3% under similar circumstances (para. 67): > [73] Fortunately in Manitoba our highest appellate court reviewed this area in *Kummen v. Kummen-Shipman* nearly two decades ago [(1983 1983 CanLII 3647 (MB CA), 2 W.W.R. 577]. Relying upon the seminal case in Canada heard by Mr. Justice Fulton (*Diligenti v. RWMD Operations Kelowna Ltd*. (1976) 1976 CanLII 238 (BC SC), 1 B.C.L.R. 36, 4 B.C.R.R. 134 S.C.) Monnin J. A. (as he then was) made the following analysis;

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260
500 – 1155 West Pender Street
Vancouver, BC V6E 2P4
www.cle.bc.ca

	"…Two brothers each own 49 per cent of the shares of the corporation. Their respective wives each own one share. In law we have a limited corporation but in fact we have what amounts to an equal partnership between two married couples who have had a falling out for more than ten years..." [74] Continuing on page 579; "It would appear that in true minority situations, either for dissolution or tax purposes or where an act of oppression has taken place at the expense of one shareholder, a discount is often granted to the purchaser in order to encourage a sale at a fair value of the shares. "The rationale behind such a discount in the price of a minority shareholder's interest is because such interest obviously does not carry with it the control of the corporation; rather it is to the contrary effect." [75] And on page 580 "Here if Harold buys Carl out, or vice versa, he will end up with 100 per cent control and is therefore not buying into a minority situation. On the contrary, he has an opportunity to buy complete control. That is the opposite of buying and ending up with a minority shareholder's situation. The principle that a minority shareholding has a value less than its proportionate part of the value of the total business has no application in the present situation and Hamilton J. erred when he so applied it. "To allow the purchaser to acquire these shares at a discount is to grant him an uncalled for bonanza and at the same time a commensurate loss to the vendor. This is not an equitable solution." [76] Perhaps the most succinct dissertation on this subject is on page 57 of the Ovens/Beach text referred to above; "The value of a 50 per cent interest in a private company in which the remaining 50 per cent is held by another shareholder, or by more than one shareholder dealing together as one, is probably 50 per cent of the value of the company as a whole. In this situation, the holder of a 50 per cent interest has no leverage. He does not have the power to direct the affairs of the company and he is not a minority shareholder. The success or failure of the shareholders to deal with this deadlock situation will be reflected in the value of the company as a whole."
Moore v. Moore, 2005 MBQB 67 (re:	52 Both experts limited their opinions to *en bloc* valuations. Neither expert's report addressed the issue of whether a willing buyer in a notional marketplace would pay the full 50% of the *en bloc* value for 50% of the shares of this closely held family run

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

speculative sale; akin to a latent tax argument)	business. The Master stated: "No argument was advanced as to a minority share discount and may not have been possible at any event at law." 53 In *Lev v. Lev*, [1992] M.J. No. 242 (Man. C.A.), Scott C.J.M. wrote on whether a minority discount should be applied to the valuation of certain assets. In that case the trial judge had found that: "There is no evidence that the husband would be required to sell any of his properties.... The possibility of the husband being forced to sell his properties is merely speculative." Scott C.J.M. agreed that no error had been demonstrated by factoring in whether the husband would have to sell his properties when considering whether the court should adjust value to reflect a minority discount. 54 I am not persuaded that the husband will be required to sell his shares in Canadian Woodworker in order to make the equalization payment. A minority discount will not be applied.
Ontario	
Earle-Barron v. Barron, 2012 ONSC 2837 (CanLII) (controlling shareholder, even if not on basis of shares)	Of note, a **minority discount** of only 10% applied to a wife's 1/3 interest in a trucking/expediting company, down from the owner's expert's opinion that 15% was applicable. The difference in value at the end of the day was only about $15k (para. 160) but the husband's valuator viewed the wife as the controlling mind of the business. The judge accepted that the wife, whom he found demonstrated "controlling tendencies" (para. 133), held the 2/3 shares owned by her biz partners in trust for them and ran the business on a day-to-day basis (para. 161), and accordingly accepted the lower discount applied by the husband's expert.
Blatherwick v. Blatherwick, 2015 ONSC 2606 (re: personal value/influence of the shareholder)	379 I do recognize that there is a possibility that Mr. Blatherwick might sell his shareholding interests in the Seasons Halloween Business to a third party, in which case this would likely attract a minority discount. However, it is necessary to keep in mind that Mr. Blatherwick has the largest share in Seasons Halloween Business and, in any one company; he has at least as great an interest as other shareholders. Further, any buyer may need his assistance to transition customers which he has dealt with directly for many years. 380 As a result, I conclude a minority discount is appropriate and I accept the lower minority discounts calculated by Mr. MacRae in his reports.
New Brunswick	
Khoury v. Khoury, [1994] W.D.F.L. 963 (re no immediate sale, dominant shareholder)	122 Mr. Low has applied a 20-25% discount while Mr. Blockman would have used 15%. A 15% discount would probably be more appropriate in view of the fact that the properties are not for sale in the immediate future and also because the husband is the managing partner administering the properties and that his advice in these matters is valuable to all the partners. I believe it would be easier for him to entice the other partners into a disposition. The literature and the evidence submitted lead me to downplay the size of the minority discount in these situations. See *Lev v Lev* [1992] 40 RFL 3d 404 (Man. CA) - where the Court of Appeal of Manitoba approved a discount of 8.325%. I accept the 15% discount taken by Mr. Blackman as appropriate in this case.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

Nova Scotia	
Nickerson v. Nickerson, [1983] W.D.F.L. 1204 (complete and utter mystery – there was no minority shareholder)	26 Of these two valuations, I am inclined to believe that the Doane Raymond valuation is the one which more closely reflects the true value of the shares. With respect to both valuations, I have expressed some of my doubts; others can be implied from the observations which I have made. I believe the only way in which this matter can be resolved is for me to exercise my best judgment and determine a share value; therefore, I set the total share value at $50,000. Although neither Mr. Nickerson nor Mr. MacKenzie allowed for a minority discount, I will discount the value of Mrs. Nickerson's minority interest by 20% in accordance with normal practice in these matters.

VI. Family Businesses

When it comes to a closely held family business, how do trial level courts across Canada determine whether to apply a discount for a minority interest and what, if any, should that discount be? To answer these questions, we surveyed all trial level decisions in each jurisdiction wherein the court referenced a "minority discount" or a "minority shareholder discount", and then narrowed down these findings to include only family law cases. We then reviewed each case to discern whether it involved a situation where one or both spouses were shareholders who owned an interest in a family owned business. We did not include cases where the family owned business was owned solely by the spouses. In total, we identified 13 reported cases in Canada that met this search criteria, each of which is discussed below. We note that some of these cases are duplicated above, but are here as part of a thematically connected cohort.

A. British Columbia

No Minority Discount Applied

1. ***Hill v. Hill***, 2016 BCSC 2248

Ms. Hill owned one of three shares in a corporation that owned a small commercial building. Her two siblings each owned one of the other two shares.

Ms. Hill's value in the company was primarily made up of a shareholder's loan due to her and a promissory note. There was no issue taken with the value of the real estate and there was only one valuation in evidence. The valuator did not apply a minority discount.

Ms. Hill's position was that the value of her interest in the corporation was less than valued by the valuator on the basis of a minority discount because she did not have a controlling interest. She argued that her siblings may be unwilling to purchase her interest or join her in the sale of the shares.

In assessing this argument, the court noted that there was no evidence of the shareholders being "deadlocked" and that Ms. Hill was an equal shareholder. She was not a minority shareholder with one majority shareholder who controlled the company.[2]

The court accepted the valuator's value.

2. ***Parton v. Parton***, 2016 BCSC 1528

Mr. Parton held a 50% interest in a business and his brother, Doug Parton, held the other 50%.

The parties both accepted the valuator's valuation, which included two values – one if Doug Parton wanted to sell his shares and another if he did not. Mr. Parton's position was that a minority discount should be applied to his shares. Ms. Parton's position was that there should be no minority discount.

The expert opined that, if Doug Parton did not want to sell his shares, then a 25% discount should be applied, and that another 10% should be applied for the lack of control if both shareholders were willing to sell their shares. Mr. Parton argued that Doug Parton's evidence was that he does not want to sell his shares and that he (Mr. Parton) intends to gift his shares to the parties' son. Ms. Parton refuted this evidence for a number of reasons.

The court stated that the only question was whether a discount should be applied because Doug Parton did not want to sell his shares. The court concluded that a discount was not appropriate for the following three reasons:

1. Doug Parton expressed some reluctance to sell his shares at the present time, but the court concluded he would be willing to do so if it would benefit him;

2. The sale of the company's assets or shares was clearly in Doug Parton's best interest; and

3. The possibility that the Parton family would keep the business was based on Mr. Parton being successful in having the court order that the value of the shares be reapportioned entirely in his favour because, if not successful, it would be practically impossible for Mr. Parton to make an equalization payment to Ms. Parton.[3]

<u>Minority Discount Applied</u>

1. ***McKinney v. McKinney***, 2008 BCSC 709

Mr. McKinney owned 30% of the shares in a family business. His father, James, owned 40%, his mother 30% and his brother 20%.

[2] *Hill v. Hill*, 2016 BCSC 2248 at para 105.
[3] *Ibid* at paras 25 and 32.

Mr. McKinney's father maintained the contracts for leasing farm property and selling product, and he wrote the cheques. Mr. McKinney took direction from his father and did not participate in decisions, including whether to declare dividends. His father caused the company to pay Mr. McKinney below market wages and charged the company below market rates for use of land that the McKinney's owned.[4]

The expert testified that the usual minority discount for a 30% shareholding is between 30% and 50%, but that in this case it should be 75% because:

1. Mr. McKinney's father had *de facto* control;

2. The company had not distributed any excess cash to its shareholders, although it had received advice to the contrary;

3. A purchaser of a 30% interest will not have control and so cannot compel distributions of earnings;

4. Mr. McKinney's 30% interest is not likely salable at any price to an arm's length purchaser;

5. There is no special purchaser for the shares; and

6. The company had poor economic performance and an adverse tax position as a result of not paying out the excess cash.[5]

The court stated that determining an appropriate minority discount was "a difficult exercise of judgement", and that while the factors the expert set out supported a substantial discount, 75% was too extreme.[6] The court found that a 50% minority discount was appropriate.

B. Alberta

No Minority Discount Applied

1. ***Peregrym v. Peregrym***, 2015 ABQB 176

Mr. Peregrym held 42.5% of a family company and his mother held 57.5%. The court found that Mr. Peregrym's mother had very little interest in the operations of the company.

Mr. Peregrym's shares were valued at a low of $1,630,000 and a high of $1,740,000 by an independent expert. The difference between the low and high values was whether notional tax on

[4] *McKinney v. McKinney*, 2008 BCSC 709 at para 62.
[5] *Ibid* at para 99.
[6] *Ibid* at para 101.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

disposition of assets was applied. The independent valuator stated that a minority discount may be applied to acknowledge the disadvantage of owning a minority shareholding.[7]

The court found that the Peregrym family had good relations and accepted the expert's evidence that in this case a minority discount should not be applied.[8] Additionally, a discount was not appropriate because the corporation's value was primarily found in cash, guaranteed investments, and land.

C. Manitoba

No Minority Discount Applied

1. ***Moore v. Moore***, 2005 MBQB 67

Mr. Moore held a 50% interest in a family business. Mr. Moore applied to oppose confirmation of portions of a Master's report on a marital property reference. This included the Master finding no basis for a minority discount to his interest in a family business. "

There had been two experts who provided opinion as to the *en bloc* value of Mr. Moore's interest. Neither expert opined on whether a buyer would pay 50% of this value for 50% of the shares in a closely held family business. The decision notes that the Master stated, "No argument was advanced as to a minority share discount and may not have been possible at any event at law."[9]

The court was not convinced that Mr. Moore would have to sell his shares to make the equalization payment and applied no minority discount.

D. Ontario

No Minority Discount

1. ***Ganson v. Ganson***, [1996] O.J. No. 3870 (O.S. C.J.)

Mr. Ganson held a one-third interest in two corporations, along with his mother and father, who held the remaining interest.

The court stated that it is common to apply a discount in such circumstances. This discount is frequently comprised of a combination of a minority discount and a marketability discount. The marketability discount refers to a limited market within which the shares may be transferred.[10]

[7] *Peregrym v. Peregrym*, 2015 ABQB 176 at para 222.
[8] *Ibid* at para 258.
[9] *Moore v. Moor*e, 2005 MBQB 67 at para 52.
[10] *Ganson v. Ganson*, [1996] O.J. No. 3870 (O.S. C.J.) at para 46.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca

Mr. Ganson's expert applied, what he said and the court agreed, was a "conservative discount of 15%" to Mr. Ganson's interest in the corporations.[11] Ms. Ganson's expert applied no discount. Among other reasons, Ms. Ganson's expert worked off the assumption that Mr. Ganson was not in a minority position, but rather was a member of a "control block"; he presumed that the three shareholders acted as one mind.[12]

The court found that Mr. Ganson was a key and significant part of the controlling block and thus a minority discount was not appropriate.

2. ***A.A. v. Z.G.***, 2015 ONSC 4397

The husband at one time held 98% in the company and his father 2%, but after restructuring a couple of times, he held 24% of the company and his siblings held the remainder. The husband claimed that his father, who once was a shareholder, continued to control the company to the exclusion of the other shareholders.

The husband's accountant applied a 30% minority discount to the value of the company as result of the company having a minority interest in several joint real estate ventures. He applied a further 10% discount to the husband's minority interest in the company.

The wife's valuator took no issue with the husband's accountant's value, but said there should be no discounts applied. While she accepted that, in the public market, general practice was to discount minority interests, in this case, it was a family company and there was no evidence of disagreement between the family members.

The court stated that discounting was a subjective exercise. In this case, the shareholders were close family members, there was no evidence of the intention to dispose of shares in the near future, and no evidence that family member's shares were treated differently. The court stated that a discount is not appropriate in the circumstances of a privately held family corporation.

<u>Minority Discount Applied</u>

3. ***Balcerzak v. Balcerzak*** (1988), 41 R.F.L. (4th) 13 (Ont. Gen. Div.)

Mr. Balcerzak held a 37.55% interest in a corporation in which his brother and father were also shareholders. After Mr. Balcerzak's father retired, Mr. Balcerzak and his brother carried on the business.

Both parties called an expert to opine on the value of Mr. Balcerzak's interest in the corporation. The court found that his 37.55% interest was worth $755,550. The parties disagreed as to whether a minority discount should be applied.

[11] *Ibid*.
[12] *Ibid* at para 47.

Mr. Balcerzak's expert suggested that a 30% minority shareholder discount should first be applied because, generally, minority shareholders do not have all the rights a controlling shareholder has. Once that was applied, Mr. Balcerzak's expert suggested that a further 40% marketability discount should be applied to the remainder of the value to account for Mr. Balcerzak's "inability or reduced ability to sell his shares quickly, at his discretion, with any amount of certainty and with minimum transactions cost."[13]

Ms. Balcerzak's expert's opinion was that there should be no discount. Ms. Balcerzak argued that the shareholders are family members, all of whom own less than 50%, so no one shareholder can act to the detriment of another. Additionally, the shares were not being offered for sale, nor was it likely that Mr. Blacerzak would ever sell his interest.

The court stated that the discount should not be very high where all the shareholders have similar minority shareholdings, especially where the shareholders are a close family who have worked together for many years and are likely to do so for many more years.[14]

The court applied a discount of 15%.

4. ***F. v. V.***, [2002] O.J. No. 3900 (O.N. S.C.)

The wife owned 20% of a holding company with her estranged siblings. The holding company held investments. The wife was not on the company's Board, had no control over the Board, and could not transfer her shares without the Board's approval.

The wife's valuator's opinion was that there should be a total discount of 40%. This discount was comprised of a liquidity discount because there was no market for the shares, as well as a minority discount because the wife did not have control or influence. The husband's valuator did not comment on this discount, but his counsel argued against a discount on the basis of CRA policy that presumes against a discount where the company is a family-controlled private company.

The court found that this company could not be described as a family-controlled company because the family as a whole was not making the decisions. In this case, the issues of liquidity and control needed to be considered. The wife could not control or direct the company, declare dividends, or cause the redemption or transfer of her shares. Additionally, it was found that there was no market for her shares with the only potential buyer being another family member. There was no evidence that was a possibility. The court applied a liquidity and minority discount of 40%.

5. ***Huck v. Huck***, [2004] O.J. No. 3652 (O.N. S.C.)

Mr. Huck and his brother each held 50% of a family company.

[13] *Balcerzak v. Balcerzak* (1988), 41 R.F.L. (4th) 13 (Ont. Gen. Div.) at para 24.
[14] *Ibid* at para 29.

Mr. Huck's expert discounted his shareholding on the basis that he and his brother each owned 50%, so there was a lack of control, along with a lack of ability to liquidate and lack of marketability.

The court discounted Mr. Huck's shareholding by 10%. Mr. Huck had no intention of selling, and the lower amount was to recognize that such discounts were usually applied.

6. ***McNamee v. McNamee***, 2010 ONSC 674

Mr. McNamee and his brother held shares in a corporation as a result of their father doing a corporate reorganization and estate freeze.

The parties' joint valuator opined on the value, which included a minority discount and a marketability discount. These discounts were on the basis that Mr. McNamee's father had financial control. The amount of the discount was not included in the reasons.

Both parties challenged the expert. Mr. MacNamee argued there was no value to his shareholding on the basis that he was powerless and his father would not sell, and no buyer would buy his shares so long as his father was in control. Ms. MacNamee disputed the value on grounds unrelated to the applied discount.

The court accepted the joint valuator's value.

E. New Brunswick

Minority Discount Applied

1. ***Fox v. Fox***, [1993] N.B.J. No. 188 (N .B. Q.B.)

Mr. Fox was a successful businessman who was involved in several enterprises with his father and two brothers. He held a one-third interest in a holding company that held two operating companies.

Ms. Fox retained a business valuator who valued the holding company at $2 million and Mr. Fox's one-third interest at $666,666. The judge accepted the method of valuation. Because of Mr. Fox's minority position, the valuator applied a 15% minority discount, which resulted in a value of $570,000 (rounded). The judge accepted $570,000 as the value of Mr. Fox's shares.

F. Yukon

Minority Discount Applied

2. ***J.A.C. v. V.R.C.***, [2015] Y.J. No. 28 (Y.K. S.C.)

This case involved a complex corporate structure. The husband, along with his four brothers and their father, had an interest in a number of family companies. Four of the six companies involved

family members who controlled 100% of the four companies either directly or indirectly. The husband also owned some shares as a bare trustee in one of the two companies in which arm's length parties were involved. The wife made a claim for a share of the husband's interest in the group of companies.

The valuator applied a minority discount ranging from 10% to 15% in recognition of the husband:

1. Not controlling any of the companies;

2. Not having the ability to prevent steps of which he did not approve; and

3. Being unable to unilaterally pay dividends or redeem shares.

The husband's valuator referred to the discount as a "discount for a lack of marketability".[15]

In the court's decision, it referred to *Balcerzak* in support of applying a minority discount where the shareholders have similar minority interests, are a close family unit who have worked together for many years, and will likely continue to work together for many years.

The wife's valuator indicated that he had stopped making minority discounts and left it to the court, and that he was "a business valuator and not an expert on judging past and future family behavior."[16]

At paragraph 167, the court referenced *Financial Principles of Family Law*[17] (pages 7-17) as follows:

> (d) Family Control/Group Control
>
> It is generally accepted that when a shareholder is part of a group of shareholders who have historically acted in concert to their mutual benefit, and will likely continue to do so, including eventually selling their collective interests together, no minority discount is appropriate.
>
> The Canada Customs and Revenue Agency (CCRA, formerly Revenue Canada) has acknowledged that in cases where a taxpayer is a minority shareholder but other family members hold a sufficient number of shares to all form a control group, a minority discount is not appropriate. ...

The court found that, in the context of this family business, it was inappropriate to apply a minority discount. Such a discount should not be applied on a notional sale that is not even contemplated,

[15] *J.A.C. v. V.R.C.*, [2015] Y.J. No. 28 (Y.K. S.C.) at para 164 [*J.A.C.*].
[16] *Ibid* at para 166.
[17] Freedman, Andrew J., ed, *Financial Principles of Family Law* (Toronto: Thomas Reuters, 2019).

and while the business had historically run by consensus, the court found that the husband was the effective leader and manager of the group of companies.[18]

Conclusion

The case law shows us that the application of a discount to a spouse's minority shareholder interest in a closely owned family business varies between jurisdictions and depends very much on the facts of each case and the court's discretion. When determining the appropriateness of a minority discount, we see that the court tends to assess a spouse's level of control in a company or companies (whether that be with respect to decisions about the operations of the company, certain corporate actions such as paying out dividends or selling the business to an arm's length purchaser, and/or making decisions about the strategic direction of the company), the relationships between family members as shareholders, and the prospects for a future liquidity event.

VII. Oppression Remedy Cases

In Canadian cases involving an oppression remedy, an oppressed minority shareholder may request the court to intercede in the affairs of the corporation so as to protect their interests. One of the alternative remedies available to the court is to direct the corporation to purchase the oppressed minority shareholder's interest at fair value. In these cases, fair value means a pro rata portion of the *en bloc* fair market value but does not reflect any discount for owning less than a controlling interest.

VIII. How to Attack/Defend the CBV's findings

A. CBV Perspective

Two primary sources of data used by valuation professionals in the United States to estimate minority discounts are FactSet Mergerstat/BVR Control Premium Study and FactSet Mergerstat Review. Both sources publish data on control premiums paid to acquire controlling interests in merger and acquisition transactions, which are then used to calculate implied minority discounts.

1. FactSet Mergerstat/BVR Control Premium Study is an online database consisting of over 15,000 takeovers of public companies resulting in over 50 percent ownership since 1998. Acquisition data, the calculated control premiums, and implied minority discounts are provided for each transaction included in the dataset. The database contains information on companies from around the world (i.e., both the acquirer and target can be companies based inside or outside of the United States).

2. FactSet Mergerstat Review is annual publication that includes a wide variety of statistics on acquisition activity for both private and public companies. The publication contains

[18] *J.A.C.*, *supra* note 16 at para 168.

information on companies outside of the United States, but either the acquirer or the target must be based in the United States.

Unfortunately, the foregoing sources are primarily focused on the United States and tend to be based on data from large, public companies. In addition, where the shares of the acquired public company were actively traded with widely disseminated corporate information prior to the bid, some portion of the control premium may relate to purchaser perceived synergies rather than a premium for control. There is limited data available, if any, on the quantum of minority discounts applicable to shares of small, private companies in Canada. In the absence of alternative information, the selection of minority discounts by CBV's in British Columbia when valuing small, private companies is typically a highly subjective exercise that requires the CBV to use their professional judgement. The use of professional judgment by the CBV is one of the primary reasons that having separate valuations prepared on the same business by two or more CBV's often results in different conclusions.

B. Lawyer's Perspective

When cross-examining a CBV's finding and professional judgement with respect to minority discounts, counsel may consider the following:[19]

General

1. What was the rationale or basis for determining the discount? Is it reasonable?

2. Does family control exist?

3. Does the selected discount consider facts specific to the case or was the average discount simply taken from published studies?

4. What is the implied yield and rate of return on the investment if the discount proposed is applied? If the return is too high, then the value may be too low (i.e. the minority discount may be too high).

Assumptions

1. Are the assumptions reasonable and valid?

2. Are the assumptions self-serving or demonstrative of advocacy?

3. Does hindsight confirm the assumptions?

4. What are the bases for the assumptions?

[19] Freedman, Andrew J., ed, *Financial Principles of Family Law*, (Toronto: Thomas Reuters, 2019), vol. 3 at 41-5.

5. Do any reasonable alternative assumptions exist?

6. If certain assumptions were changed, what impact would it have on the value conclusion? This will highlight any sensitivities to the conclusion.

7. In concluding that the assumptions were reasonable, was the CBV's rationale justifiable or supportable?

Restrictions

1. The report may restrict its use to a certain purpose and may not be appropriate for the case at hand.

IX. Conclusion

It is suggested that the issue of minority discounting is often either overlooked or underdeveloped. The issue is more complex and indeed subjective than it appears as first blush. It is also not automatic. It is dangerous where counsel look at just the first layer of analysis – the existence of the minority position itself – and not at the myriad other factors which can come into play (some in ways that are surprising), the appropriateness of the discount or, if found, the appropriate level.

A great deal of thought and planning needs to be put towards the manner in which the discount issue is explored and discovered, as well as to ensure that sufficient persuasive evidence is marshaled in support (or to undercut it, as the case may be).

It is hoped that this paper provided an opportunity for a closer consideration of the pitfalls and opportunities which the minority discount concept presents.

TELEPHONE 604.669.3544
TOLL FREE 1.800.663.0437
FAX 604.669.9260

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4

www.cle.bc.ca