



**ADR INSTITUTE OF CANADA, INC.
INSTITUT DE MÉDIATION ET D'ARBITRAGE DU QUÉBEC**

**VENDREDI, LE 17 OCTOBRE 2008 / FRIDAY, OCTOBER 17, 2008
MONTRÉAL (QUÉBEC)**

**USING EXPERTS IN MEDIATION AND ARBITRATION
L'UTILISATION D'EXPERTS EN MÉDIATION ET EN
ARBITRAGE**

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BUSINESS VALUATION

EXAMPLES OF DISPUTED ISSUES

- **“Fair market value” or “fair value” of minority shareholder’s shares in private company**
- **Value of fractional interests in real estate, joint ventures**
- **Interpretation of accounting concepts (e.g., “cash flow”, “earnings”, etc.)**

DISPUTE MAY INVOLVE

- Value of a partnership interest
- Quantum of damages suffered by plaintiff (e.g., lost profits, adverse effect, etc.)
- Interpretation of agreement provisions (e.g., *Commissioner of Competition and Air Canada* (June, 2000))

DEFINITION OF ASSIGNMENT

- Identification of disputed item(s) to be quantified or valued
- Effective quantification date (damages date or valuation date)
- Timing
 - Draft
 - Formal report
 - Filings with Arbitration Panel
 - Anticipated Hearing date

DEFINITION OF ASSIGNMENT

(CONT'D)

- Interpretation of disputed accounting- or valuation-related clauses in shareholders' agreements:
 - Buy/sell
 - Price-adjustment
 - Earn-outs
 - Non-competition

DEFINITION OF ASSIGNMENT

(CONT'D)

- **Analyzing financial or valuation issues**
 - Required by judicial directive
 - Required by statute
 - Required by contract
 - Recommended by valuator

- **Analyzing and interpreting financial data**

FINANCIAL EXPERT MAY ASSIST BY

1. **Preparing expert testimony of expert witnesses retained by attorney**
2. **Identifying, for production, documents and records thought to exist**
3. **Analyzing documents, records and facts, including summaries**
4. **Categorizing and indexing of documents**

FINANCIAL EXPERT MAY ASSIST BY

(CONT'D)

5. Identifying issues and contentions
6. Preparing questions and documents for, and assisting during, discovery
7. Preparing for pre-hearing and settlement conferences and negotiations

FINANCIAL EXPERT MAY ASSIST BY

(CONT'D)

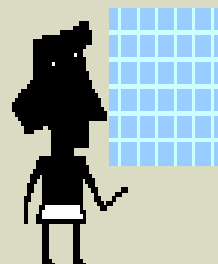
8. Proving business facts
9. Assessing financial issues involved
10. Advising on discovery
11. Reviewing/critiquing opposing expert's report
12. Conducting informative site visit and management interview, if appropriate

SERVICES OF FINANCIAL EXPERT ALSO INCLUDE (IN ARBITRATION)

- Preparing Expert's Report
- Presenting *viva voce* evidence
- Assisting counsel by formulating questions for cross-examination of opposing expert
- Providing rebuttal testimony (counterproof)
- Reviewing post-hearing briefs concerning financial or valuation issues

USE OF FINANCIAL EXPERT EVIDENCE

Expert can prepare graphics, charts and other visual aids whenever considered appropriate to assist arbitrator. "A picture is worth a thousand words!"



ADVISORY FINANCIAL EXPERT WILL:

- Identify technical financial issues relating to particular subject matter
- Explain technical financial terms and significance of each
- Identify and explain technical financial issues from opponent's point of view
- Advise as to key areas of discrepancy

EXAMPLE: ARBITRATOR-APPOINTED EXPERT *COMMISSIONER OF COMPETITION* and *AIR CANADA (2000)*

- **Arbitrator:** Charles A. Hunnicut, Washington attorney and former U.S. Assistant Secretary of Transportation for Aviation and International Affairs
- **Experts:** BMO Nesbitt Burns and Deloitte & Touche

EXTRACTS FROM ARBITRATOR'S RULING *COMMISSIONER OF COMPETITION and AIR CANADA* (JULY 11, 2000)

“Based on the submissions filed on behalf of the Commissioner of Competition and Air Canada ... on the oral presentations made in Toronto on June 27, 28 and 30, 2000, the documents presented at that hearing, the documents submitted ... and on the advice of Mr. Richard Wise [Arbitrator-appointed expert] of Wise, Blackman, I make the following ruling on the issue of the Fair Market Value of Canadian Regional Airlines

EXTRACTS FROM ARBITRATOR'S RULING

COMMISSIONER OF COMPETITION and AIR CANADA

(JULY 11, 2000)
(CONT'D)

“The thorough and professional presentation of the legal and economic issues of this matter by Counsel for Canada and Air Canada has been exemplary. All of the experts relied upon by the parties in this arbitration are well qualified and I would not presume to weigh their outcomes on the basis of their qualifications. However, I have given careful consideration to the approaches taken by the experts and have given weight to their valuations on the basis of the approach and on the contents of their analyses and their cross examination. The expertise of Mr. Richard Wise in my review of the complete record in this arbitration was invaluable and on questions of professional valuation methodologies have found myself in every instance in complete agreement with the position of Mr. Wise.”



Vendredi, le 17 octobre 2008
Friday, October 17, 2008
Hyatt Regency Montréal
Montréal (Québec)

Richard M. Wise, FCA, CA•IFA, FCBV, FASA, MCBA, CVA
Wise, Blackman LLP/SENCR
Business Valuators • Litigation Accountants

ARBITRATOR'S LETTER RULING OF JUNE 6, 2000 (ON EXPERT'S ADVICE REGARDING FAIR MARKET VALUE OF CANADIAN REGIONAL AIRLINES)

- Definition of Fair Market Value
- Must be objective standard of value
- Must not be "value to owner"
- Must be open market
- Hindsight inadmissible
- Valuation date
- Extent of the record to be utilized