Court of King's Bench of Alberta

Citation: Laferriere v Simply Solventless Concentrates Ltd., 2024 ABKB 625

2024 ABKB 625 (CanLII)

Date: 20241029
Docket: 2401 03148
Registry: Calgary

Between:

Daniel Jean Laferriere

Applicant

- and -

Simply Solventless Concentrates Ltd

Respondent

Reasons for Decision
of
Honourable Justice M.H. Hollins

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[1] The Applicant, Mr. Laferriere, was the Chief Operating Officer of the Respondent cannabis company, Simply Solventless Concentrates Ltd. (SSC)[1]. When Mr. Laferriere joined the company in 2020, he purchased $2M common shares of SSC at an average price of approximately $0.05 per share. His employment with SSC ended in November of 2021.

[2] From its incorporation in 2020, the plan was always to attempt to trade SSC shares on a public market. In 2021, SSC began to plan an amalgamation with another company, Dash

[1] Even though there are other corporate identities at play by virtue of the eventual amalgamation, I refer to both the pre-Transaction and post-Transaction company as "SSC" for ease of reference.

Capital Corp, (the Transaction), by way of reverse takeover, to assist in meeting the requirements of the securities regulator (the Regulator) to trade on the TSX.

[3] The shareholders of SSC were required to approve the Transaction at a meeting in December of 2023. The Applicant, as was his right, dissented and sought to have his shares redeemed. Regulatory approval followed shortly after the shareholder approval and the new SSC shares began trading in late December, 2023.

[4] The parties agree that the Applicant is entitled to have his shares valued and paid out. They also agree that the Valuation Date, prescribed by s.191(3) of the *Alberta Business Corporations Act*, RSA c.B-9 (*ABCA*), is December 5, 2023. They do not agree on the price. The Applicant says that the fair value of his shares at the Valuation Date is $0.20 per share ($400,000 in total). SSC says that the fair value of the Applicant's shares is $0.017 per share ($34,000 in total).

2024 ABKB 625 (CanLII)

The Law

[5] Under the *ABCA*, a shareholder may elect not to participate in the acquisition of his shares by another company; s.191(2) *ABCA*. If he so elects, he is entitled to be paid by the corporation for the fair value of his shares. If necessary, the Court will fix the value of the shares; s.191(13) *ABCA*.

[6] Fair value has been defined in the jurisprudence as "the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in money or money's worth"; *Brant Investments Ltd v Keeprite Inc*, 1987 CarswellOnt 135 at para. 132 (Ont HC), affirmed 1991 CarswellOnt 133 (ONCA). It is a value that is "just and equitable" in the circumstances; *RFG Private Equity Limited Partnership No. 1B v Value Creation Inc*, 2016 ABQB 391 (*RFG QB*) at paragraph 113, affirmed 2018 ABCA 85 (*RFG CA*), leave refused 2018 CarswellAlta 3076 (SCC).

[7] There is no one formula for determining fair value. It is fact-specific and involves the exercise of discretion by the court, not the application of a precise mathematical formula or calculation. The following methods or approaches are common: market valuation, net asset valuation and investment valuation. Any of these can be used in combination and may be subject to adjustments in order to arrive at a "fair and equitable" value; *RFG* (*QB*) at paras.115-119.

The Parties' Positions

[8] Both parties have employed the market valuation approach. However, the Applicant says that the August, 2023 private placement price reflects fair value with no adjustments required. SSC argues that the private placement price is not an accurate reflection of fair value, which it says is much less, for reasons discussed below.

[9] In 2021, SSC began taking steps to become a public company. Dash was incorporated in Alberta in 2021 to facilitate the reverse takeover of SSC in order to qualify for listing on the TSX. This involved the SSC shareholders giving up their shares for shares in the newly formed company. This was the transaction that the SSC shareholders were asked to approve at the meeting of December 6, 2023.

2024 ABKB 625 (CanLII)

[10] Another of the public trading requirements of the Regulator was a certain debt-to-equity ratio. For SSC, that meant converting some of its debt to equity through a private placement and debenture conversion. This step - a private placement issued on August 28, 2023 - was a necessary precursor to the Transaction.

[11] The Applicant says that the market value of the shares is easily determined because SSC shares were offered and purchased for $0.20 per share in the aforementioned private placement. He says this the highest price available in an open market because it was what investors voluntarily paid at that point.

[12] SSC argues that the private placement price should not be taken at face value because of adjustments which need to be made to that $0.20 per share in order to reach a just and equitable value. Specifically, SSC argues that:

(a) The private placement was for “Units” comprised of a share plus a warrant, making the effective price paid for each share something less than $0.20. SSC has calculated this fractional share value as $0.02-$0.05 per share; and

(b) The investors who bought Units in August of 2023 did so in anticipation of SSC going public. Given SSC’s financial situation at the time, these investors were paying more than market value for the chance to participate in the upside of going public, which was contingent on the closing of the Transaction to which the Applicant dissented. SSC argues that it would be unfair to allow the Applicant to benefit from the eventual upside when he was not prepared to take the risk associated with the Transaction that was assumed by these private placement investors (sometimes called “The Synergy Principle”).

[13] I will address these arguments in turn, but I largely agree with the position of SSC. The private placement did not reflect a fair and equitable value because of SSC’s financial position at that time and the resulting risk to the remaining SSC shareholders if the Transaction and the consequent going-public event did not happen.

A. The Effective Share Price in the Private Placement

[14] The Applicant points to the fact that the price in the private placement was $0.20 per unit. However, as noted by SSC, this ignores the fact that no individual shares were sold, rather only “Units”. A Unit was comprised of one share plus one warrant, the latter exercisable at $0.20 per warrant for 3 years after purchase.

[15] The evidence of William MacDonald, the director and founder of SSC, was that SSC barely raised the minimum equity required by the Regulator and only did so by including warrants in the offering. His Affidavit attaches a calculation that attempts to assign specific values of the $0.20 Unit price to each of the shares and the warrants separately. This is based on the Black-Scholes method of valuing a warrant or other right to acquire shares in the future.

[16] SSC’s application of the Black-Scholes method resulted in a share value of $0.02 (debenture conversion) to $0.05 per share (investment) and a warrant value of $0.15-$0.17 per warrant. The average share price was therefore $0.035 per share and that what was SSC offered to the Applicant.

[17] The Applicant vigorously opposes the evidence used in SSC’s calculation. First, he says that the Black-Scholes method is an American creation that has found little foothold in Canada

and none in Alberta. It does indeed appear to be gleaned from an American article, “Solving Dilution Problems” by Stephen I. Glover, as referred to in *ID Biomedical Corp v GlaxoSmithKline PLC*, 2005 BCSC 1748 at para.13. However, its use in Canada has not been sparse, particularly in matrimonial property cases. I would not label the Black-Scholes method as inherently suspect or unreliable.

[18] However, the Applicant also complains that simply attaching a one-page calculation to an Affidavit, with no indication of who prepared it, when or based on what information, renders this evidence of little if any value to the Court. With this, I agree.

[19] I note here that, unlike virtually every case presented to me by counsel, this hearing involved no *viva voce* testimony and no expert evidence at all. I am not complaining about the approach taken by the parties, particularly given the amounts in issue here, only noting that I am determining share value with relatively little information and no assistance from experts.

[20] However, even if I cannot take the calculations presented by SSC at face value, it is only logical to assume that if a Unit costs $0.20 and is comprised of a share (which becomes the purchaser’s property immediately) plus a warrant (which entitles the purchaser to purchase another share at the same price later at his option), the value of the share alone cannot be $0.20. That approach assigns no value whatsoever to the warrant.

[21] I am similarly unconvinced that SSC’s allocation of value makes sense. MacDonald’s evidence was that the warrant was much more valuable than the share because it gave the holder a three-year open option to purchase “without involving risk capital”. However, if the warrants were effectively tossed in for free to elicit more investment, then arguably they have no value at that point in time. If the warrants are assigned value at purchase, as SSC says, then they cannot be described as requiring no upfront risk capital.

[22] What I do accept is Mr. MacDonald’s evidence that management had beat the bushes as far as possible and the only way they could get to the debt-equity ratio required by TSX was by “sweetening the pot” with an additional right to acquire more shares in the future. To assign no value whatsoever to the warrant ignores this reality. Determining the value of the share, as opposed to the Unit, will require further consideration of the circumstances of SSC in 2023.

B. The Synergy Principle

[23] Generally, the dissenter cannot share in the benefit of the transaction to which he dissented in the valuation of his shares. To the extent that the share price on valuation date reflects the anticipated uplift of the subject transaction, he cannot take the benefit of any future synergistic benefits expected therefrom.

[24] The general principle was clearly enunciated by the Ontario Court of Appeal in *Smeenk v Dexleigh Corp*:

> The applicants are not entitled to obtain the benefits of the amalgamation, having dissented from the transaction. By dissenting, the applicants elected to participate in neither the benefits nor the perceived detriments and risks of the amalgamation; they chose not to invest in the proposed arrangements and the resulting enterprise. The applicants in this case were not "squeezed out" or expropriated but were offered, with the other shareholders, a continuing interest in the amalgamated corporation. This interest and any benefits or risks flowing from it, the applicants declined in favour of referring the matter of their compensation to the Court.

2024 ABKB 625 (CanLII)

> *Smeenk v Dexleigh Corp*, 1993 CarswellOnt 154 (Ont CA) at para.51, affirming 1987 CarswellOnt 130 (Ont HC) see para.124; see also *Brant Industries Ltd v KeepRite Inc*, 1987 CarswellOnt 135 (Ont HC) at para.124, aff'd 1991 CarswellOnt 133 (Ont CA)

[25] There has always been, and continues to be, discretion to include the synergistic benefits in the valuation, in whole or in part, where that must be done in order to produce a just and equitable result. For example, in some situations, the offer of acquisition or amalgamation in the subject transaction is itself a fair indication of what an open and competitive market thinks the shares are worth. From Clark Hunter and Clarissa Pearce, "*Fair Value – A Common Issue with Sparse Authority*", 2011 Ann Rev Civ Lit 25 at page 58:

> Often a merger or takeover will create new business circumstances or opportunities from which the existing company will benefit. Benefits that increase the value of the company are referred to as "synergistic benefits".
>
> Whether synergistic benefits should be considered in determining the "fair value" of shares has been the subject of some difficulty within Canadian jurisprudence. Often a company will offer synergistic benefits to more than one potential purchaser. In such circumstances, the value of the synergistic benefits are not limited to a specific transaction and can be regarded as inherent to the company itself and therefore properly included in fair value. However, in circumstances in which only one specific transaction leads to an increase in value, courts have typically held that such synergistic benefits belong to the acquirer and should not be included in fair value.

[26] An exception to the exclusion of synergistic benefits may be where the transaction dissented from is already operationally implemented prior to the shareholder vote, meaning that the existing shareholders may already be experiencing increases or decreases in the value of their shares before the valuation date; *RFG (QB)* at paras.141-143; see also *Deer Creek Energy Ltd v Paulson & Co*, 2008 ABQB 326 at paras. 538-542, affirmed 2009 ABCA 380 at para.17.

[27] Yet another exception to the exclusion of synergistic benefits from post-transaction valuation is where the dissenting shareholder was not truly dissenting but was squeezed or forced out and thereby involuntarily deprived of the benefits. This was recognized as potentially inequitable in *Brant Investments* (Ont HC at para.124) and in *Smeenk* (Ont CA at para.51).

[28] Justice Romaine, following an extensive review of Canadian and American authorities, summarized the law as follows:

> ...a dissenting shareholder cannot benefit from an increase in underlying share value created by a corporate transaction from which that shareholder dissented: Smeenk at p.404. While a narrow exception to this general rule exists in the circumstances of a squeeze-out transaction, it appears that courts have been reluctant to exercise their discretion to take into account the benefits of the transaction dissented from in assessing fair value.
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> *RFG (QB)* at para.131

[29] The Applicant urged me to follow the *RFG (QB)* case as the Court there found that the target company, Value Creation (VC), was <u>not</u> in financial distress on the valuation date because

2024 ABKB 625 (CanLII)

of the anticipated joint venture with BP Energy. This led the Court to reject some of steep discounts applied by VC's expert witness.

[30] However, Romaine J's finding that VC's financial woes were no longer an issue on the valuation date was based on a number of factors that do not exist in this case; (1) the shareholder vote was a certainty with almost 80% of the shareholders committed prior to the vote; (2) BP Energy had provided VC's creditors with an irrevocable letter of credit for $500M to buy VC the time to complete the transaction; and (3) there were a number of other offerors throughout the pre-transaction phase.

[31] Ultimately, Romaine J rejected both the VC proposed value ($1.06) and the RFG proposed value ($2.98) and set the share value at $1.89 per share. However, the result itself is of little application to this case as the Court assessed the share value based on a net asset approach, which considered the value of specific assets separately.

[32] There was no suggestion that the Applicant in this case was forced out. I will address the other factors examined in *RFG* and *Deer Creek*, none of which are present in this case, to explain why I think the Synergy Principle applies here.

(i) No Other Offers

[33] This may be the most important factor in a market value analysis, particularly where, as here, the SSC shares were not publicly nor widely traded prior to the Transaction.

[34] In *Deer Creek*, Total E&P Canada's first offer to buy shares was at $25 per share. This was increased to $31 per share only when another competitor, Shell Canada Limited, offered $31 per share and Total increased its offer to match. The dissenters argued that the Deer Creek Board had not been duly diligent and had undersold the company's value in recommending acceptance of the $31 per share. However, Romaine J accepted the expert evidence that the Deer Creek Board had acted properly in assessing those offers. She fixed the dissenters' share value at $31 per share, while they had wanted $110-$200 per share.

[35] Similarly, in *RFG*, both the Queen's Bench Court and the Court of Appeal noted that there were multiple competing offers to joint venture with or purchase particular assets of RFG prior to the shareholder vote. This indicated that, even apart from the Total offer, there was inherent value in RFG or at least in its assets. Indeed, Justice Romaine reasoned that, even if the subject transaction had not proceeded or had been unavailable, there was sufficient third-party interest in RFG to indicate that the proffered share price was fair and equitable.

[36] In the case at bar, there were no other offers to partner with, acquire or amalgamate with SSC, apart from the Dash offer. Mr. MacDonald's evidence is that raising even $500,000 of new capital in 2023 was very difficult and ultimately, only accomplished by creating units which included a warrant and a share for the subscription price of $0.20. His evidence also speaks to limited inherent value in SSC, whose assets were almost entirely "slow moving" cannabis inventory.

[37] In December of 2023, leading up to the shareholder vote, SSC apparently tried to shop the Applicant's block of shares around, or at least the ones that were not subject to escrow restrictions, with no takers.

[38] From 2021-2023, there was a complete lack of market interest in SSC, apart from the Dash transaction, which was undertaken for the sole purpose of qualifying the amalgamated

2024 ABKB 625 (CanLII)

company to trade its shares publicly. This was a transaction that the Applicant was expressly opposed to, believing the public market would reject the stock and devalue his holdings.

[39] There was no market activity from which to gauge share value, apart from the private placement, which I accept was facilitated by investors willing to pay above market value for the chance to speculate on SSC share value in a public market.

(ii) No Operational Implementation

[40] As mentioned earlier, reference was made in *Deer Creek (QB)* to the fact that, where a pending transaction has not been implemented at all prior to the shareholder vote on the transaction, there should be no value stemming from the transaction accorded to a dissenters' shares; *Deer Creek (QB)* at para.539-542 and *Deer Creek (CA)* at para.17.

[41] It is not clear what qualifies as "operational implementation" but in *RFG (QB)*, the Court mentioned that the offeror, BP Energy, had provided RFG's lenders with a commitment to pay the RFG debt post-transaction, which commitment the lenders accepted in extending the term of the loans. Other hypotheticals might include replacement of directors, transfer of licences or of operational responsibilities.

[42] On the evidence before me, there was no aspect of the Transaction implemented prior to the shareholder vote.

(iii)No Shareholder Commitments/Certainty

[43] In both *RFG* and *Deer Creek*, the overwhelming majority of existing shareholders were not only supportive of the subject transaction but had committed, in some cases contractually, to vote in favour of the transaction. While that may have been the informal reality in this case, I heard no such evidence about this shareholder vote.

[44] In *RFG*, the inevitability of the transaction approval, combined with the offeror's financial commitments to RFG's lenders and the existence of other interested parties, led the Court to say that RFG was not distressed on the valuation date. However, that is not the situation here.

[45] I cannot assume certainty of the SSC shareholder vote. We know now that only the Applicant dissented, but that is hindsight. Nor were there any of the other factors discussed above that speak to the certainty of the outcome. Nor was this a two-stage transaction, as in Deer Creek, where shifts in operation or in the market between the first and second phase might affect the share value.

(iv)Financial Distress

[46] All of this leads back to the actual financial status of SSC on December 5, 2023. Absent the going-public event coming out of the anticipated Transaction, there was not much positive news for SSC in 2023. As Mr. MacDonald deposes:

(a) In June, 2023, the SSC financial statements showed virtually equivalent assets and liabilities, resulting in an effective share value of $0.17 per share, although SSC estimates that the shares had little to no value in reality because of its continued financial decline over 2023, as discussed below; and

(b) Throughout 2023, SSC's accounts payable were significant and long overdue, including outstanding legal fees of over $500,000 and a tax debt of approximately

2024 ABKB 625 (CanLII)

> $1.5M. Management was on its heels trying to negotiate with SSC's creditors and avoid a bankruptcy event. This included renegotiating with its mortgagee to avoid CCAA proceedings, resolving litigation and covering payroll from the pockets of management personally.

[47] The private market for SSC shares was exhausted. Even before the end of 2023, management had done what they could to raise more capital, barely reaching the threshold required by the Regulator. In light of SSC's frantic bargaining with creditors in the home stretch, SSC's finances can only be described as something between concerning and dismal. The investors who agreed to pick up Units in the last private placement were part of SSC's 'hail Mary' attempt to satisfy the Regulator and finally trade on the TSX, which was, according to SSC, the only option left to return value to the shareholders.

[48] The Applicant disagreed, at least with the timing, believing the public market would reject or undervalue the shares. In valuing his shares, I do not accept that the private placement Unit price in August of 2023 reflected the true value of SSC shares on an open and competitive market. There was no competition and only the minimum amount of capital was raised after considerable effort. Those investors were not looking to divest absent a going-public event but rather, were prepared to take a chance that shareholder approval would be obtained, the Transaction would close and the Regulator would approve SSC trading on the TSX.

[49] It was the approving shareholders, which included these 2023 investors, who were prepared to take the risk of going public. It could not be fair and equitable to allow the Applicant, who risked nothing, to benefit from a share price buoyed by those who assumed the risk. As the Ontario Court of Appeal said in *Brant Investments*:

> In appropriate cases, particularly where the dissenters are forced out, the trial Judge may exercise his discretion so as to allow the dissenters to participate in the benefits of the transaction. The availability and nature of the participation would necessarily depend on the particular facts of the case. In this case, I have no hesitation in agreeing with the learned trial Judge that the dissenting shareholders were attempting to have their cake and eat it, too. Although clearly free to participate in the transaction, they declined to do so, all the while claiming entitlement to reap the potential financial benefits of participation; they hoped to reap the benefits of the proposed transaction without accepting any of its risks. I agree with the learned trial Judge that this is not an appropriate case in which to include in the determination of fair value an amount attributable to the transaction involved.
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> *Brant Industries v KeepRite Inc*, 1991 CarswellOnt 133 (Ont CA) at para.104

The Calculation

[50] There is no expert evidence valuing these shares. There is no formulaic approach, at least not without properly admissible evidence on the Black-Scholes calculation.

[51] Starting with the private placement, SSC says the share price (alone, without the warrant) was $0.035 per share, just over 10% of the Unit price. Without a better explanation, I do not accept that the warrants accounted for 90% of the value of a Unit. I am also left with the less

2024 ABKB 625 (CanLII)

empirical evidence of SSC's financial situation, being unable to pay its creditors or even its employees without management contributions and narrowly avoiding *CCAA* proceedings at the instance of its landlord.

[52] The value of an SSC share held by a shareholder with no expectation or intention to participate in public trading was minimal. If an SSC share began as one-half the value of a Unit, or $0.10, it would have to be deeply discounted to reflect this reality. I find that the value of the SSC shares on December 5, 2023 was $0.05 per share.

2024 ABKB 625 (CanLII)

Costs and Interest

[53] Costs in these kinds of applications are dealt with in section 191(11) of the *ABCA*, which provides that the dissenting shareholder is entitled to payment of his costs of such an application. No such extraordinary circumstances exist here to displace the application of that statutory provision. Penalizing the Applicant in this situation would be akin to removing his resort to the courts, which has been expressly given to him by the governing legislation.

[54] Interest is also awarded under s.191(17) *ABCA* at rates prescribed by the Regulation to the *Judgment Interest Act*, RSA 2000, c-J.1.

[55] Any disagreement between the parties on the issues of payable costs or interest may be referred to my office.

M.H. Hollins
J.C.K.B.A.

Appearances:

Ryan Barata
for the Applicant, Daniel Jean Laferriere

Peter Linder, KC and Elena Semenova
for the Respondent, Simply Solventless Concentrates Ltd