

CANADA / JUDGMENT

Espig v. Siwash Minerals Inc. & Reimer

2019 BCSC 2049

COURT

Supreme Court of British Columbia

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2019 BCSC 2049 Espig v. Siwash Minerals Inc. & Reimer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Espig v. Siwash Minerals Inc. & Reimer,

2019 BCSC 2049

Date: 20191128

Docket: S1710186

Registry: Vancouver

Between:

Peter Espig, Milo Filgas, and Frank Hogel

Plaintiffs

And

Siwash Minerals Inc. and Abram Reimer

Defendants

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Appearing on his own behalf and on behalf of the other Plaintiffs:

Peter Espig

Appearing on his own behalf and on behalf of Siwash Minerals Inc. as the Defendants:

Abram Reimer

No other appearances.

Place and Date of Trial:

Vancouver, B.C.

August 26-30 and September 3, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2019

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Introduction and Overview

- [1] This case, at its core, is a claim by the three plaintiffs for return of funds they advanced to the corporate defendant pursuant to a document entitled "Investment Proposal" ("Proposal"), exhibit 3 at trial. Between October, 2015 and May, 2016, each of the plaintiffs advanced \$25,000.00 to the defendant, Siwash Minerals Inc. ("Siwash"). The form of the investment was a convertible debenture with a term of 36 months. The plaintiffs at trial demand repayment of the investment. The defendant resists repayment, and pleads that the Investment Proposal required the plaintiffs to convert their investment into corporate shares.
- [2] The plaintiffs also advanced in the Notice of Civil Claim various claims of material misrepresentations by the personal defendant at or around the time of execution of the Proposal. These misrepresentations, say the plaintiffs, are sufficiently material that I should either set aside the entire agreement or order repayment of the investment irrespective of my interpretation of the terms relating to conversion. In those pleadings, the plaintiffs also claim damages against both the personal and corporate defendants.
- [3] At trial, no party was represented by counsel. Peter Espig represented himself, and also the interests of the two other plaintiffs. Abram Reimer represented himself and the corporate defendant, Siwash. Both Mr. Espig and Mr. Reimer did a commendable job of putting forward their respective positions, and those of the other parties whose interests they

advanced. Both Mr. Espig and Mr. Reimer testified for several hours, and each cross examined the other. Collectively, they placed a considerable body of documentary evidence before the court. I am satisfied that I have the evidence required to resolve all issues in dispute between the parties. Equally, I am satisfied that I understand fully the positions advanced by each at trial.

- [4] The plaintiffs were not, in my view, assisted by pleadings which were drafted by counsel then representing them, and which misstated some key facts, including some facts inconsistent with the critical document, the Investment Proposal. However, Mr. Espig clarified those matters during his testimony, and made reasonable concessions during final submissions, which have made my task reasonably straightforward.
- [5] I am satisfied that the fundamental claim of the plaintiffs, that they are entitled to be repaid by Siwash the original amount of the investment, is made out. I am not satisfied that any of the claims of misrepresentation against Mr. Reimer have been proved. What follows are my reasons for reaching those conclusions.

Summary of Facts

- [6] Mr. Reimer and Mr. Espig met in 2015 at a mining conference in Kamloops. At that time, Mr. Reimer was the Chief Executive Officer of Siwash, which at all material times has held the mining rights to a property known as the Monument site ("Monument"), north of Hope. Mr. Espig was the CEO of a company called Nicola Mining Inc. ("Nicola"), which owned a milling facility near Merritt.
- [7] After some preliminary discussion concerning sale of the Monument property, the two men decided to structure a business arrangement which would permit ore to be mined at the Monument site and transported to the Nicola milling facility for gold extraction. Siwash and Nicola entered into a Mining and Milling Profit Share Agreement on June 24, 2015. Mr. Espig testified, and I accept, that he was not interested in purchasing the Monument project, but wanted to be involved in the venture and structure a deal that would be beneficial for all parties.
- [8] Mr. Espig was the primary draftsman of the Investment Proposal, but he described its creation as a cooperative process, with input from various individuals, including Mr. Reimer. Mr. Reimer agreed that he had input into the content of the Proposal, but could not recall which specific terms were included at his suggestion.
- [9] The project required capital to get off the ground, and that was the fundamental purpose of the Investment Proposal. Based on somewhat dated assay reports, there appeared to be gold on the site. However, it remained to be seen if it was financially viable to extract the gold and truck it to the Nicola milling facility for processing. Siwash had no funds available for such an endeavour, hence the need for outside investors.

- [10] There was considerable dispute in the evidence concerning the existence of a "stockpile" of ore on the site at the commencement of the venture, and in particular whether or not Mr. Reimer expressly represented to the investors that a stockpile of approximately two to three thousand tonnes was present. What is not in dispute is that the essential plan at the outset was to have sufficient funds available to get a total of ten thousand tonnes of ore, or mill feed, to the milling facility. Assuming the ore contained sufficient quantities of gold, the profit generated from that gold would permit further mining operations to be undertaken.
- [11] Mr. Reimer operated an excavation company, Woodside, which was to be responsible for initial extraction of ore, once permits were obtained. Such was required to be done through purely mechanical means, since Siwash was unable to obtain a blasting permit. Whatever samples were extracted would then need to be transported by truck to the mill site. Trucking costs were the single greatest expense item. According to Mr. Espig, unless the ore contained more than 7 grams per tonne of gold, the project would not be financially viable. Only at those levels would profit or proceeds exceed base costs. Mr. Espig testified that from the outset he believed, based on past testing, that the yield would likely be greater than 9 grams per tonne. In addition, he believed that profit generated from the initial three thousand tonnes of mill feed would be sufficient to permit the extraction and transport of the next seven thousand tonnes of ore. He said that, based on what Mr. Reimer said about a stockpile on site, there would be no extraction costs for that initial amount.
- [12] The Investment Proposal envisaged an influx of capital of \$100,000.00, from four investors, to be utilized to commence mining operations.
- [13] Mr. Espig also wished to structure the Proposal in a way which would give the four investors two seats on the Siwash board of directors and, if the debentures were to be converted to shares, a majority shareholder position in the company.
- [14] Mr. Reimer wanted to structure the Proposal in a way which made the conversion to shares mandatory, rather than at the option of the investors. There was considerable email communication between the parties on that topic, although only one such email chain was introduced at trial. I will detail its contents when I consider that important question.
- [15] Mr. Reimer also testified that he did not know what a convertible debenture was, indeed still does not know. He said he told Mr. Espig that Siwash was not interested in borrowing money, but rather sought an investment in the company which provided an ownership interest to the investors.
- [16] Ultimately, five people invested \$25,000.00 each pursuant to the Proposal. They were: Mr. Espig, the two other named plaintiffs, Milo Filgas and Frank Hogel, a fourth individual, apparently an acquaintance of Mr. Hogel, and an uncle of Mr. Reimer. Mr. Filgas was involved in the project through a man named Andrew Von Kursell, who at one time was to be an investor, and had some input into the structure of the Proposal. Mr. Hogel, a businessman living in Germany, was introduced to the project by Mr. Espig.

- [17] The investment was made in two instalments, \$10,000.00 in late 2015, and a further \$15,000.00 in the first part of 2016.
- [18] The Proposal required the initial investment to be made immediately upon execution of the document. Mr. Reimer executed each of the five documents on behalf of Siwash at various times. Both Mr. Espig and Mr. Filgas executed the proposal on October, 2015, Mr. Hogel sometime later in 2015. The one copy of the document that is in evidence is the one signed by Mr. Espig on October 5, 2015. The parties agree that the other two plaintiffs signed identical documents and advanced funds accordingly.
- [19] The Proposal reflects the entitlement of the investors to two board seats, and also references Mr. Espig's willingness to sit on the board, thus bringing the board composition to five members.
- [20] Mr. Espig resigned from the board in September, 2016, based on disagreements with Mr. Reimer about the latter's leadership of Siwash. Mr. Filgas remained as a board member until an eventful annual general meeting of Siwash in April, 2017, at which time Mr. Reimer and members of his family effectively assumed complete control of the board.
- [21] The Monument vein proved not to be profitable during the currency of the profit sharing agreement between Siwash and Nicola, which agreement has now lapsed. It appears that the primary reason for the failure to generate income was the lower than expected yield of gold per tonne, which was insufficiently profitable to cover extraction and transportation costs.
- [22] This action was commenced on November 1, 2017.
- [23] I heard a great deal of evidence from both Mr. Espig and Mr. Reimer about disagreements between the two of them about the term 'convertible debenture'. Each of them in large measure blames the other for the project's failure. I understand why it was important for both men to put forward their position and perspective on their business dealings during the tenure of this venture.
- [24] However, I intend to address this evidence, and in particular, resolve conflicts in the evidence, only to the extent necessary to decide the issues that are central to the legal outcome of this trial.

Issues

- [25] The two primary issues I must decide are as follows:
- 1) Did Mr. Reimer make any material misrepresentations that induced the plaintiffs to enter into the Proposal and invest money pursuant to the Proposal?
 - 2) Is the investment a debt that is now due and owing by Siwash to the plaintiffs?

- [26] There is also the ancillary issue of alleged breach of the agreement by Siwash, said to be a failure to deliver "Coupon payments" to the investors, pursuant to the "Investment Terms" of the Proposal. However, that issue is easily dealt with, and was not seriously pressed by Mr. Espig in final submissions.

Coupon Payments

- [27] Pages 2 and 3 of the Proposal contain a boxed section under the heading Investment Terms that sets out the various terms under which the funds were advanced.
- [28] Two of the terms reference "Coupon payments" to be made to investors and "Bonus Payment(s)" to be made "pari passu" to the founding members of the company. The rates are zero for year one and 15 percent for years two and three. Those payments are to be made only after all costs, including transportation, have been paid.
- [29] There is no dispute in the evidence that what was envisaged by all concerned was that net profits from the venture would be reinvested in the company operations, with the exception of the Coupon and Bonus payments. Those terms were inserted to permit all stakeholders to share in a small portion of the Siwash profits.
- [30] The Notice of Civil Claim pleads that Siwash breached the agreement by not providing any such payments to the plaintiffs. However, the evidence is clear that there were no profits to be distributed at any time. Of note, one of the major issues of contention between Mr. Reimer and Mr. Espig at the time of the latter's resignation from the board was responsibility for a large outstanding trucking bill.
- [31] There being no net profits, Siwash cannot be in breach of this contractual term.

Misrepresentations by Mr. Reimer

- [32] The plaintiffs allege five misrepresentations by Mr. Reimer in the Notice of Civil Claim. I reproduce them here:

The Misrepresentations

11. Prior to the conclusion of the Agreement, Reimer or, alternatively, Reimer on behalf of Siwash, made the following representations to the Plaintiffs:
 - (a) the outstanding liabilities assumed in the Investment totalled \$1,305.66;
 - (b) the current Siwash directors would be liable for any other liabilities;
 - (c) neither Reimer nor Jon Stewart, another director of Siwash, would, at any time, receive a salary from Siwash, although a consulting stipend would be considered for Jon Stewart;
 - (d) Siwash had 2000 to 3000 tonnes of historic grade material stockpiled; and
 - (e) after conversion of the Debentures, the fully diluted share structure would be:

- (i) existing Shares post conversion - 99,801, and
- (ii) investors Shares post conversion - 100,000.

(collectively, the "Representations")

[33] The first two misrepresentations are of a piece, and conveniently dealt with together. Both relate to paragraph 1(b) of the Investment Proposal, which reads:

- (b) Liabilities To Be Excluded. The Investors' proposal assumes that it would assume only identified liabilities of \$1305.66, \$905.66 to Lindsay Kenney and \$400 in rent, that are incident to the ongoing operations of the Asset. Directors of Siwash would continue to remain liable for any liabilities or liens on the Company unbeknownst to the Investors, unless agreed upon by the Investors at a later date.

[34] In short, Mr. Espig requested that Mr. Reimer provide a budget for the company prior to drafting the Proposal. Assisted by Mr. Von Kursell, Mr. Reimer did so. That budget showed "debt" of \$1,200. Based on figures provided by Mr. Reimer, Mr. Espig drafted paragraph 1(b) of the Proposal.

[35] In his testimony, Mr. Espig explained the importance of knowing the full financial picture of Siwash, including all current indebtedness, prior to making an investment. However, he did not say that Mr. Reimer ever made the representations as framed in the pleadings. Rather, he said that he assumed that the budget provided by Mr. Reimer included all company debt. He later discovered that Mr. Reimer had caused company debt to exceed \$1,305.66.

[36] I view the distinction between an express representation and a possible omission from a budget as important. Mr. Reimer did not make any express representation. Moreover, the way in which the document was drafted effectively insulated the investors from responsibility for any debt beyond \$1,305.66. Finally, neither Mr. Espig nor Mr. Filgas testified that any representations in this regard induced them to make their investment.

[37] I turn next to the allegation regarding salaries, which overlaps with the previous claims.

[38] I accept the evidence of Mr. Espig concerning discussions between him and Mr. Reimer on this topic and what was known to the former at the time of the investment. Mr. Espig said that he stressed to Mr. Reimer the importance of not incurring financial liabilities in the early stages of the venture.

[39] Thus, there should be no salaried employees. There was a specific telephone discussion about the need to remunerate Jon Stewart, a key man in Siwash operations. Mr. Espig told Mr. Reimer, and the latter agreed, that there could not be a fixed salary for Mr. Stewart, but rather an agreement to reimburse him for expenses and pay him a salary from time to time, to be set by the company. In short, there was to be no guaranteed salary.

- [40] On June 11, 2015, Mr. Reimer emailed Mr. Espig a draft of the proposed employment contract for Jon Stewart which referred to compensation of "a salary set from time to time in accordance with the Employer's policy." Mr. Espig approved of the contract. That, he said, was the only employee contract of which he was aware at the time of the investment.
- [41] Mr. Reimer testified that he at some point, likely June, 2015, emailed Mr. Espig two fully executed employment contracts, one for himself, the other for Jon Stewart. Those two contracts set salaries at approximately \$51,000.00 for Stewart and \$115,000.00 for Reimer. Thus, Siwash would have owed those two employees more money in base salary than was expected to be raised through the Investment Proposal.
- [42] Mr. Espig testified, and I accept, that no prudent investor would invest in such a company, which was in essence insolvent. He certainly would not have done so. He said he only learned of those contracts many months later, when Jon Stewart approached him and showed him a document and expressed his regret. Mr. Stewart was deceased by time of trial, and thus unavailable to testify for either party, although both said his evidence would support their version of these facts.
- [43] The copy of the executed contract for Jon Stewart produced at trial was purportedly signed on December 11, 2014, by both Mr. Stewart and Mr. Reimer, on behalf of the company. I have no doubt that the contract was signed at a later date, after the June 11, 2015 email. Mr. Reimer's evidence on this issue makes no logical sense. If there were already an executed document in existence, with a fixed salary, there would have been no reason for his email to Mr. Espig with the draft, silent as to amount of salary. Of note, the covering email from Mr. Reimer asks Mr. Espig to "let me know if we need to change anything."
- [44] On November 30, 2016, Mr. Reimer entered into a "Debt Settlement Agreement" with Siwash, effectively converting his accrued salary owing of \$115,000.00 into shares in the company. I find that Mr. Reimer must have executed the employment contracts with fixed salaries sometime between June, 2015 and November 30, 2016, and back-dated them to December, 2014. I will say nothing more about the propriety of him doing so, since it is not legally relevant to this case. I would note, however, that it is not the type of action likely to instill confidence in investors holding a convertible debenture, in considering their option of conversion of debt to shares.
- [45] Of fundamental importance on this issue is the fact that Mr. Espig's evidence, which I have accepted, is not consistent with the pleadings. There is no evidence that Mr. Reimer made any representation about drawing a salary. If the two contracts with fixed salaries were already in place in June, 2015, which seems extremely doubtful, then Mr. Reimer failed to disclose some major financial obligation of the company to potential investors. Again, that is different than the express representation pled in the Notice of Civil Claim. If, as I find much more likely, Mr. Reimer created the financial obligation after the fact, and back-dated the contracts, his actions are of a different sort, which may have given rise to other remedies than those pled.

- [46] In short, there is no evidence of any express misrepresentation to support this claim.
- [47] I will address next the alleged misrepresentation concerning fully diluted share structure, post-conversion of the debenture. This claim, too, is not made out. Mr. Espig testified about the effect of the Debt Settlement Agreement being the dilution of the shares potentially held by the investors. I accept that such would be the result. Likewise, Mr. Espig complained that Mr. Reimer later caused additional shares to be issued to some of his family members. That, too, would have diluted the potential share position of the investors.
- [48] However, there is no evidence about any representations made by Mr. Reimer as to future share issues. On its face, the Investment Proposal would seemingly create a share structure similar to the one alleged in paragraph 11(e) of the Notice of Civil Claim. However, that assumes a total of four investors. In fact, there were five, one of whom was a relative of Mr. Reimer. That fact alone would give the Reimer family, if acting collectively, a majority shareholders stake.
- [49] It is also of note that some of the subsequent issuance of shares was done with the express knowledge and imprimatur of at least some of the investors. In short, this particular claim of misrepresentation is without merit or evidentiary foundation.
- [50] The most difficult claim to resolve is that Mr. Reimer represented that there was a stockpile of previously blasted totalling 3,000 tonnes on site.
- [51] The position of the plaintiffs was that Mr. Reimer told them, prior to the execution of the Investment Proposal, that there was a stockpile of material on site, suitable for transportation to the mill, of approximately 3,000 tonnes. Mr. Reimer, they claim, showed them this stockpile, seen in photographs introduced at trial as a large boulder, during a site visit or visits in October and November, 2015. Mr. Reimer then sent an email with attached diagrams, under the subject heading "Stockpile" on November 16, 2015. These assurances regarding the existence of a stockpile influenced the investors' decision to advance funds for the project.
- [52] Mr. Reimer testified that he made no representations concerning an existing stockpile. He said that the large boulder seen in photos was sent to the mill as part of the millfeed, but that he never referred to it during site visits as a "stockpile." He also said that anyone familiar with mining projects, as these investors were, would know that the boulder was not in fact a stockpile. With regard to the "Stockpile" email, Mr. Reimer said that he was intending to convey his intention to create a stockpile, not refer to an existing one.
- [53] Although he referred to "what was blasted from the vein", he meant the boulder, which may have been previously blasted some years prior or been deposited by natural geological processes. He said it was known to all concerned that Siwash had not obtained a blasting permit, so could not have been involved in any blasting activity.

- [54] The evidence on this topic is equivocal, and open to a number of interpretations. In essence, the plaintiffs' claim of misrepresentation fails based on absence of proof. Of particular importance is that neither Milo Filgas nor Mr. Espig could say with any precision what representation Mr. Reimer made during the site visit. Mr. Filgas said that Mr. Reimer pointed out the boulder and referred to it as a "stockpile." According to Mr. Espig, that site visit occurred on October 18, 2015. By that time, both he and Mr. Filgas had committed to the project and signed the Investment Proposal.
- [55] Mr. Espig's evidence was that it was Frank Hogel in particular who was influenced by the assurance of an existing stockpile. Mr. Hogel visited the site in November, 2015 and committed to the project in early 2016. During that site visit, Mr. Espig said they took photographs of themselves standing on the boulder, and Mr. Hogel sought assurances from Mr. Reimer concerning what it was. Mr. Reimer referred to it as a stockpile, in the range of 2,000 to 3,000 tonnes. Mr. Hogel did not testify at the trial, and there is no admissible evidence as to his motivation for executing the Investment Proposal.
- [56] Mr. Reimer also produced an email thread among himself, Mr. Espig and Mr. Hogel from November and December, 2015, when Mr. Hogel was contemplating investing in the project. In response to a query from Mr. Hogel regarding amount of ore "mined out" already, Mr. Reimer wrote that "there has been no ore mined here yet."
- [57] I also consider the evidence of Mr. von Kursell, who was a witness for the plaintiffs. He was considering becoming an investor in the fall of 2015. In cross examination, he agreed that Mr. Reimer made no representation to him about a stockpile. He also said that he visited the site and saw the large boulder, which he "absolutely" would not consider to be a stockpile.
- [58] At the end of the day, I cannot find that Mr. Reimer made the express misrepresentation as pled, nor that any of the plaintiffs relied on anything he did say about a "stockpile" in making a decision whether or not to invest funds.

Repayment of the Investment

- [59] The plaintiffs' position on this issue is straightforward: the Investment Proposal is a convertible debenture, which by its very nature is an instrument of debt. The option of converting debt to shares is the choice of the investors, which they chose not to exercise. Consequently, the debt must be repaid at the end of the term, 36 months. According to Mr. Espig, it was understood by all that the document created debt for the company.
- [60] Mr. Espig pointed out that the financial statements for Siwash to November 30, 2016 show the amount of \$125,000.00 as debt, in the form of a "note payable."
- [61] Mr. von Kursell, who was involved in the discussions leading to the Investment Proposal testified that it was clear to all concerned that the investment was a debt. He said that after 36 months, it became a "callable loan."

- [62] Mr. Reimer testified that he did not know what a convertible debenture was in 2015, and still does not know. He also said that he made it clear from the outset that he was not interested in borrowing money or accruing company debt. He wanted an investment which would be converted to equity in due course.
- [63] He produced an email chain from June, 2015, at which time drafts of the Proposal were circulating, showing a discussion about "forced conversion." The email thread appears to be incomplete, and the attachments are absent. Mr. Hogel's email, sandwiched between important ones from Mr. Espig and Mr. Reimer, is in German. The subject line of that email is "Forced Conversion", and it appears to excerpt some proposed language for the Investment Proposal that "all units will be converted" upon payment of the Coupon (my emphasis).
- [64] From the surrounding emails, it is clear that Mr. Reimer is advocating for what he calls "forced conversion" and Mr. Espig says Mr. Hogel will not agree to same. Mr. Reimer appears not to fully know what is meant by "being reimbursed" in 36 months, and queries if it is akin to a "note repayment."
- [65] The final two emails, between Mr. Reimer and Mr. Espig the morning of June 12, 2015 are ambiguous. It is clear that on June 11, 2015, Mr. Espig had told Mr. Reimer that Mr. Hogel would not agree to forced conversion, and suggested that Mr. Reimer make a counter-proposal. In his email on June 12, 2015 to Mr. Espig, Mr. Reimer says that after thinking about things overnight, he has a "thought to consider". There follows the interest figures which ultimately appear in the final document. Mr. Reimer ends with: "possibly forced conversion with early Coupon/Bonus payment if we are ready for the IPO."
- [66] Mr. Espig's response, sent three minutes later, is simply: "That's fine."
- [67] Mr. Espig was never asked about the email. Neither party produced the surrounding emails, nor gave evidence about further discussions between June and October, 2015, when the final document was executed by Siwash. Clearly, there was further discussion among the parties about the content of the Investment Proposal.
- [68] The relevant parts of the Investment Proposal are as follows:
- The investors "will invest up to C\$100,000, in the form of a convertible debenture, under terms defined hereafter"
 - "Structure" - "Shall be in the form of a convertible debenture with the following key terms highlighted below:"
 - "Conversion" - "Each Unit can convert into 5.02 Class "A" Voting Common Shares", and "The Investors have the option to convert into shares immediately after closing of Tranche 1 while continuing to maintain its right to the Coupon(s)"
 - "Term" - "36 months"

- [69] The document does not specifically refer to the investors' option to either demand repayment or convert to shares. However, I note that the final document contains permissive language ("can convert") as opposed to the mandatory language in the email chain ("will be converted"). I view that change as significant. It is some evidence that Mr. Hogel's position, refusal to agree to forced conversion, carried the day.
- [70] I also note that a debenture is by definition an instrument of debt. Black's Law Dictionary (10th ed., 2014) defines "convertible debenture" as "A debenture that the holder may change or convert into some other security, such as stock [usually at the option of the holder]".
- [71] Although the document is not worded as clearly and precisely as one might desire, it does create a legally enforceable instrument of debt, akin to an unsecured promissory note.
- [72] I do not view Mr. Reimer's evidence that he did not wish to incur debt, nor understand what was meant by a convertible debenture, to be persuasive. I start with the obvious, namely that Mr. Reimer could have sought legal advice before committing Siwash to this Proposal, if he was uncertain about its meaning. By the time of the Annual General Meeting of April 8, 2017, Siwash had engaged counsel, James Pflanz, who Mr. Reimer referred to, as recorded in the meeting minutes, as "the company's lawyer."
- [73] Mr. Pflanz chaired that Annual General Meeting (AGM). In response to a question from Jon Stewart about voting rights of the investors, Mr. Pflanz said that the investors had not "bought shares" pursuant to the Proposal. He then said "I've read that agreement, it's debt." Thus, the position of Siwash at that time was that the Investment Proposal was a debt instrument.
- [74] From the email chain of June, 2015, it is clear that Mr. Reimer was alive to the potential for the Proposal to create debt.
- [75] Finally, I consider the financial statements of Siwash to be some circumstantial evidence that the company viewed the amount of the investment to be debt. Those statements were prepared by a reputable accounting firm, based on information provided to them by Mr. Reimer.
- [76] Based on all the evidence, and my reading of the Investment Proposal, I have no hesitation in concluding that Siwash is legally obligated to repay the three plaintiffs the amount of their original investment.
- [77] I have considered the fact that there was never a formal demand for repayment, but find that such is not fatal to the plaintiffs' claim. I accept the submission of Mr. Espig that the commencement of this action is the equivalent of a demand for repayment. I also note that by that time, the 36 month term had not yet expired, but relations between the parties had become quite acrimonious. Indeed, certain comments of Mr. Pflanz at the April 8, 2017 AGM could be construed as a clear invitation to sue for repayment.

[78] I grant judgment in favour of each of the three named plaintiffs against the defendant Siwash Minerals Inc. in the amount of \$25,000.00 plus court ordered interest from the date on which the debt became due. The evidence is far from clear on that last point. Out of perhaps an overabundance of fairness to the defendant, I will select the latest possible date for purposes of interest calculation. For certain, by the end of May, 2016, each of the three plaintiffs had advanced \$25,000.00. I award court ordered interest from June 1, 2019.

Conclusion

[79] The plaintiffs' other claims for damages for breach of contract are dismissed.

[80] The claims for damages against the defendant Abram Reimer are dismissed.

[81] Given the mixed success of this action, I make no award of costs.

"Tammen J."

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