SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: December 22, 2016

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

QUINTO MINING CORPORATION
Debtor/Respondent
And
MASON GRAPHITE INC.
Petitioner
And
FTI CONSULTING CANADA INC.
Monitor

JUDGMENT ON MASON GRAPHITE INC.'S MOTION TO LIFT THE STAY OF PROCEEDINGS, IN HOMOLOGATION OF A TRANSACTION AND FOR A SETTLEMENT APPROVAL ORDER (#391)

INTRODUCTION

[1] The Petitioner makes a motion to homologate, approve and declare executory a settlement that it entered into with the Debtor. The Debtor and the Monitor contest the motion.

CONTEXT

[2] The facts are not in dispute.

[3] On or about April 5, 2012, Mason Graphite Inc. purchased 215 mining claims from Quinto Mining Corporation for a total purchase price of US$15 million plus the issuance of warrants.[1]

[4] A portion of the purchase price was deferred.

[5] On January 27, 2015, the Court issued an initial order under the *Companies' Creditors Arrangement Act*[2] in relation to Quinto and a number of affiliated companies. The initial order included a stay of proceedings which has been renewed from time to time and is still in force today.

[6] By December 2015, Mason had paid US$10 million to Quinto. The balance of US$5 million was payable at the earlier of (1) commercial production of the mining claims, or (2) two equal instalments of US$2.5 million each on October 5, 2016 and April 5, 2017.[3]

[7] As long as there was an outstanding balance due to Quinto under the purchase agreement, Mason was required to notify Quinto semi-annually on its progress towards commercial production.[4] Pursuant to this obligation, Mason sent the following notice to Quinto on December 29, 2015:

> Mason Graphite Inc. has not yet started its commercial production. Actually, Mason Graphite does not have the funds to start the commercial production and with the actual difficult financing market, Mason Graphite is not expecting to start the commercial production before 2018.[5]

[8] On January 12, 2016, Mason offered the Monitor $366,500 payable on closing as complete and final payment to fully reimburse the last deferred payment under the purchase agreement. The offer was based on the $450,000 price accepted by Quinto for the sale of 264 claims to Champion Iron.[6] The offer was rejected.

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1 Exhibit R-1 or D-1.
2 R.S.C., 1985, c. C-36 ("CCAA").
3 Exhibit R-1 or D-1, Section 2.6. This obligation is not contested by Mason and is specifically admitted in Mason's email of January 12, 2016 (Exhibit M-4) and in its financial statements for the years ended June 30, 2015 (Exhibit M-6, p. 19) and June 30, 2016 (Exhibit D-16 or M-7, p. 19).
4 Exhibit R-1 or D-1, Section 2.7.
5 Exhibit R-16 or D-2.
6 Exhibit D-3 or M-4. $450,000/264 claims x 215 claims = $366,477.

[9] On July 28, 2016, Mason increased its offer to $3 million.[7]

[10] On August 16, 2016, the Monitor, on behalf of Quinto, refused the offer but made a counter-offer of US$4 million.[8]

[11] On August 22, 2016, Mason accepted the counter-offer.[9]

[12] Between August 26 and September 6, 2016, Mason and Quinto exchanged drafts of a settlement and mutual release agreement and had largely agreed on its terms.[10]

[13] On September 6, 2016, before the proposed settlement agreement was executed, Mason issued a press release announcing a bought deal private placement offering of shares for $25 million.[11] The transaction closed on September 27, 2016.[12]

[14] Following the press release, Quinto decided it would no longer proceed with the proposed settlement because it was no longer in the best interests of its stakeholders.[13]

[15] On October 4, 2016, after an exchange of letters between counsel,[14] Mason (1) paid US$2.5 million to the Monitor as partial payment of the US$4 million settlement, but also as the instalment due October 5, 2016; (2) transferred US$1.5 million to its attorneys' trust account with irrevocable instructions to transfer the amount to Quinto upon Court approval of the settlement; and (3) instituted the present proceedings.

POSITION OF THE PARTIES

Mason

[16] Mason pleads that it arrived at an agreement with Quinto on August 22, 2016 and that the parties finalized the terms of the written contract on September 6, 2016. It characterizes the agreement as a transaction under Article 2631 of the *Civil Code of Québec.* It argues that there is no basis to annul the transaction. Finally, it adds that the Monitor was fully aware of the negotiations from the beginning and that the Monitor consented to the agreement.

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7 Exhibit R-2 or D-4. It is not clear if the offer was in US or CDN dollars, but that it is not necessary to decide that question.
8 Exhibit R-3 or D-5.
9 Exhibit R-4 or D-6.
10 Exhibits R-5, R-6 and R-8, or D-7 to D-10.
11 Exhibit R-7, D-11 or M-2. Exhibit D-11 or M-2 is the email received by Quinto.
12 Exhibit D-14 or M-5.
13 Exhibit R-10 or D-13.
14 Exhibits R-11, R-12 and R-13.

[17] It therefore pleads that the Court should homologate and give effect to the transaction and should issue a Settlement Approval Order as envisaged by the parties. It also asks the Court to lift the stay of proceedings against Quinto for this limited purpose.

QUINTO

[18] Quinto pleads that no binding contract exists with Mason. It argues that the emails exchanged on August 16 and 22, 2016 do not constitute offer and acceptance because they do not include all of the essential elements of the agreement. Further, it argues that if the August 16, 2016 email is an offer, it was conditional and the conditions were never satisfied. It argues that the draft settlement agreement sent to Mason on September 6, 2016 was the offer and that it validly revoked the offer prior to its acceptance by Mason.

[19] Further, it argues that its consent to any agreement was vitiated by Mason's misrepresentations that it had insufficient funds to pay the full amount due and that it was uncertain that it could obtain financing to do so.

[20] Quinto also argues that the Court should not lift the stay of proceedings.

[21] Finally, Quinto argues that the agreement should not be approved by the Court, because it deprives Quinto's creditors of US$1 million and therefore is not fair and reasonable, is not beneficial to Quinto and its stakeholders generally, is inconsistent with the purpose and spirit of the CCAA, and is not supported by the Monitor.

Monitor

[22] The Monitor generally supports Quinto's position. It agrees that there was no final and binding agreement and that the agreement cannot be a transaction in the absence of any dispute or litigation.

[23] Further, the Monitor argues that the collection risk was the driving force behind the negotiations with Mason and that the private placement came as a surprise to the Monitor. It says that Mason had all of this financing lined up and that it should have disclosed this to the Monitor.

[24] It adds that it never made any firm or legally binding commitment to Mason with respect to its support of the agreement. It says that it has reassessed its position in light of the private placement and that it no longer supports the agreement because it is not fair and reasonable and it does not benefit Quinto's creditors.

ISSUES

[25] The Court will analyze the following issues:

1. Does the stay of proceedings apply and, if so, should the Court lift the stay of proceedings to allow the motion to proceed?

2. Was there a binding agreement between Quinto and Mason for an accelerated payment of US$4 million?

3. If so, is that agreement invalidated by the alleged misrepresentations or omissions with respect to Mason's financial capacity?

4. If not, should the Court homologate the transaction and/or approve the agreement?

ANALYSIS

1. The stay of proceedings

[26] As a preliminary matter, the Court must decide if the stay of proceedings under the Initial Order and the CCAA applies, and if so, whether it should lift the stay and allow the motion to proceed.

[27] Quinto raises the argument that the stay applies and should not be lifted two thirds of the way through its outline of arguments:

> 47. Notwithstanding the foregoing, should the Court find that a valid and binding settlement agreement was entered into between the parties, which is not admitted and is expressly denied, Quinto submits that the stay of proceedings should not be lifted by the Court.

[28] The Monitor agrees, in the last two paragraphs of its outline of arguments:

> 31. The Monitor is of the view that all of the elements necessary to the adjudication of Mason's Motion on the merits are properly before the Court.
>
> 32. The Monitor supports the arguments made by Quinto with respect to the lift of the stay, but respectfully submits that the Court should nonetheless issue a decision as to the merits of Mason's Motion inasmuch as it seeks the homologation and approval of the purported transaction.

[29] The Court has tremendous difficulty understanding either of these positions.

[30] The issue of lifting the stay must be debated at the outset. The parties should not wait until the Court has decided the merits of the dispute and then, if the motion is well

founded, ask the Court to refuse to lift the stay, as Quinto suggests. The Monitor's suggestion is not much better: it agrees with Quinto that the stay applies and should not be lifted, but adds that the Court should nevertheless dismiss Mason's motion on the merits.

[31] In any event, the Court is satisfied that the stay should be lifted. The stay is drafted in very broad language and its broad language extends even to motions brought by third parties against the debtor before the CCAA Court. However, the main concern that the stay is meant to address is proceedings brought before another Court or body or extra-judicial proceedings over which the CCAA Court has no control. In those circumstances, the third party must obtain the CCAA Court's authorization before it proceeds.

[32] The stay also has some relevance in the context of motions brought before the CCAA Court. The CCAA Court's jurisdiction is not limited to hearing the motions brought by the debtor or the monitor. The CCAA Court will generally allow a third party such as a creditor or other stakeholder to bring a motion before the CCAA Court. In those cases, it is appropriate to lift the stay, if it applies. However, there are instances where it is not appropriate to allow the motion brought by the third party to proceed. For example, a motion by the creditor in the CCAA Court to enforce a pre-filing debt should be not be allowed to proceed if there is a claims process in the CCAA proceedings. In those circumstances, it would be appropriate to refuse to lift the stay.

[33] In the present case, the dispute has arisen in the context of CCAA proceedings. Mason asks the Court to approve the agreement. It is not a matter of a claim that can be dealt with through the claims process. The Court is satisfied that it should hear the motion and decide it. It will therefore lift the stay, to the extent that it is necessary to do so.

2. Was there an agreement?

[34] A contract is formed by the acceptance of an offer to contract.[15]

a. Offer

[35] Mason offered the Monitor $3 million on July 28, 2016 as complete and final payment to fully reimburse the last deferred payment under the purchase agreement.[16]

[36] On August 16, the Monitor, acting on Quinto's behalf, rejected the offer made by Mason on July 28 and made a counter-offer in the following terms:

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15 Article 1385-1386 C.C.Q.
16 Exhibit R-2 or D-4.

> The Monitor has now discussed this matter with the company and the company does not accept the proposal set out in your email of July 28, 2016 below. The company is however prepared to accept, subject to any necessary Court approval, a payment of US$4 million in full and final settlement of the future amounts owing by Mason Graphite, subject to the following conditions:
>
> 1. Acceptance of this offer by no later than 5:00 p.m. Eastern Time on Monday August 22, 2016, after which time this offer shall be null and void;
>
> 2. Execution of a definitive settlement agreement by no later than September 2, 2016;
>
> 3. Payment in full by no later than September 30, 2016 (or three business days after Court approval is granted if such approval is determined by the company to be required).[17]

[37] To be an offer, the email sent by the Monitor on behalf of Quinto on August 16 must contain "all the essential elements of the proposed contract" and the offeror must "signify his willingness to be bound if it is accepted".[18]

[38] The August 16 email contains all of the essential elements: the parties, the price, when it was to be paid and why it was being paid. The clauses added to the draft settlement agreement represent fairly standard contractual language and cannot be qualified as essential elements. The Court invited Quinto's attorney to point to anything in the draft settlement agreement that was not in the email and that he considered to be essential, and he was unable to do so.

[39] The offer provides that it is "subject to any necessary Court approval" and it sets out three "conditions".

[40] The first "condition" is simply a term for acceptance, as provided for in Art. 1390 C.C.Q. As set out below, the offer was accepted within this term.

[41] The second "condition" is in the nature of a resolutory condition: if the parties do not execute a definitive settlement agreement by September 2, 2016, the agreement is terminated. Quinto argues that this condition means that the offer is not an offer, but rather an offer to contract under Art. 1396 C.C.Q.:

> **1396.** An offer to contract made to a determinate person constitutes a promise to enter into the proposed contract from the moment that the offeree clearly indicates to the offeror that he intends to consider the offer and reply to it within a reasonable time or within the time stated therein.

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17 Exhibit R-3 or D-5.

18 Art. 1388 C.C.Q.

> A mere promise is not equivalent to the proposed contract; however, where the beneficiary of the promise accepts the promise or takes up his option, both he and the promisor are bound to enter into the contract, unless the beneficiary decides to enter into the contract immediately.

[42] The Court does not agree. The general rule is that a contract is formed by the sole exchange of consents and that it is not necessary to execute a written contract.[19] Article 1396 C.C.Q. is designed to deal with situations such as the sale of a house, when a formal notarial deed of sale is essential to the validity of the agreement. That is not the case here. A written contract was only necessary because the parties said it was, and they could have changed their minds and proceeded on the basis of the emails.

[43] The third "condition" is the delay for payment. This is an essential element of the agreement and not a condition.

[44] The final issue is Court approval. This is also in the nature of a resolutory condition: if Quinto determines that Court approval is required and the parties fail to obtain it, the agreement is terminated.

[45] None of these conditions are such that Quinto is not intending to be bound once the offer is accepted.

[46] The Court concludes that there was an offer by the Monitor on behalf of Quinto on August 16, 2016.

b. Acceptance

[47] Mason replied on August 22, 2016:

> Mason Graphite accepts the offer as outlined below and will pay $4 million USD in full and final settlement of the future amounts owed to Quinto. The definitive settlement agreement will also include the de-registration of all securities in favor of Quinto Mining Corp.
>
> Please confirm your acceptance.
>
> Peter McCague, Mason's Legal Advisor and copied on this email, will contact you in order to organize the process. His phone number is…..[20]

[48] An acceptance must "correspond substantially to the offer" and must be received within the term for acceptance.[21]

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19 Article 1385 C.C.Q.; *Gainsford* c. *Cornell*, 2013 QCCS 2852, par. 29-33.
20 Exhibit R-4 or D-6.
21 Article 1393 C.C.Q.

[49] In this case, Mason responded on August 22, before the expiry of the term for acceptance. The response includes three elements:

- Mason accepted the offer "as outlined below", which refers to the Monitor's email of August 16;
- Mason stated that it "will pay $4 million USD in full and final settlement of the future amounts owed to Quinto", which simply restates what was in the Monitor's email; and
- Mason adds that the definitive settlement agreement "will also include the de-registration of all securities in favour of Quinto Mining Corp."

[50] The last element simply states the obvious: if Mason's payment constitutes full and final settlement, then Quinto cannot keep any security. This is a clarification and not a new element which transforms the acceptance into a counter-offer.

[51] In any event, Mason writes at the end of the email, "Please confirm your acceptance", and the Monitor responds "Thank you Benoît. The company's counsel will prepare a settlement agreement".[22] The first draft prepared by Quinto's counsel includes the de-registration of the securities. So even if the August 22 email is a counter-offer, it was accepted by the Monitor. Either way, there is a meeting of the minds on August 22, 2016 and the formation of a contract.

c. Written contract

[52] The agreement was conditional on execution of a definitive settlement agreement by no later than September 2, 2016.

[53] A first draft of the settlement agreement was sent by Quinto's counsel on August 26.[23] It assumed that Court approval was necessary and provided for payment within three business days of the Settlement Approval Order.

[54] Mason provided its comments on September 1 in the form of a revised draft.[24] The revised draft provided for payment within ten business days of the Settlement Approval Order.

[55] The September 2 deadline was implicitly extended by both parties when they continued to exchange drafts after September 2 without raising the issue of the date.

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22 Exhibit R-4.
23 Exhibit R-5 or D-7.
24 Exhibit R-6 or D-9.

[56] Quinto's counsel responded with a "slightly revised" agreement on September 6 at 11:46 a.m.:

> Please find attached a clean copy of the slightly revised Settlement Agreement together with a PDF blackline against the draft you circulated. You will note that we have accepted all of your changes, with the exception of the settlement fee payment date which is October 4, 2016 (the day before the next milestone payment is due under the Purchase Agreement). In that regard, I can confirm that we have obtained a September 23, 2016 hearing date and will provide Mason Graphite with 7 business days following granting of the Settlement Approval Order to arrange for payment.
>
> Kindly let us know if we can consider the Settlement Agreement final and proceed to execution.[25]

[57] Mason never responded to this e-mail. At 12:53 p.m., Quinto's counsel wrote that "We have just received some new information that impacts the settlement. We will get back to you shortly."[26] At 1:53 p.m., Quinto's lawyer wrote to say that "the Company can no longer proceed with the proposed settlement".[27]

[58] The Court is satisfied that the written contract was finalized on September 6. The only remaining issue was the delay for payment and that issue had narrowed with each draft: Quinto proposed three business days in its first draft, Mason replied with ten, and the last draft provided for seven. Benoît Gascon, the president of Mason, testified that he was prepared to accept the last draft.

[59] In any event, Quinto's refusal to sign the draft settlement agreement cannot mean that the condition is not met and that the agreement is terminated.[28]

[60] The Court therefore concludes that the condition was met and that the draft settlement agreement dated September 6, 2016 represents the agreement between the parties.

3. Is the agreement invalidated by Mason's misrepresentations and omissions?

[61] In the context of the negotiations, Mason made certain representations about its financial capacity. According to Quinto and the Monitor, these representations were not true and they caused Quinto to accept an accelerated discounted payment that it would not have accepted if it had known the truth.

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25 Exhibit R-8 or D-10.
26 Exhibit R-9 or D-13.
27 Exhibit R-10 or D-13.
28 Article 1503 C.C.Q.

[62] As a first step, it is important to review exactly what Mason said to Quinto or to the Monitor during the negotiations about its financial capacity:

- In its June 29, 2015 reporting notice to Quinto about the status of commercial production, Mason stated that it had started the feasibility study that it expected to complete in July/August 2015. It said that the next step will be the mine construction financing with a completion target date of late 2015/early 2016.[29]

- In its December 29, 2015 reporting notice to Quinto, Mason stated:

  > Mason Graphite Inc. has not yet started its commercial production. Actually, Mason Graphite does not have the funds to start the commercial production and with the actual difficult financing market, Mason Graphite is not expecting to start the commercial production before 2018.[30]

- In its initial offer dated January 12, 2016, Mason stated:

  > The last deferred payment due to Quinto is not funded or covered by any restricted cash and would eventually need to come from a future financing which, in today's financial markets, is highly uncertain in terms of timing and amounts required for our next phases of development.
  >
  > This last deferred payment is secured by the 215 mining claims sold by Quinto in 2012. If Mason Graphite does not proceed with the last deferred payment, then Quinto will have to recover part of the amount through the realization of the mining claims which, in today's market, will prove to be difficult, costly and lengthy in time.[31]

- On July 4, 2016, Mason sent its regular reporting notice to Quinto, repeating the December 29, 2015 notice.[32]

- In its revised offer dated July 28, 2016, Mason stated:

  > Our previous offer was based on the available cash we had on hand. To increase the amount, we need to secure an external financing either through equity or debt.
  >
  > Over the past few months, we've been working on securing a financing for an early repayment of the last deferred payment, which is not easy in the actual market, even more since it is aimed at reimbursing a debt.

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29 Exhibit R-16.
30 Exhibit R-16 or D-2.
31 Exhibit D-3 or M-4.
32 Exhibit D-16.

> Nevertheless, we have found some financial partners and are now in a position to have access to an amount of $3M to be used as a complete and final payment to fully reimburse the last deferred payment without conditions and payable on closing.
>
> I would appreciate your thoughts on this in order to come to an acceptable resolution to both parties. Otherwise, this will likely mean you getting back the asset and trying to monetize it, which will not be easy and will take more time.[33]

[63] These statements are consistent with other public statements by Mason:

- On September 25, 2015, Mason announced positive results of its feasibility study. At the same time, it estimated that it would take 13 to 16 months to bring the project to commercial production at a cost of $165.9 million.[34]

- In its financial statements for the year ending June 30, 2015, which were issued on October 27, 2015, Mason states:

> Management believes that the Company has sufficient funds to meets its obligations and planned expenditures for the ensuing twelve months as they fall due. However, the Company will need additional funds to meet its payment obligation of US$2,500,000 ($3,118,500) on October 5, 2016 with Quinto (Note 8). In assessing whether the going concern assumption is appropriate, management takes into account all available information about the future, which is at least, but not limited to, twelve months from the end of the reporting period. The Company's ability to continue future operations and fund its exploration and evaluation activities is dependent on management's ability to secure additional financing in the future, which may be completed in a number of ways including, but not limited to, a combination of strategic partnerships, joint venture arrangements, project debt finance, royalty financing and other capital market alternatives. Management will pursue such additional financial sources when required, and while management has been successful in securing financing in the past, there can be no assurance it will be able to do so in the future or that these sources of funding or initiatives will be available for the Company or that they will be available on terms which are acceptable to the Company.[35]
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> (Emphasis added)

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33 Exhibit R-2 or D-4.
34 Exhibit R-14. See also Exhibit R-15 for the filing of the technical report.
35 Exhibit M-6, p. 7.

[64] Mason obtained the additional funds that were required. On September 6, 2016, Mason announced the $25,025,000 bought deal private placement offering.[36]

[65] The press release provides for the following uses of the funds:

> The gross proceeds of the Offering will be used by the Company as follows:
>
> i. Approximately $17 million for development expenses related to the Company's Lac Guéret graphite mine and Baie-Comeau, Québec concentrator plant project (the "Project"), the majority of which the Company expects to incur over the next twelve months (or approximately $21 million if the over-allotment option is exercised in full). These development expenses represent a portion of the Project's estimated $165.9 million capital expenditure budget, as described in the "NI 43-101 Technical Report: Resource Update and Feasibility Study, Lac Guéret Graphite Project" report published by the Company on February 29, 2016;
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> ii. Up to approximately $6 million for the payment of amounts owing to Quinto Mining Corporation related to the Company's acquisition of the mining claims that comprise the Lac Guéret property;
>
> iii. Approximately $1 million for an additional equity investment in Group NanoXplore Inc., an advanced materials company specialized in the production of graphene and graphene-enhanced polymers, and in which Mason Graphite currently holds a 31% equity stake on a non-diluted basis;
>
> iv. The remainder of the proceeds for general corporate purposes.[37]

[66] The private placement closed on September 27, 2016 with aggregate gross proceeds of $28,778,750.[38]

[67] Further, the financial statements for the year ending June 30, 2016, were issued on October 20, 2016. The going concern note now reads as follows:

> Management believes that the Company has sufficient funds to meets its obligations and planned expenditures for the ensuing 12 months as they fall due considering the private placement of $28,778,750 completed on September 27, 2016 (see Note 19). ...[39]

[68] Quinto and the Monitor allege that they were misled by Mason. They argue that the negotiations and the agreement were based on the collection risk and that if they had known that Mason had access to over $25 million, they would not have accepted the discounted payment.

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36 Exhibit R-7, D-11 or M-2.
37 Exhibit D-11 or M-2. The French version is produced as Exhibit R-7.
38 Exhibit D-14 or M-5.
39 Exhibit D-16 or M-7, p. 7.

[69] Quinto and the Monitor are therefore alleging that they were misled by Mason's failure to disclose relevant facts, which constitutes a "dol par réticence". The Court of Appeal summarized as follows the elements that the plaintiff alleging "dol par réticence" must prove:

> [45] Martineau plaide avoir été induit en erreur par le silence de Canadian Tire lors de la prorogation de l'entente. Cette dernière aurait omis à cette occasion de lui dévoiler l'implantation de deux nouveaux magasins dans le même secteur que celui où se trouve son entreprise. Nous serions donc en présence d'un dol par réticence.
>
> [46] Le dol ne se présume pas. Martineau devait tout d'abord établir l'existence d'une erreur. À cette fin, il devait faire la preuve de sa propre ignorance des circonstances déterminantes qu'il aurait dû connaître pour consentir de manière éclairée à la prolongation de l'entente. Il devait ensuite établir que, s'il avait connu ce qu'il prétend lui avoir été caché, il aurait refusé de s'engager ou l'aurait fait à des conditions moins onéreuses. Il devait finalement démontrer l'intention véritable de Canadian Tire de le tromper.[40]
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> (Emphasis added)

[70] Mason argues that it disclosed all of the relevant facts, that it did not mislead Quinto or the Monitor and that there was no error. Gascon[41] testified as follows:

- The offer that he made in January 2016 was based on the price that Champion had paid Quinto for other claims. Mason had sufficient cash on hand to pay the amount offered.

- When the Monitor declined that offer, Gascon sought out and found two investors willing to invest $3 million to fund the Quinto payment. He acknowledged that he spoke to other investors in that period, but he makes a clear distinction between the two investors who were prepared to fund the Quinto payment and the other investors who were prepared to fund the construction phase but not the payments to Quinto.

- When the Monitor made the counter-offer at US$4 million, Gascon went back to the two investors and they increased their investments to US$4 million.

- Once he had a deal with Quinto on August 22, 2016 for the accelerated payment, Gascon went to Financière Banque Nationale on August 24, 2016 and he went back to the investors who had been prepared to fund the

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40 *Martineau* c. *Société Canadian Tire ltée*, 2011 QCCA 2198, par. 45-46.

41 The use of first names will lighten the text and make it clearer. It should not be seen as a lack of respect for the individuals concerned.

> construction phase and quickly obtained their consent to the private placement.

[71] Gascon therefore argues that all of the facts were disclosed to Quinto and the Monitor. He says that his statement on July 28, 2016 that "we have found some financial partners and are now in a position to have access to an amount of $3 million to be used as a complete and final payment" was accurate. Although the private placement was agreed to very quickly after the deal with the Monitor, he says that the additional funds were never available to fund the payments to Quinto. This is consistent with the language in the private placement agreement,[42] the underwriting agreement,[43] the subscription agreement,[44] and the press releases,[45] all of which confirm that only a portion of the proceeds of $25 million or $28 million is to be used for the Quinto payments:

> Up to approximately $6 million for the payment of amounts owing to Quinto Mining Corporation related to the Company's acquisition of the mining claims that comprise the Lac Guéret property

[72] The Court notes that with the current exchange rates, US$4 million is approximately $5.3 million and US$5 million is approximately $6.7 million.

[73] Quinto and the Monitor have not advanced any evidence to challenge Gascon's assertions.

[74] The Court therefore concludes that Mason did not mislead Quinto or the Monitor with respect to its capacity to pay Quinto.

[75] To the extent that Quinto and the Monitor were in error as to Mason's capacity to pay Quinto, that error was not induced by Mason.

[76] Further, if Mason's capacity to pay was that important, Quinto or the Monitor could have taken steps to inquire or Quinto could have included language in the written contract to give itself a recourse if Mason's capacity to pay turned out to be greater that Quinto and the Monitor believed:

- Quinto or the Monitor could have asked Mason about its financial capacity and the steps that it was taking to obtain financing;
- Quinto or the Monitor could have asked for evidence of Mason's financial means and of the steps that it was taking to obtain financing;

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42 Exhibit D-12 or M-9.
43 Exhibit M-8.
44 Exhibit D-15.
45 Exhibit R-7, D-11 or M-2 and Exhibit D-14 or M-5.

- Quinto could have included a clear statement in the preamble or in the body of the written contract that it was relying on the representation by Mason that it did not have the financial capacity to pay more than US$4 million;

- Quinto knew that Mason had to obtain financing; if the amount of the financing was important to Quinto, it could have waited until Mason obtained the financing or it could have included a clause requiring Mason to pay the extra US$1 million if it obtained additional funds by a certain date;

[77] Instead, Gascon testified that Quinto and the Monitor never asked any questions about Mason's capacity to pay and there is nothing in the contract. In the absence of any inquiry and any contractual language, the Court is very hesitant to annul a transaction simply because one party said it could not afford to offer any more money.

[78] Finally there is no proof that Mason intended to mislead Quinto or the Monitor. The disclosure by Gascon is set out above, and it was not misleading. Moreover, if Mason had truly intended to mislead Quinto and the Monitor, surely it would have waited a couple of hours for the contract to be signed before announcing the private placement.

[79] The Court therefore concludes that the contract is valid.

4. Should the Court homologate the transaction and/or approve the agreement?

[80] Finally, Quinto and the Monitor argue that even if the agreement is valid, the Court should not approve it because the Monitor no longer recommends it and because it is not in the interests of Quinto or its creditors. The argument is essentially that it would not be appropriate to leave US$1 million on the table, now that we know that Mason can afford to pay it.

[81] There is a preliminary issue as to whether the Court's approval is required. The parties referred to two different bases for requiring such approval.

[82] First, Section 36(1) CCAA provides:

> **36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (Emphasis added)

[83] The question is whether agreeing to accept an accelerated and discounted payment with respect to a debt owed to the debtor constitutes a sale or other disposition of assets by the debtor.

[84] This provision should be read broadly to give the Court jurisdiction to protect the assets of the Debtor. On that basis, the Court is satisfied that the debt owed to the Debtor is an asset and that the accepting a discounted payment is equivalent to a disposition of the asset.[46]

[85] Further, the CCAA Court has jurisdiction to approve settlement agreements entered into by the debtor during the stay period.[47]

[86] In any event, the parties provided for a Settlement Approval Order is Section 2 of the draft settlement and mutual release agreement.

[87] The Court concludes that its approval is required in the present matter.

[88] The tests for authorizing a sale under Section 36(1) CCAA or approving a settlement under the Court's general powers are somewhat different.

[89] Section 36(3) CCAA includes a non-exhaustive list of the factors to be considered by the Court in granting its authorization under Section 36(1) CCAA:

> **(3)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
> >
> > **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> >
> > **(d)** the extent to which the creditors were consulted;
> >
> > **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and

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[46] See, for example, *Corporation financière CPVC/CPVC Financial Corporation (Proposition de)*, 2011 QCCS 5106, where Section 65.13 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, ch. B-3, was applied in similar circumstances.

[47] *Robertson* v. *ProQuest Information and Learning Company*, 2011 ONSC 1647, par. 22; *Nortel Networks Corporation (Re)*, 2010 ONSC 1708, par. 71.

> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[90] With respect to the approval of a settlement, Justice Pepall sets out the following factors in *ProQuest*:

> To obtain approval of a settlement under the CCAA, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the CCAA.[48]

[91] The factors are similar, except that Section 36(3) CCAA emphasizes the importance of the Monitor's approval of the sale process and its opinion on the sale. In the present case, the Monitor participated in the negotiations and would have recommended that the Court approve the agreement, if not for the private placement.

[92] The Court takes the Monitor's position to be that the agreement at US$4 million is fair and reasonable and beneficial to the creditors only if Mason does not have the capacity to pay more, and that the agreement is not fair and reasonable or beneficial to the creditors if Mason has the capacity to pay the original amount of US$5 million. The Monitor was of the view that Mason did not have the capacity to pay more when the agreement was negotiated in August 2016, but it changed its mind when the private placement was announced September 6.

[93] Essentially, Quinto and the Monitor take the private placement as evidence that (1) Mason misled them prior to September 6, and (2) Mason now has the capacity to pay the full amount due to Quinto.

[94] The Court does not agree with either conclusion.

[95] The Court reviewed above the representations made by Mason and finds that the private placement does not contradict any of them or render any of them misleading. Gascon's evidence that he approached Financière Banque Nationale and that he went back to the investors willing to finance the construction only after he reached the agreement with the Monitor on August 22 was not contradicted.

[96] Further, as discussed above, Mason made the representation in the private placement agreement, the underwriting agreement, the subscription agreement and the press releases that only "up to approximately $6 million" out of the proceeds of $25 million or $28 million is to be used for the Quinto payment. The private placement therefore does not give Mason the capacity to pay US$5 million (which is approximately $6.7 million).

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[48] *Robertson*, *supra* note 47, par. 22. See also *Nortel*, *supra* note 47, par. 73.

[97] In those circumstances, the Court will not take into account the Monitor's change of mind as a result of the private placement. Instead, the Court will rely on the Monitor's view prior to the private placement that the agreement entered into on August 22, 2016 was fair and reasonable. The passage of time has made the agreement less advantageous for Quinto – instead of Mason paying US$4 million in September 2016 as agreed in August 2016, Mason paid the first US$2.5 million on October 5, 2016 (as provided under the original purchase agreement) and will pay a further US$1.5 million pursuant to this judgment. However, the passage of time is not Mason's fault. It was ready to pay the full amount as agreed and it has not done so only because Quinto and the Monitor refused.

[98] Further, there are circumstances where the Court will authorize a sale at a price lower than the highest offer. In *Boutiques San Francisco*, Justice Gascon, then of this Court, authorized a sale at the price obtained through the tender process and did not give effect to the later, higher, offers by the parties:

> [20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la *LACC* est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.
>
> ...
>
> [24] Il y a lieu d'ajouter que l'ensemble des créanciers a sans doute plus intérêt à ce que les engagements pris raisonnablement et consciemment par les débitrices postérieurement à l'ordonnance initiale soient respectés plutôt que mis de côté chaque fois que des considérations purement monétaires le permettent.[49]
>
> (Emphasis added)

[99] The circumstances here are somewhat different. There was no organized bidding process. Rather, Mason was the only party with whom Quinto could make a deal. Nevertheless, there were negotiations and the parties reached a deal with the approval of the Monitor.

[100] Further, the Court must consider not only the interests of the creditors but also fairness to parties dealing with Quinto and the Monitor:

> In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I

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[49] *Boutiques San Francisco inc. (Arrangement relatif aux)*, 2004 CanLII 480 (QC CS), par. 20 and 24.

> think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as [...], I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.
>
> ...
>
> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.[50]
>
> (References omitted; emphasis added)

[101] If the Court does not approve the agreement, it would place Mason in a very delicate position. Mason would remain obligated to pay US$5 million to Quinto, and paying that amount could be a breach of its representations that only "up to approximately $6 million" is to be used for the Quinto payment and could expose Mason to a claim by the investors.

[102] Finally, it is important to emphasize that Mason is not at fault for this situation. Mason did not make any misrepresentation to Quinto or to the Monitor.

[103] In these circumstances, the Court has concluded that it is appropriate to approve the agreement. It is more important to respect the agreement reached by the parties than to allow Quinto and the Monitor to set it aside and go get an extra US$1 million.

[104] The Court is satisfied that the Monitor has acted properly throughout this process. It negotiated the agreement in the belief that it was for the benefit of the creditors and it was prepared to recommend that the Court approve the agreement. When additional facts came to its attention that changed its view, it brought those additional facts to the attention of the Court.[51] The Court simply does not agree with the impact of those additional facts.

[105] The final issue, tied in with the previous one, is whether the Court should treat the agreement as a transaction and homologate it. The issue here is whether the agreement entered into by the parties meets the definition of a transaction in Article 2631 C.C.Q.:

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50 *Royal Bank of Canada* v. *Soundair Corp.*, 1991 CanLII 2727 (ON CA), par. 40 and 46.
51 *InterTAN Canada Ltd. (Re)*, 2009 CanLII 2030 (ON SC), par. 5, 8-10.

> **2631.** Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.

[106] The Monitor argues that the agreement is not a transaction because there was no dispute as to the amount due by Mason to Quinto, such that the parties did not "prevent a future contestation", "put an end to a lawsuit" or "settle difficulties arising in the execution of a judgment".

[107] The parties were, however, avoiding the difficulties that might arise if Mason defaulted on its obligation to pay. Further, the accelerated and discounted payment constitutes mutual concessions: Mason agreed to pay early, and Quinto agreed to accept less.

[108] Moreover, the parties acknowledged and agreed in the draft contract that their agreement constituted a transaction within Article 2931 C.C.Q.[52]

[109] In any event, however, the issue is somewhat moot in that the Court will approve the agreement and order the parties to act in accordance with it. The homologation of the transaction does not add anything.

[110] For that reason, the Court will not grant those conclusions.

FOR THESE REASONS, THE COURT:

[111] **GRANTS** Mason Graphite Inc.'s motion to lift the stay of proceedings, in homologation of a transaction and for a settlement approval order (#391);

[112] **LIFTS** the stay of proceedings granted by the Court for the benefit of Quinto Mining Corporation for the limited purpose of allowing Mason Graphite Inc.'s motion to proceed;

[113] **DECLARES VALID AND ENFORCEABLE** the agreement entered into by Quinto Ming Corporation and Mason Graphite Inc. on August 22, 2016, as evidenced by the draft Settlement & Mutual Release Agreement dated September 6, 2016;

[114] **APPROVES** the draft Settlement & Mutual Release Agreement dated September 6, 2016;

[115] **DECLARES** that the present judgment constitutes a Settlement Approval Order as that term is defined in the draft Settlement & Mutual Release Agreement dated September 6, 2016;

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[52] Exhibit R-8, Paragraph (F) of the Preamble and Section 7.

[116] **ORDERS** the parties to comply with all the terms and conditions of the draft Settlement & Mutual Release Agreement dated September 6, 2016;

[117] **THE WHOLE WITH LEGAL COSTS.**

Stephen W. Hamilton, J.S.C.

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LAVERY DE BILLY
For the Petitioner

Mtre Sébastien Guy
Mtre Ilia Kravtsov
BLAKE, CASSELS & GRAYDON
For the Debtor

Mtre Chrystal Ashby
Mtre Sylvain Rigaud
NORTON ROSE FULBRIGHT CANADA
For the Monitor

Date of hearing: December 8, 2016