CITATION: Boliden Mineral AB v. FQM Kevitsa Sweden Holdings AB, 2021 ONSC 6844
COURT FILE NO.: CV-20-00639328-00CL
DATE: 20211101

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	)	
	)	
BOLIDEN MINERAL AB and BOLIDEN KEVITSA MINING OY	)	Crawford Smith and Zain Naqi, for the Applicants
Applicants	)	
– and –	)	
FQM KEVITSA SWEDEN HOLDINGS AB, FIRST QUANTUM MINERALS LTD., FQM FINANCE LTD. and FQM PROJECTS FINANCE LTD.	)	Patrick Flaherty, Andrew Finkelstein, and Brendan Brammall, for the Respondents
Respondents	)	
	)	
	)	**HEARD:** September 20 and 21, 2021

PENNY J.

REASONS FOR JUDGMENT

[1] In this application, the applicants seek declaratory and other relief in connection with indemnities given in a share purchase agreement. The indemnities relate to the potential for tax reassessments and taxes owing from pre-closing periods. Specifically, the applicants seek declarations that indemnities have been breached, that the respondents are liable to indemnify the applicants for all losses with respect to taxes arising from a reassessment by the Finnish tax authority and judgment in excess of 30 € million.

[2] The share purchase agreement distinguishes for some purposes between pre- and post-closing tax periods. The respondents accepted that they may become liable to indemnify the applicants for certain taxes arising out of the reassessment of pre-closing tax periods but: a) say there is an outstanding appeal of the reassessment, with a potential further appeal, with leave, to the Supreme Administrative Court of Finland. The respondents, therefore, say any final determinations of quantum and obligation to pay are premature; and b) in any event, they have no liability to indemnify the applicants for any taxes required to be paid in respect of any post-closing tax period.

[3] Thus, in general, issue is joined around the liability to indemnify the applicants for any taxes payable that are attributable to any period after June 1, 2016, the date the share deal closed, and whether any payments should be required now, given that a final determination of the legality of the Finnish tax authority's reassessment is still outstanding.

Background

[4] The applicant, Boliden Mineral AB ("Boliden"), is a Swedish mining company with interests in Sweden, Finland, and Ireland. The applicant, Boliden Kevitsa Mining Oy (formerly FQM Kevitsa Mining Oy, and which I will refer to as "Kevitsa"), is a Finnish corporation. Since June 1, 2016, Kevitsa has been a wholly-owned subsidiary of Boliden.

[5] Kevitsa owns and operates an open-pit mine located in northern Finland that went into operation in 2012. The mine carries on active production of nickel, copper, gold, platinum, and palladium.

[6] The respondent, First Quantum Minerals Ltd. is a British Columbia company listed on the Toronto Stock Exchange. It is involved in the mining and metals industry and is the parent company of several entities, including the other respondents. I will refer to the respondents collectively as "FQM".

[7] In 2016, FQM sold Kevitsa to Boliden in a share purchase deal (which I will refer to as the share purchase agreement or "SPA"). Boliden agreed to purchase the shares of Kevitsa from the respondents for a total purchase price of US$712,000,000. The SPA is governed by Ontario law and subject to the jurisdiction of the Ontario courts. The deal closed on June 1, 2016.

[8] The SPA contains two indemnities to protect the purchaser against a reassessment of Kevitsa's taxes: (1) a general indemnity for any losses incurred by the applicants as a result of any breach or inaccuracy of FQM's representations and warranties, including those relating to the tax position of Kevitsa; and (2) a free-standing, tax-specific indemnity. It is the meaning and effect of these tax indemnities that is at the heart of the dispute in this application.

[9] Prior to the SPA closing in June 2016, Kevitsa had accumulated substantial tax losses. At the end of the 2015 tax year (the last full tax year prior to closing), Kevitsa's tax loss carry forwards were approximately 81 million €. FMQ wrote down these losses in its financial statements in anticipation of the sale of Kevitsa to Boliden.

[10] Under Finnish law, tax losses of a company after a change of control are *prima facie* forfeit. The company can continue to utilize former tax losses under new ownership, however, if a permit to do so is granted by the Finnish Tax Administration ("FTA"). The

permit application is a procedure that allows the FTA to restore tax losses of an enterprise that existed prior to the change in ownership. Where there are *bona fide* commercial reasons for the transaction (i.e., the acquisition is not simply to acquire the tax losses) and the business that generated the losses will be carried on under new ownership, a permit can be obtained allowing the enterprise to carry forward the former accumulated tax losses under the new ownership. After closing, Kevitsa applied for a permit. The FTA granted the permit in May 2017, confirming Kevitsa's ability to utilize its pre-closing tax losses.

[11] It is common ground that FMQ gave no specific indemnities or any other assurances with respect to Kevitsa's pre-closing tax losses or any ability of Kevitsa to retain or utilize those tax losses after June 1, 2016.

[12] In April 2017, less than a year after the acquisition, the FTA commenced a tax audit of Kevitsa. The audit concerned a corporate reorganization and restructuring FQM had carried out in 2010 (the "2010 Reorganization"), six years before Boliden acquired Kevitsa's shares. The FTA issued a preliminary tax audit report in June 2018. It found there were insufficient business reasons for FQM's 2010 Reorganization and that it was primarily tax-motivated and thus contrary to the Finnish general tax anti-avoidance rules. As a result, substantial deductions for interest expense and exchange rate losses, which arose out of the 2010 Reorganization, and which were subsequently utilized by Kevitsa to eliminate and/or reduce taxable income from 2012 to 2016, were disallowed.

[13] Boliden advised FQM of the FTA's reassessment claim. In accordance with subs. 8.4(c) of the SPA, FQM chose to assume defence of the claim. It engaged tax advisors and filed a response to the FTA's preliminary report in September 2018 in Kevitsa's name. It is again common ground that, while FMQ had legal carriage of the defence by virtue of exercising its right to assume carriage under the SPA, Boliden reviewed and approved the submissions made to the FTA and, later, to the Finnish Tax Adjustment Board and to the Northern Finnish Administrative Court.

[14] In December 2018, the FTA issued a final report reassessing Kevitsa for millions of Euros in taxes, penalties, and interest for the 2012-2016 tax years—all Pre-Closing Tax Periods. The FTA concluded FQM's 2010 Reorganization was undertaken for tax avoidance purposes. The FTA's ruling disallowed deductions for interest expense and foreign exchange losses relating to the 2010 Reorganization. This had the effect of significantly increasing Kevitsa's taxable income—by nearly 113 million €—for 2012 through 2016.

[15] The FTA concluded that the 2010 Reorganization "had no actual effect from the point of view of the company and the entire group other than the tax effects gained as a result of the structure. The ownership and funding reorganization that was implemented must be regarded as devoid of economic substance. In light of the above, the reorganization is deemed to have been carried out exclusively with a view to gaining tax advantages by using the interest deduction right in Finland. In Finland, the taxable business income has been burdened with an interest deduction that must be regarded as inauthentic."

[16] The FTA levied a punitive tax penalty of up to 30% on the increased income under s. 32(3) of the relevant Finnish tax legislation, applicable where "the taxpayer has filed a substantially false tax return or any other declaration required to fulfil the reporting duty

or any other statutory information or document or has not filed any declaration, knowingly or due to gross negligence".

[17] The following chart shows Kevitsa's tax results from the 2010 to 2016, before the effects of the FTA's reassessment:

	Tax Results Before Reassessment (all amounts in €)		
Tax Year	**Profit or (Loss) for the Year**	**(Accumulated Tax Losses)**	**Income Taxes Payable**
2010	(14,632,094)	(14,632,094)	nil
2011	(22,390,840)	(37,022,935)	nil
2012	(7,009,279)	(44,032,214)	nil
2013	(269,835)	(44,302,049)	nil
2014	(13,456,495)	(57,758,544)	nil
2015	(23,163,409)	(80,921,953)	nil
2016	13,024,639	(67,897,314)	nil

[18] As this chart illustrates, prior to the reassessment, Kevitsa did not pay any income tax for 2010 through 2016. From 2010 to 2015, taxes payable were nil because Kevitsa did not have taxable income. For 2016, Kevitsa recorded a profit but paid no income tax because it utilized tax losses to fully offset that income.

[19] The FTA's disallowance of 113 million € in expenses claimed for 2012-2016 had a dramatic impact on its tax position. The following chart shows Kevitsa's tax results from 2010 to 2016, after the effects of the FTA's reassessment:

	Tax Results Before Reassessment	Tax Results Post-Reassessment (all amounts in €)					
Tax Year	**Profit or (Loss) for the Year**	**Interest Expense Disallowed by FTA**	**Foreign Exchange Losses or (Gains) Disallowed by FTA**	**Added Taxable Income Based on FTA Disallowances**	**Revised Profit or (Loss) for the Year**	**(Accumulated Tax Losses) or Net Taxable Profit for the Year after Reducing Available Tax Losses**	**Revised Taxes Payable (20% of Net Taxable Profit for the Year)**
2010	(14,632,094)	nil	nil	nil	(14,632,094)	(14,632,094)	nil
2011	(22,390,840)	nil	nil	nil	(22,390,840)	(37,022,935)	nil
2012	(7,009,279)	12,766,308	(5,768,928)	6,997,380	(11,899)	(37,034,834)	nil
2013	(269,835)	12,769,627	(12,600,435)	169,192	(100,643)	(37,135,477)	nil
2014	(13,456,495)	nil	41,302,050	41,302,050	27,845,555	(9,289,922)	nil
2015	(23,163,409)	7,872,410	52,885,459	60,757,869	37,594,460	28,304,538	5,660,908
2016	13,024,639	4,197,288	nil	4,197,288	17,221,927	17,221,927	3,444,385
Total		37,605,633	75,818,146	113,423,779			9,105,293

[20] As shown in the above chart, the reassessment had the following impacts:

- There was no change to the 2010 and 2011 tax years, as there was no increase in taxable income for those years
- For 2012 and 2013, Kevitsa was reassessed with substantially higher taxable income, but still incurred an overall loss. As a consequence, no additional income tax became payable. However, the increase in taxable income had to be offset by available tax losses, which reduced the amount of tax losses available to be carried forward and applied against future income
- For 2014, Kevitsa realized a profit of 28 million € (as opposed to a loss of 13 million € pre-reassessment) due to a large increase in reassessed taxable income. Although Kevitsa was able to use tax losses to fully offset this profit and did not have to pay additional income tax, the increase in taxable income again reduced the balance of tax losses available to be utilized in later years
- For 2015, Kevitsa realized a profit of 37 million € (as opposed to a loss of 23 million € pre-reassessment) due to a large increase in reassessed taxable income. Kevitsa had available tax losses to offset some of this profit, but had to pay income tax on the remainder. The additional income tax payable for 2015 was 5,660,908 €. Again, the increase in taxable income reduced available tax losses, this time to zero
- For the 2016 tax year, Kevitsa recognized a profit of 17 million €. There were no tax losses to offset that profit, given the large increase in Kevitsa's taxable income in earlier years. The additional income tax payable for 2016 was 3,444,385 €

[21] For the 2012-2016 period, the FTA reassessed and required payment of:

> 9,105,293 € in additional income tax (from the 2015 and 2016 reassessments);
>
> 5,638,000 € in penalty or punitive taxes;
>
> 6,000 € in Yleisradiovero (Yle), a special tax used to fund Finland's public broadcasting company; and
>
> 1,288,074 € in interest. Interest is charged by the FTA on unpaid amounts at penalty rate of 7% per year and continues to accrue.
>
> In total, the tax authorities reassessed Kevitsa an additional 16,037,367 € for 2012 to 2016 as a result of the reassessment.

[22] The impact of the reassessment was not limited to the 2012 to 2016 tax years. A further consequence was to increase Kevitsa's taxes for 2017 and 2018. This is because tax losses used to reduce 2017 and 2018 taxable income were no longer available post-reassessment. The tax losses had been reduced, and were effectively "used up", by higher taxable income reassessed in earlier years.

[23] This following chart shows the 2017/2018 tax results, before the effects of the reassessment:

	Tax Results Before Reassessment (all amounts in €)		
Tax Year	**Profit or (Loss) for the Year**	**(Accumulated Tax Losses) or Net Taxable Profit for the Year after Reducing Available Tax Losses**	**Income Taxes Payable (20% of Net Taxable Profit for the Year)**
Tax Losses Carried Forward from 2016		(67,897,314)	
2017	39,867,791	(28,029,254)	nil
2018	46,947,227	18,917,703	3,783,541

[24] The next chart shows the 2017/2018 tax results, after the effects of the reassessment:

	Tax Results After Reassessment (all amounts in €)		
Tax Year	**Profit or (Loss) for the Year**	**(Accumulated Tax Losses) or Net Taxable Profit for the Year after Reducing Available Tax Losses**	**Income Taxes Payable (20% of Net Taxable Profit for the Year)**
Tax Losses Carried Forward from 2016		nil	
2017	39,867,791	39,867,791	7,973,558
2018	46,947,227	46,947,227	9,389,445

[25] For 2017-2018, Kevitsa incurred additional tax liabilities, totalling 14,398,435 € as follows:

13,579,462 € in additional income tax;

3,000 € in Yle tax; and

815,973 € in interest, which continues to accrue.

[26] The financial impact of the reassessment is over 30 million € for all affected tax years.

[27] Kevitsa appealed the FTA's reassessment in March 2019. Appeals are made in the first instance to the Finnish Tax Adjustment Board (the "Board"). The appeal included detailed submissions prepared by Finnish tax counsel under FQM's direction, as approved by Boliden. The Board dismissed the appeal in March 2020. It issued lengthy reasons for decision and upheld the FTA's reassessment in its entirety.

[28] The Board found, among other things, that:

> This case is about the tax legal evaluation of the arrangement undertaken by FQM group on the basis of Section 28 of the Tax Assessment Procedure Act [the general anti-avoidance provision], not about the retroactive interpretation of the tax legislation, as the Company has argued, or the retroactive change of taxation.
>
> … taking into account the working of the tax evasion provision and the current state of case law, the reassessment decision of taxation made by the Tax Administration is not contrary to the principle of legality enshrined in the Finnish Constitution either. Hence, there is no reason to overturn the reassessment decision of the Tax Administration on this ground either.
>
> The completely artificial and cascading arrangement now at hand involved tax evasion. This came up only in the tax audit of the Company. By behaving in the above-mentioned way, the Company filed an essentially false tax return intentionally or by gross negligence with a view to evading tax.

[29] After the Board dismissed FQM's appeal, FQM proceeded with a further appeal to the Northern Finnish Administrative Court. The appeal was filed in April 2020. The decision is still outstanding. There is also the possibility of a further appeal, with leave only, to the Supreme Administrative Court of Finland.

[30] Despite the ongoing appeal process, the applicants have been forced to pay substantial amounts arising out of the FTA's reassessment. Thus far, the FTA has collected approximately 8.6 million € in reassessed taxes, penalties, and interest. The applicants have not been reimbursed by FQM for any amounts under the indemnity.

[31] Further payments to the FTA are stayed pending the appeal before the Northern Finnish Administrative Court. If the appeal is dismissed, the stay will be automatically lifted, and the FTA will be able to continue seizing monies from Kevitsa. In the meantime, unpaid taxes, penalties, and interest incur interest at a penalty rate of 7%.

[32] In February 2021, FQM moved to stay this application pending completion of all tax appeals in Finland. Mr. Justice Koehnen denied the motion. He found that:

> … The injustice here is substantial. Boliden has already paid €8.6 million to Finnish tax authorities as a result of the assessment. It says it is entitled to indemnity for that amount and wants that issue determined. FQM's only apparent answer is to wait three or four more years until Finnish tax appeals are exhausted at which point Boliden can lift the stay on the Ontario application, schedule a hearing and potentially wait for several more years until FQM exhausts all possible appeals in Ontario. The commercial idea behind an indemnity is based on a substantially more real-time approach than that.
>
> …
>
> The current state of affairs is that Boliden is faced with a €28,000,000 [now over 30 million €] obligation. That obligation continues until it is diminished or quashed by an appellate court. Boliden bargained for and deserves protection against that risk. The first step in seeking that protection is to bring a claim for indemnity in Ontario. To prevent Boliden from doing so denies it the protection it bargained for under the share purchase agreement.

Issues

[33] There are six issues raised on this application:

(1) (a) Did the reassessment by the FTA based on the 2010 Reorganization, constitute a breach the representation and warranty in s. 3.1.22(d) of the SPA?

(b) If yes, what is the extent of the indemnification obligation under s. 8.2(a)(i) of the SPA? In particular, does the indemnification obligation extend to alleged losses incurred in 2017 and 2018.

(2) Does Boliden have the right to indemnification with respect to the 2017 and 2018 alleged losses under s. 8.2(c)(i) of the SPA?

(3) Does s. 8.2(e) of the SPA (which bars claims for Losses arising from a change in accounting method that shifts losses from a Pre-Closing to post-closing tax period) preclude Boliden from claiming indemnification with respect to the 2017 and 2018 alleged losses?

(4) Should Boliden's indemnification claim with respect to 2017 and 2018 alleged losses be dismissed on the basis that it is an abuse of process?

(5) Whether any indemnified tax liabilities for 2016 must be apportioned on the basis of a June 1, 2016 (date of closing) cut off? and

(6) Given the outstanding appeals, the scope of the liabilities associated with the FTA's reassessment have not been finally determined. How, in the circumstances, should questions of quantum be resolved?

Analysis

1(a). Did the reassessment by the FTA based on 2010 Reorganization, constitute a breach or inaccuracy of the representation and warranty in s. 3.1.22(d) of the SPA?

[34] Article 8.2(a)(i) of the SPA sets out the respondents' general indemnification obligation in the event of a breach or inaccuracy of the Seller's representations and warranties:

> 8.2 Indemnification by the Seller and Other FQM Parties; Indemnification by the Buyer
>
> (a) Subject to the limitations set forth herein each of the Seller and other FQM Parties shall jointly and severally indemnify and hold harmless the Buyer Indemnitees from and against any and all Losses arising from, in connection with or related to:
>
> > (i) any breach or inaccuracy of any representation or warranty made by the Seller or other FQM Parties in this Agreement…

[35] The SPA defines "Loss" or "Losses" to mean:

> any loss, Liability, demand, claim, cost, damage, award, suit, action, penalty, Tax, fine or expense (including interest, penalties and reasonable lawyers' fees and expenses) that are sustained, suffered or imposed, however, (i) a consequential or indirect loss shall only be considered a Loss to the extent it is a reasonably foreseeable consequence of the event or circumstance constituting the ground for the applicable indemnification obligation.

[36] "Liabilities" is also defined to mean "any liabilities or obligations of any kind, whether accrued, contingent, absolute, or otherwise."

[37] Also relevant to some of the arguments made is the definition of "knowledge" which means:

> 1.10 Knowledge
>
> In this Agreement, references to "the knowledge of the Seller or any of the Other FQM Parties" mean the actual knowledge, after reasonable inquiry of Clive Newall, President; Hannes Meyer, Chief Financial Officer; Alan Delaney, General Manager; and/or Christopher Lemon, General Counsel & Corporate Secretary.

[38] Article 3.1 sets out FQM's representations and warranties. It provides:

> Except as set forth in the Disclosure Letter, each of the Seller [FQM Kevitsa Sweden Holdings AB], FQML, FQM Finance and FQM Projects Finance jointly and severally represents and warrants to the Buyer as set out in the following Subsections of this Section and acknowledges that the Buyer is relying upon such representations and warranties in entering into this Agreement.

[39] Article 3.1.22 contains FQM's representations and warranties relating to the taxes of Kevitsa and its wholly owned subsidiary, FQM Finnex Oy:

> Taxes
>
> 3.1.22
>
> (a) The Corporation [Kevitsa] and Subsidiary [FQM Finnex Oy] have duly and timely filed all Tax Returns required to be filed by them and all such Tax

> Returns are complete and correct in all material respects. No extension of time in which to file any such Tax Returns is in effect.
>
> (b) The Corporation and the Subsidiary have paid on a timely basis all Taxes which are due and payable, including all instalments on account of Taxes for the current year, that are required to be paid by them, all assessments and reassessments, and all other Taxes due and payable by them on or before the date hereof, other than those which are being or have been contested and in respect of which reserves have been provided in the Financial Statements.
>
> …
>
> (d) There are no grounds for the reassessment of the Taxes of the Corporation or the Subsidiary.

[40] The SPA defines "Taxes" to include:

> all taxes, levies, duties, fees, premiums, assessments, reassessments and other charges of any nature whatsoever, whether direct or indirect, including without limitation, income tax, profits tax, gross receipts tax, corporation tax, mining tax, commodity tax, sales and use tax, wage tax, payroll tax, worker's compensation levy, employer health tax, capital tax, stamp duty, real and personal property tax, land transfer tax, customs or excise duty, excise tax, turnover or value added tax on goods sold or services rendered, withholding tax, pension plan, social security charges, unemployment insurance charges and retirement contributions, and any interest fines, additions to tax and penalties thereon.

[41] Under Art. 8.1, the representations and warranties in 3.1.22 are defined as "Tax Representations" and survive "until six (6) months after the expiration (including all periods of extension, whether automatic or permissive) of the period during which any tax assessment may be issued by a Governmental Authority in respect of any taxation year to which the Tax Representations extend."

[42] FQM argues that the representation and warranty in 3.1.22(d) must be interpreted as of the date the contract was made. It cites Art. 7.2(a) of the SPA which provides that the representations and warranties of the Seller "shall be true and correct in all material respects as of the Closing Time as though made on and as of the Closing Time." FQM also cites a decision of the Court of Appeal for Ontario, *Beatty v. Wei*, 2018 ONCA 479 at para. 50 for this proposition. Based on this assertion, FQM argues that the representation and warranty that "there are no grounds for the reassessment of the Taxes" of Kevitsa must be interpreted to mean "known grounds" for reassessment as of the date of closing. FQM relies on evidence from its group tax manager, David Silvestro, and Finnish tax experts to say that it had no knowledge the FTA would reassess Kevitsa's 2010 Reorganization nor was there any basis for FQM to reasonably foresee any such reassessment. Accordingly, FQM argues, there was no breach or inaccuracy of Art. 3.1.22(d) under Art. 8.2(a)(i).

[43] I am unable to accept this argument.

[44] In Art. 3.1.22(d) FQM represented and warranted that "[t]here are no grounds for the reassessment" of Kevitsa's "Taxes". This representation and warranty is absolute and unconditional.

[45] As sophisticated commercial parties, FQM and Boliden both understood, by including this provision at all, that the door was not closed on a potential reassessment of Kevitsa's tax position and that the risk of a reassessment could materialize after the SPA was concluded. The broad, unqualified promise that "[t]here are no grounds for the reassessment" accounted for that risk and placed it on the seller, not the purchaser. This makes commercial sense, because the FQM ran Kevitsa pre-closing and made all the corporate decisions, including decisions related to the company's tax position and potential tax liabilities. Thus, whether there were any tax "skeletons in the closet" was far more within FQM's purview that Boliden's.

[46] FQM's representation and warranty that "[t]here are no grounds for the reassessment" is not knowledge-qualified. The SPA draws a clear distinction between representations and warranties that are knowledge-based and those that are not. The distinction is expressly contemplated under Art. 1.10, cited above, which defines "knowledge" as "the actual knowledge, after reasonable inquiry of" certain named senior officers of FQM.

[47] There are numerous representations and warranties in the SPA that are limited to the knowledge of the sellers, but Art. 3.1.22(d) is not one of them - it is unqualified and unequivocal. Representations and warranties in the SPA which are qualified by FQM's knowledge include: Art. 3.1.1 (Organization), Art. 3.1.20 (Material Contracts) and Art. 3.1.21 (Litigation).

[48] Further, *Beatty v. Wei,* relied on by FQM, has no application to the circumstances of this case. This is because, in *Beatty v. Wei,* the representation in issue was specifically restricted "to the best of the Seller's knowledge and belief". Article 3.1.22(d) is a completely different kind of representation and warranty, unqualified by any knowledge-based requirement. The respondents' evidence about what it actually knew or might reasonably have known is, in the circumstances of this case, irrelevant.

[49] On FQM's interpretation, Art. 3.1.22(d) would only be engaged in the most limited of circumstances where FQM failed to disclose a ground of reassessment it was specifically aware of at the time of closing. The indemnity would, therefore, only cover conduct tantamount to fraudulent misrepresentation or deceit. That is not what the parties agreed to in Art. 3.1.22(d) nor, viewing the language used in the context of the agreement as a whole and the factual matrix reasonably known to the parties at the time, is it what they intended.

[50] The representation and warranty in 3.1.22(d) says "there are no grounds". That turned out to be inaccurate. There were grounds and the FTA acted on them to reassess Kevitsa's 2012 to 2016, as well as the 2017 and 2018, tax years. That decision has been upheld on the first level of appeal. I conclude, therefore, that the reassessment of Kevitsa's 2010 Restructuring was a "breach or inaccuracy" of the clear and unqualified representation and warranty that there were "no grounds" for a reassessment.

1(b). If yes, what is the extent of the indemnification obligation under s. 8.2(a)(i) of the SPA? In particular, does the indemnification obligation extend to alleged losses incurred in 2017 and 2018.

[51] The question then becomes to determine the scope of the obligation to "indemnify and hold harmless the Buyer Indemnitees from and against any and all Losses arising from, in connection with or related to" the breach or inaccuracy. "Losses" includes "any loss, Liability [meaning "any liabilities or obligations of any kind, whether accrued, contingent, absolute, or otherwise"], demand, claim, cost, damage, award, suit, action, penalty, Tax, fine or expense (including interest, penalties and reasonable lawyers' fees and expenses) that are sustained, suffered or imposed". The dispute about this issue turns on the further proviso in the definition of "Losses" which states: "however, (i) a consequential or indirect loss shall only be considered a Loss to the extent it is a reasonably foreseeable consequence of the event or circumstance constituting the ground for the applicable indemnification obligation."

[52] FQM concedes it is liable for reassessed taxes actually paid or ultimately found payable for the years 2012 to 2016. It maintains, however, it is not liable for any reassessed taxes paid or payable for the years 2017 and 2018 because: a) liability for such losses is expressly disclaimed in the SPA; and, b) the 2017/2018 losses are in any event consequential or indirect and were *not* reasonably foreseeable.

(a) Pre-Closing Tax Period

[53] FQM first argues that Boliden's position amounts to an attempt to extend the tax indemnity in section 8.2(c)(i) for taxes owed in Pre-Closing Tax Periods (i.e., 2012 to 2016) which does not require a breach of a representation, to cover taxes owed in post-closing tax periods (i.e., 2017 and 2018). FQM says the parties expressly confined the 8.2(c)(i) indemnity only to taxes owed in Pre-Closing Tax Periods. Giving section 3.1.22(d) the meaning asserted by Boliden effectively writes out the agreed-upon limitation in section 8.2(c)(i) to Pre-Closing Tax Periods.

[54] The flaw in this argument is that the general indemnity under subsection 8.2(a)(i) is a distinct indemnity from the indemnity in 8.2(c)(i). They have different criteria and serve different purposes. They must each be given proper effect. The specific 8.2(c)(i) indemnity requires no "breach or inaccuracy" and does not engage the concept of Losses at all; rather, as noted earlier, it is a free-standing obligation triggered only by a requirement to pay any "Taxes" in respect of a "Pre-Closing Tax Period". The general indemnity in Art. 8.2(a)(i) does not use the term "Pre-Closing Tax Period". FQM's argument improperly conflates the general indemnity under 8.2(a)(i) with the narrower tax-specific indemnity under 8.2(c)(i).

[55] There is nothing in Art. 8.2(a)(i) restricting the scope of indemnification to amounts incurred for a "Pre-Closing Tax Period". That language cannot be imported into a different context which would unduly narrow FQM's obligation. The general indemnity covers "any and all Losses", with no express temporal limitation.

(b) Consequential or Indirect

[56] The loss claimed that is in dispute is the loss of accumulated tax losses that, but for the reassessment, would have been available (and were, before the reassessment, actually utilized) in 2017 and 2018 to reduce Kevitsa's taxable income in those years.

[57] Instead, the reassessment eliminated significant deductions for interest and foreign-exchange costs used in 2012 to 2016, which had the result of increasing taxable income

which, in turn, necessitated the "use" of the accumulated tax losses to reduce taxable income in those years. This had the further result that the accumulated tax losses were "used up" in prior years and were, therefore, no longer available to reduce what was otherwise taxable income in 2017/2018.

[58] Boliden says the "loss" of the benefit of the accumulated tax losses in 2017 and 2018 is a direct result of the reassessment and is neither consequential nor indirect. But for the reassessment of the earlier years, Kevitsa's taxes in 2017 and 2018 would not have increased.

[59] FQM argues that the claimed loss is both consequential and indirect because there were a series of the intervening steps that had to occur before Kevitsa could obtain the benefit of any pre-closing accumulated tax losses. Those steps included:

(a) Boliden had to make an application for a permit to continue Kevitsa's accumulated tax losses under new ownership;

(b) the FTA had to grant the permit application;

(c) Kevitsa had to have taxable income in the post-closing years;

(d) there had to be a reassessment of pre-closing years; and

(e) any reassessment of pre-closing years had to use up the accumulated tax losses so they were no longer available in post-closing years.

[60] It seems to me that a consequential or indirect loss is one which does not flow immediately from the breach but from some other consequence of the breach; in other words, a consequential or indirect loss is one which is at least once removed from the breach of contract itself.

[61] Here, the loss of the benefit of prior accumulated tax losses in 2017 and 2018 is an indirect consequence of the reassessment. The reassessment of 2012 had a domino effect on 2013, the reassessment of 2013 had a domino effect on 2014, and so on. This seems to me to show that the loss of the benefit of prior tax losses in 2017 and 2018 is an indirect consequence of the need to "use" those losses to reduce taxable income in prior years. Accordingly, I find that the first part of the proviso in the definition of "Losses" is engaged; the claimed loss is consequential or indirect. It is important to recall, however, that the SPA provides that even a consequential or indirect loss is recoverable; it is "considered a Loss to the extent it is a reasonably foreseeable consequence of the event or circumstance constituting the ground for the applicable indemnification obligation." Thus, I will now turn to the more involved question of whether the "Loss" of the ability to use the tax losses to reduce taxable income in 2017 and 2018 was "a reasonably foreseeable consequence of the event or circumstance constituting the ground for the applicable indemnity obligation".

(c) Reasonable Foreseeability

[62] FQM argues, as noted above, that the "loss" claimed was not reasonably foreseeable because so many uncertain, intervening steps or actions were required to bring about the result of increased taxable income for Kevitsa in 2017 and 2018.

[63] FQM argues that it:

(i) wrote down the tax losses on its books just before closing;

(ii) gave no representation or warranty about the continued availability or amount of any pre-closing accumulated tax losses;

(iii) advised Boliden that retaining the tax losses post-closing was "uncertain";

(iv) had no responsibility for, and no involvement in, Boliden's application for a permit to retain Kevitsa's tax losses under new ownership, or in Boliden's eventual success in being granted the permit;

(v) had no reason to suspect Kevitsa would be reassessed over the propriety, from FTA's point of view, of the 2010 Reorganization;

(vi) had no reason to suspect that, if reassessed, significant tax deductions resulting from the 2010 Reorganization would be disallowed, resulting in an increase in Kevitsa's taxable income, triggering the need to "exhaust" the accumulated tax losses to reduce taxable income in pre-closing years; and

(vii) had no reason to suspect the further result that Kevitsa would have taxable income in 2017 and 2018 and that the tax losses would no longer be available for use to reduce Kevitsa's taxable income (if any) in post-closing years.

[64] Notwithstanding Mr. Flaherty's able and forceful arguments, I am unable to accede to FQM's arguments on this issue. I find that the Losses claimed for 2017 and 2018 were a "reasonably foreseeable consequence" of the FTA's reassessment.

[65] The governing purpose of damages for breach of contract is to put the innocent party, so far as money can do it, in the same position they would have been in had the contract been performed. The defaulting party is liable for damages that were reasonably foreseeable at the time the contract was made. Reasonable foreseeability is taken to include losses that would follow "in the ordinary course of things" or by virtue of particular knowledge, sometimes called "special circumstances", known to the parties at the time. The degree of risk required is that there be a "serious possibility" that the damage suffered would result from the breach: *Hadley v. Baxendale* (1854), 9 Exch. 341 (H.L.); *Victoria Laundry (Windsor) Ltd. v. Newman Indust. Ltd.*, [1949] 1 All E.R. 997 (C.A.).

[66] The SPA itself is consistent with the manner in which these concepts are applied. Under the SPA, reasonable foreseeability applies only to consequential or indirect "Losses" that were a "consequence of the event or circumstance constituting the ground for the applicable indemnity obligation". In other words, it is not the event or circumstance constituting the ground for the applicable indemnity obligation (i.e., the breach) that must be reasonably foreseeable, but the financial consequences of that event or circumstance.

[67] Here, the event or circumstance constituting the ground for the applicable indemnity obligation is the FTA's reassessment of Kevitsa's 2010 Reorganization and Kevitsa's taxes for 2012 to 2018. The occurrence of that event is not subject to the test of reasonable foreseeability. Rather, the triggering of this particular indemnity obligation arises, as discussed above, from the language of the SPA and from Arts. 3.1.22(d) and 8.2(a)(i) specifically. What is subject to the test of reasonable foreseeability under Art. 8.2(a)(i) and the definition of Losses is whether a reassessment of the 2010 Reorganization would

have a consequential impact on taxable income in 2017 and 2018, and on the availability and applicability of Kevitsa's accumulated tax losses in those years.

[68] Thus, while FQM's factum spent a good deal of time arguing that the FTA's reassessment of the 2010 Reorganization was not reasonably foreseeable, I do not think it matters. The reassessment is the event or circumstance constituting the ground for the applicable indemnity obligation. The SPA, not reasonable foreseeability, governs that issue. This was effectively conceded by FQM in oral argument of the application.

[69] FQM places heavy reliance on the uncertainties associated with Kevitsa retaining the pre-closing tax losses and certain evidence advanced about this issue. I am not persuaded by the evidence or the argument. It may well be true that the granting of the permit to continue the tax losses post-change of ownership was not a foregone conclusion. This does not mean, however, that it was not reasonably foreseeable.

[70] Obviously, FQM knew about the tax losses and knew they had value. Pre-closing, Kevitsa did not pay any income tax for 2010 through 2016. From 2010 to 2015, taxes payable were nil because Kevitsa did not have taxable income. This is when Kevitsa accumulated the bulk of the tax losses that were carried forward. However, in 2016, Kevitsa recorded a profit and had otherwise taxable income but paid no income tax because it utilized over $13 million € of tax losses to fully offset that income.

[71] It beggars belief to think that FQM was blind or indifferent to whether Boliden would apply for a permit. It is clear from the evidence that at least one of the effects of, if not one of the reasons for, the write down of Kevitsa's tax losses immediately prior to the transaction was to bolster Kevitsa's claim that the Boliden acquisition was a *bona fide* commercial transaction not done for the purpose of "trading" in tax losses; in other words, facilitating the grant of the permit that Boliden was reasonably expected to apply for. Indeed, Boliden would have been crazy not apply for it, given that Kevista had just started to turn a profit in 2016, the year of the acquisition.

[72] Equally, I am satisfied that it was also reasonably foreseeable that Boliden's application to carry forward the tax losses would be successful. Again, it need not be certain; it is sufficient that it was reasonably foreseeable.

[73] There is evidence from Mr. Kennett Pettersson, a highly qualified expert in Finnish tax law, that at the time of the transaction, the circumstance for the FTA to deny a permit to carry forward tax losses was quite circumscribed, and no such circumstance existed in this case: Kevitsa's business was not being acquired for tax reasons; the transaction was *bona fide* and commercially-motivated; and, the mining business (which created the losses) was to carry on after closing. On that basis, Mr. Pettersson concluded that:

> … sophisticated commercial parties would have well understood at the time of the relevant transaction in this case that the FTA was very likely to grant an application for the carry-forward of tax losses in the normal course, since none of the circumstances for a refusal would have been present.

[74] Although FQM had quibbles with the reliability of this evidence, I do not think those issues go to the essential point being made by Mr. Pettersson. As well, FQM's Finnish tax expert, Mr. Ossi Haapaniemi, did not opine on the likelihood or foreseeability of the tax losses being available to Boliden post-closing – his evidence is silent on this point.

[75] There is also an air of unreality to FQM's submissions on this issue. I say this because, if Boliden had not successfully applied to carry forward the pre-closing tax losses, FQM would have been unambiguously on the hook for the full amount of all reassessed taxes, without the benefit of any reduction in taxable income from tax loss carry forwards, in 2014 and 2015. In those years, as shown in the table at para. 19 above, Kevitsa utilized €37 million in tax losses to reduce taxable profit, with a concomitant reduction in taxes payable that, under the admitted obligations for 2012 to 2016 taxes, would have been subject to indemnification by FQM if there had been no accumulated tax losses available. And, the issue of increased taxes in 2017 and 2018 simply never would have arisen.

[76] FQM also argues that a further uncertainty was whether Kevitsa would have any profit in 2017 and beyond (against which tax losses might been applied). I find it hard to give any credence to this argument. Kevitsa was, in 2016 while still under FQM's ownership, profitable. While it may not have been certain that Kevitsa would earn taxable income in 2017 and 2018, it was, in the circumstances, reasonably foreseeable that it would.

[77] Finally, it was reasonably foreseeable that, if the FTA reassessed Kevitsa's income in pre-closing years, it would have an impact on post-closing years. This is a matter of common sense. If Kevitsa's taxable income was reassessed to be higher than reported for 2012-2016, it would reduce the overall tax losses in those years and therefore decrease the balance of accumulated tax losses and their availability to be carried forward to subsequent years. In other words, the reassessment would have had a domino effect, as noted earlier, increasing taxable income and taxes in the subsequent years.

[78] FQM has emphasized the "uncertainty" of any of these events taking place. "Uncertain" means not known or not completely confident or sure. Just because an event is not actually known, or is not a sure thing, does not mean that the event is not reasonably foreseeable. For the foregoing reasons, I find, whether under the "ordinary course" branch or the "particular knowledge" branch of the test for reasonable foreseeability in contract damages, the disputed 2017 and 2018 losses, while they were consequential or indirect, were nevertheless reasonably foreseeable. They are, therefore, indemnified "Losses" within the meaning of Art. 8.2(a)(i) for which FQM is liable.

2. Does Boliden have the right to indemnification with respect to the 2017 and 2018 alleged losses under s. 8.2(c)(i) of the SPA?

[79] In addition to the general indemnity in Art. 8.2(a)(i), which governs a breach of or inaccuracy in the representations and warranties given in Art. 3.1.22, the SPA contains a further tax-specific indemnity under Art. 8.2(c)(i):

> (c) From and after the Closing Date, each of the Seller and Other FQM Parties hereby agrees to jointly and severally indemnify and hold harmless the Buyer Indemnitees from and against:
>
> > (i) any Taxes required to be paid or remitted by the Corporation or the Subsidiary with respect to any Pre-Closing Tax Period…

[80] Unlike Art. 8.2(a)(i), the indemnity in Art. 8.2(c)(i) does not depend on a breach or inaccuracy of a representation or warranty; nor does it depend on the concept of "Losses". Rather, it is a free-standing obligation triggered by a requirement to pay any "Taxes" in respect of a "Pre-Closing Tax Period".

[81] "Pre-Closing Tax Period" means:

> (a) all tax periods ending on or prior to the Closing Date [June 1, 2016]; and
>
> (b) for all tax periods beginning before and ending after the Closing Date, the portion thereof ending on the Closing Date.
>
> This tax indemnification also extends to the entire period in which a reassessment could be rendered by tax authorities for Pre-Closing Tax Periods. Again, under s. 8.1, FQM's obligation survives "until six (6) months after the expiration (including all periods of extension, whether automatic or permissive) of the period during which any tax assessment may be issued by a Governmental Authority … in respect of any Pre-Closing Tax Period."

[82] FQM acknowledges that amounts reassessed and required to be paid for 2012-2016 are captured by this provision. However, it says additional taxes and interest payable for 2017 and 2018 are not, as falling outside of the Pre-Closing Taxation Period.

[83] FQM argues that Art. 8.2(c)(i) provides an indemnity for "any Taxes required to be paid or remitted …" As written, the indemnity is based on the taxes that are actually required to be paid or remitted. The indemnity is not for a notional reduction in the value of tax losses that may otherwise have been carried forward from Pre-Closing Tax Periods to post-closing tax periods. Any additional taxes payable for the 2017 and 2018 tax years were not required to be paid or remitted with respect to any Pre-Closing Tax Period. Rather, they were required to be paid or remitted with respect to a post-closing tax period.

[84] It argues further that the expression "with respect to any Pre-Closing Tax Period", as it is used in Art. 8 of the SPA, does not have the expansive meaning argued by Boliden. Where the parties intended to denote a more expansive connection, they used more expansive language. For example, Arts. 8.2(a), 8.2(b), 8.2(c)(iii), 8.2(d), and 8.2(e) all use the phrase "arising from, in connection with or related to" (or a similar variant). Such expansive language is not used in section 8.2(c)(i), which merely says "with respect to". Moreover, the same phrase that is used in section 8.2(c)(i) – "with respect to any Pre-Closing Tax Period" – is also used in section 8.2(e). However, in the latter context, the phrase cannot reasonably be interpreted to encompass or apply to any post-closing tax period.

[85] Thus, FQM says, Art. 8.2(c) must be read in its entirety, giving the words their ordinary and grammatical meaning. The phrase "with respect to" cannot be used to ignore the operative words used in the indemnity and to read out the express limitation to Pre-Closing Tax Periods in Art. 8.2(c)(i). If the parties intended the indemnity to extend to taxes owed post-closing in respect of tax loss carry forwards that were forfeited on closing under Finnish law, they would have expressly said so or omitted the limitation to the Pre-Closing Tax Period entirely, such as they did in Arts. 8.2(c)(ii) and (iii), which are not qualified by reference to Pre-Closing Tax Periods.

[86] I am unable to give effect to these arguments.

[87] Contrary to the position advanced by FQM, the applicants are not claiming for the "inability" to use tax losses carry forwards. They are claiming for taxes required to be paid, which flow directly from the FTA's reassessment. The tax losses carried forward by Kevitsa post-closing were not lost, eliminated, or rejected by the Finnish tax authorities. Rather, the FTA reassessed and recognized income in Pre-Closing Tax Periods which resulted in a cascading effect of substantially higher taxes payable by Kevitsa. All of those additional taxes are payable in respect of the reassessment of Pre-Closing Tax Periods.

[88] The economic and commercial reality of the FTA's reassessment is that Kevitsa was reassessed for 113 million € of additional taxable income for 2012-2016—all taxable income attributable to Pre-Closing Tax Periods. At the root of that reassessment is the 2010 Reorganization. At the Finnish corporate income tax rate of 20%, the tax cost associated with the additional taxable income of 113 million € is 22,684,756 €. There is no question this increased income tax cost is "with respect to" Pre-Closing Tax Periods, since it arises directly from reassessed income in those years.

[89] However, the actual cash outflow or payment associated with that increased income tax cost occurs partly in Pre-Closing Tax Periods (9,105,293 €) and partly in 2017 and 2018 (13,579,462 €). This is because, as discussed earlier, the FTA required accumulated tax losses in the earlier years to be used to offset the increased taxable income. The actual cash outflow or payment of the tax cost was therefore delayed from 2012-2016 to the years 2017 and 2018. Thus, the obligation to pay the increased income tax cost arises in the pre-closing tax years but becomes payable as a cash outflow in 2017 and 2018 only because of the tax losses (which FQM claims, by the way, were not transferred to Boliden in the SPA).

[90] I agree with Boliden: this is a timing issue. The substance of the obligation—the economic and commercial reality—is that the increased taxes and interest for 2017 and 2018 are "with respect to" Pre-Closing Tax Periods because that is when the obligation was crystalized. The timing of the required tax payment, by virtue of the existence of tax loss carry forwards, does not change that basic fact.

[91] Viewed in this light, the tax amounts claimed for 2017 and 2018 are "with respect to" Pre-Closing Tax Periods. The term "with respect to" is broad: it is synonymous with "regarding", "relating to", "concerning", "in relation to", "in respect of", or "in connection with"; all terms denoting a causal link. The 2017 and 2018 taxes and interest claimed are causally linked to the reassessment of the 2012-2016 pre-closing tax years.

[92] It is worth noting again, in this context, that as a result of the reassessment, *without* the carry forward of the pre-closing tax losses (which FQM claims did not exist on June 1, 2016 and which should be ignored), 100% of the reassessed income tax would unambiguously have become subject to the indemnity for "Taxes required to be paid with respect to any Pre-Closing Tax Period". Put slightly differently, under FQM's interpretation of its obligations under Art. 8.2(c)(i), it receives 100% of the benefit of the (non-existent and to be ignored) tax loss carry forwards obtained by Boliden post-closing, while Boliden/Kevista receive none.

[93] FQM's interpretation assumes the pre- and post-closing tax periods are absolutely self-contained, impermeable silos. Yet, when it benefits FQM to take a different approach, it

does so – in this case, by taking the benefit of what, on its basic argument, are out of period tax losses for which it had no responsibility whatsoever. FQM's interpretation is a highly technical one which takes no proper account of the economic and financial impact of the FTA's reassessment. It artificially restricts the scope of the Art. 8.2(c)(i) indemnity without accounting for the fact that the taxes payable in 2017 and 2018 are merely a timing effect and, properly analyzed, reflect an increased tax cost imposed in respect of Pre-Closing Tax Periods. FQM's approach is not consistent with the language of Art. 8.2(c)(i), read in the context of the SPA as a whole and the factual matrix reasonably known to the parties at the time of contracting. It produces a result which is not in accord with sound business principles and good commercial sense.

[94] I conclude, therefore, that the reassessed taxes payable in 2017 and 2018 are "Taxes required to be paid or remitted by the Corporation or the Subsidiary with respect to any Pre-Closing Tax Period" with the meaning of Art. 8.2(c)(i).

3. Does Art. 8.2(e) of the SPA (which bars claims for Losses arising from a change in accounting method that shifts losses from a Pre-Closing to Post-Closing Tax Period) preclude Boliden from claiming indemnification with respect to the 2017 and 2018 alleged losses?

[95] Art. 8.2(e) of the SPA, excludes claims against the seller arising from a change of any accounting method. Art.8.2(e) provides:

> Notwithstanding any other provision of this Article 8, no claim may be made against the Seller or Other FQM Parties in the case of any Loss arising from, in connection with or related to the Buyer, the Corporation or the Subsidiary or any of their Affiliates, after Closing, amending any Tax Return of the Corporation or the Subsidiary with respect to any Pre-Closing Tax Period, making any elections that impact any Pre-Closing Tax Period, *changing any accounting method* or adopting any convention *that* shifts taxable income to any Pre-Closing Tax Period or *shifts deductions or losses from any Pre-Closing Tax Period to any period beginning (or deemed to begin) after the Closing*. [Emphasis added.]

[96] FQM argues that Boliden's post-closing treatment of the tax losses constituted a change in accounting method within the meaning of Art. 8.2(e). Prior to closing, FQM had written off the value of Kevitsa's tax losses. After closing, Boliden chose to recognize and attribute value to those losses in its public disclosure. It thereby treated those losses differently from FQM. This decision was made by Boliden and its auditors without consulting with FQM. Ms. Springman Kjell, Boliden's witness on the application, acknowledged this was done so that Kevitsa (post-closing) could make use of those tax loss carry forwards as deductions against income in its post-closing tax returns. She agreed that "by recognizing the deferred tax receivable, Boliden was recognizing losses from the pre-closing period as a deduction against income in a post-closing period," and that this "accounting treatment permits Boliden to allocate [Kevitsa's]'s pre-closing losses to a post-closing period."

[97] The main problem with this argument is that it does not establish that there was any change in accounting "method". Under Boliden's ownership, Kevitsa treated tax losses

in exactly the same way as Kevitsa had done under FQM's ownership. Kevitsa used tax losses accumulated since 2012 as a deduction against income in 2016. Kevista did the same, under Boliden's ownership, in 2017 and 2018 (pre-reassessment). The only reason the tax losses were written down was because of the sale of Kevitsa's shares in June 2016; for obvious reasons, FQM could not have continued to hold those losses for future use on its books, when it no longer owned Kevitsa.

[98] An "accounting method" refers to accounting rules applied by a company under GAAP or IFRS. This concept appears elsewhere in the SPA; for example, under section 4.1 (dealing with the seller's conduct of the business prior to closing), FQM agreed to "not make any material change in the Corporation's or the Subsidiary's methods of accounting, except as required by Finnish Generally Accepted Accounting." Writing the tax losses down in FQM's books does not appear to have been regarded as a change in accounting method; nor does recognizing them once a permit to do so was issued to Boliden by the FTA.

[99] There is no evidence before me supporting the claim that Kevitsa's return to the status quo was a "change in accounting method". On its face, it appears it was not. FQM led evidence from an accounting expert, Mr. Joakim Rehn, in this case. Nowhere in his opinion, however, did Mr. Rehn state that the applicants changed any of Kevitsa's accounting methods after closing. Nor did FQM ask him to opine on that issue. This gap in the evidence underscores the contrived and speculative nature of FQM's position. I give no effect to this argument.

4. Should Boliden's indemnification claim with respect to 2017 and 2018 alleged losses be dismissed on the basis that it is an abuse of process?

[100] The doctrine of abuse of process is used to ensure that the administration of justice is not brought into disrepute and can, in appropriate circumstances, be applied to preclude a party from arguing diametrically inconsistent facts in different actions and knowingly advancing irreconcilable positions that are not articulated as alternative claims. FQM argues that, in this proceeding, Boliden is advancing a position based on factual assertions that are diametrically opposed to the facts and position that it advanced when seeking a permit from the FTA and in subsequent litigation appealing from the FTA's reassessment.

[101] For example, FQM argues that in Boliden's permit applications, which were filed with the FTA in 2017, it stated that "the losses confirmed in the applicant's taxation had absolutely no impact on the execution of the transaction. Consequently, the applicant's losses were not treated as tradable assets." Boliden, it argues, is now taking the position before this Court that the tax losses were acquired by Boliden as part of the transaction and that it is entitled to be compensated for losses arising from an inability to use them. On this basis, FQM argues that Boliden's application for indemnification for post-closing tax periods should be dismissed on the basis that it is an abuse of the process of this Court.

[102] I cannot agree that Boliden has made "factual assertions that are diametrically opposed". In its permit application, Boliden indicated that the tax losses in the company did not impact the decision of whether or not to acquire Kevitsa. Boliden was interested in the acquisition, not for tax reasons, but for legitimate business reasons—and it communicated that to the FTA.

[103] In this proceeding, Boliden's position is that, although the 2016 transaction was not tax-motivated, the tax losses still had inherent value to the company and, in acquiring the company, it understood it would likely have the benefit of the tax losses assuming the permit was granted (which it was). There is nothing inconsistent or irreconcilable about these positions.

[104] There is also uncontradicted evidence from Boliden's tax expert, Mr. Pettersson, directly on point. He testified that:

> As a matter of commercial and tax practice, there is nothing unusual about sophisticated commercial parties in a transaction electing not to include the value of the tax assets as part of the transaction price but nevertheless understanding and expecting that the tax losses will be carried forward and continue to have value on a go-forward basis assuming a special permit application is ultimately approved (which as I mentioned above, was likely to be granted in the normal course in this case at the time of the transaction). The approach taken by Boliden Group in the initial PPA [Purchase Price Allocation] supports the view that the Applicants did not acquire the target (FQM Kevitsa Mining Oy, now Boliden Kevitsa Mining Oy) due to existing tax losses but for bona fide commercial and business reasons. However, that approach did not imply that the tax losses had no value for the Applicants at the time of acquisition.

> In my view, given the structure of the tax loss carry forward regime in Finland, it is objectively reasonable for sophisticated commercial parties to assume that the tax losses will have value as a tax asset after an acquisition where the special permit is likely to be approved. Likewise, the fact that sophisticated commercial parties do not assign a specific value on the losses at the time of the transaction does not mean that they do not have inherent value at the time of the transaction.

[105] Mr. Pettersson was not cross-examined on this evidence. Nor was this evidence contested by FQM's expert, Mr. Haapaniemi.

[106] I therefore reject the suggestion that Boliden's arguments in this application constitute an abuse of process.

5. Proration of 2016 Tax Year

[107] With regard to the 2016 tax year, FQM submits that all amounts should be pro-rated, so that they only include amounts attributable to the period from January 1, 2016 to June 1, 2016. This, it says, follows from the definition of a Pre-Closing Tax Period in section 1.1 of the SPA. As noted earlier, "Pre-Closing Tax Period" means:

> (a) all tax periods ending on or prior to the Closing Date [June 1, 2016]; and
>
> (b) for all tax periods beginning before and ending after the Closing Date, the portion thereof ending on the Closing Date.

[108] It necessarily follows from my disposition of the two main issues that all of the reassessed taxes payable, including those in 2016 to 2018, are subject to FQM's indemnity obligations under the SPA. Accordingly, it is not necessary to address FQM's apportionment argument for reassessed taxes in 2016.

[109] In any event, very little argument, and even less evidence, was presented to address this issue. There was absolutely no tax or accounting evidence touching on the question. Perhaps counsel were suffering from "issue fatigue" by the time this issue was reached. Whatever the cause, had I considered it necessary to address the 2016 apportionment issue, I would have concluded that the available record did not permit me to come, reliably, to any conclusion on the point.

6. Tax Amounts Already Paid and Outstanding Calculation of Quantum

[110] Thus far, the FTA has collected 8,644,615 € in reassessed taxes, penalties, and interest. The evidence is that the applicants have not been reimbursed by FQM for any of this amount under the indemnity. Boliden has been out of pocket for well over a year now.

[111] FQM is liable to indemnify Boliden for this amount. Judgment is granted for payment of 8,644,615 € by the respondents to the applicants. Boliden undertook, at the close of oral argument, to hold these funds in an interest-bearing trust account pending final resolution of all appeals from the FTA's reassessment.

[112] Initially, Boliden sought security for the payment of the remaining reassessed tax liabilities. I indicated during oral argument that, as security for FQM's indemnity obligations had not been bargained for in the SPA, I did not see any basis, absent a *Mareva* injunction (which has not been sought) for granting such an order. Boliden's fallback position is that I should grant judgment for the remaining reassessed (but not yet paid) amounts but suspend enforcement until all appeals have been exhausted.

[113] I am not prepared to do that. The appeals do not necessarily result in one binary choice of an amount owing under the reassessment. The final amount of taxes owing, in other words, could change. Granting judgment under the contractual indemnities for amounts assessed but not yet payable because of a pending appeal is premature.

[114] Because the number could change and because, as a result of this fact, the detailed calculations of the specific amounts owing under the reassessment (and subject to the indemnities) were not the subject of forensic examination in this hearing, all quantum-related issues (other than the 8,644,615 €) shall have to await the final disposition of the appeals. Once that happens, the parties shall, with the benefit of the declarations made in this judgment, meet and compare notes on the precise calculations and amounts owing. If there are points of disagreement, the parties shall return to Court (before me if I am available) for the resolution of these disagreements.

Conclusion

[115] In conclusion, the application is granted in part.

[116] I grant a declaration that the respondents have breached the representations and warranties in Art. 3.1.22 of the SPA and that the respondents are jointly and severally liable to indemnify the applicants for Losses, as determined by this Judgment, under Art. 8.2(a)(i) of the SPA, which include the Losses in 2017 and 2018.

[117] I grant a further declaration that the respondents are jointly and severally liable to indemnify the applicants for Taxes required to be paid or remitted by the applicants with respect to any Pre-Closing Tax Period, as determined by this Judgment, under Art. 8.2(c)(i) of the SPA, which again, include the amounts claimed in 2017 and 2018.

[118] I grant judgment to the applicants in the amount of 8,644,615 €, to be paid forthwith and held by the applicants in an interest-bearing trust account pending final disposition of all appeals from the reassessment.

[119] The final amounts owing under the SPA indemnities, once all appeal rights from the reassessment of the FTA have been abandoned or finally resolved, shall be calculated in accordance with the declarations and reasons in this Judgment. If the parties are unable to resolve those calculations consensually, they shall return to this Court for resolution.

Costs

[120] The applicants' partial indemnity fees are $196,167.90 plus HST, plus disbursements of $77,666.90, for a total of $299,336.63.

[121] The respondents' partial indemnity fees are $398,516.73 plus HST, plus disbursements of $6,064.41 plus expert fees of €166,072.63.

[122] Absent agreement, the applicants shall have five business days to prepared and deliver a brief cost submission, not to exceed three typed, double-spaced pages. The respondents shall have a further 5 business days to deliver a responding cost submission, subject to the same page limit.

Penny J.

Released: November 1, 2021

CITATION: Boliden Mineral AB v. FQM Kevitsa Sweden Holdings AB, 2021 ONSC 6844
COURT FILE NO.: CV-20-00639328-00CL
DATE: 20211101

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BOLIDEN MINERAL AB and
BOLIDEN KEVITSA MINING OY

Applicants

– and –

FQM KEVITSA SWEDEN HOLDINGS AB,
FIRST QUANTUM MINERALS LTD., FQM FINANCE LTD. and FQM PROJECTS FINANCE LTD.

Respondents

REASONS FOR JUDGMENT

Penny J.

Released: November 1, 2021