Federal Court of Appeal | Cour d'appel fédérale

Date: 20240105

Docket: A-301-21

Citation: 2024 FCA 3

CORAM: **BOIVIN J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

GLENCORE CANADA CORPORATION

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on April 19, 2023.

Judgment delivered at Ottawa, Ontario, on January 5, 2024.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: BOIVIN J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

A. Introduction

[1] In 1996, Falconbridge Limited (Falconbridge) offered to acquire publicly-traded shares of Diamond Fields Resources Inc. (Diamond Fields) for consideration valued at approximately $4.1 billion. A bidding auction took place and Falconbridge lost to its competitor, Inco Ltd.

(Inco). In connection with its offer, Falconbridge received fees (Fees) from Diamond Fields totalling $101,541,987.

[2] The appellant, Glencore Canada Corporation (Glencore), is a successor to Falconbridge. Pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), Glencore received a reassessment for Falconbridge's 1996 taxation year in which the Fees, less related expenses, were included in income. The Tax Court of Canada (*per* Favreau J.) upheld the reassessment for reasons (TC Reasons) cited as 2021 TCC 63. Glencore appeals from this judgment to this Court.

[3] As explained below, I would dismiss the appeal but for different reasons than the Tax Court. The Tax Court determined that the Fees constituted income from a business in accordance with s. 9(1) of the Act. I also conclude that the Fees were income from a business, and income from property, but pursuant to s. 12(1)(x) of the Act.

B. Background

The auction

[4] The target of the bidding auction (Diamond Fields) and the bidders (Falconbridge and Inco) were all Canadian mining companies. The auction unfolded over a 2-month period early in 1996.

[5] At the relevant time, Falconbridge was an established public corporation whose operations were described by the Tax Court as exploring, developing, mining, processing, marketing and selling metals and minerals (TC Reasons at para. 4). The business was conducted by Falconbridge directly and through subsidiary corporations (TC Reasons at para. 9).

[6] Diamond Fields was also a public corporation. Its primary asset was a nickel-copper-cobalt deposit (Deposit) at Voisey's Bay, Labrador which it acquired in February 1995. At all material times, the Deposit was owned by a Diamond Fields' subsidiary, Voisey's Bay Nickel Company (Voisey's Bay Co.).

[7] Inco was also a public corporation and was a major competitor of Falconbridge.

[8] The sequence of events below is based mainly on the parties' agreed statement of facts:

(i) On June 8, 1995, Diamond Fields and Inco entered into an agreement regarding the Deposit. Under its terms:

(a) Inco acquired 25 percent of the shares of Voisey's Bay Co.;

(b) Inco agreed to market all nickel and cobalt production from the Deposit for the first 5 years of production and agreed to market a minimum amount of nickel production for the following 15 years; and

(c) In the event that Diamond Fields received a takeover offer from a third party, it agreed to notify Inco of the offer and provide Inco with a reasonable opportunity to discuss it.

(ii) Also on June 8, 1995, Inco announced that it had acquired 2 million of the outstanding Diamond Fields common shares.

(iii) Early in 1995, Falconbridge held discussions with Diamond Fields to acquire an interest in the Deposit. These discussions failed.

(iv) Early in 1996, Diamond Fields contacted Falconbridge about a possible sale of its 75 percent interest in Voisey's Bay Co.

(v) On February 9, 1996, Falconbridge and Diamond Fields agreed to arrangements to merge under which Falconbridge would offer to acquire the outstanding common shares of Diamond Fields by way of a plan of arrangement. The consideration to be received by the Diamond Fields shareholders was to be a combination of Falconbridge shares, cash and exchangeable notes for a total value of approximately $4.1 billion. These arrangements acknowledged that Diamond Fields would discuss the Falconbridge offer with Inco pursuant to the agreement mentioned above.

(vi) On March 26, 1996, Inco also made an offer to acquire Diamond Fields' outstanding common shares. The consideration was to consist of Inco shares, cash and exchangeable notes with a total value of approximately $4.3 billion.

(vii) On April 2, 1996, Falconbridge made a counter-offer.

(viii) On April 3, 1996, the Diamond Fields board of directors recommended that its shareholders reject the Falconbridge counter-offer and accept Inco's offer.

(ix) On April 9, 1996, Falconbridge dropped out of the bidding.

(x) Diamond Fields' shareholders eventually accepted Inco's offer and the merger was completed in August 1996.

The Falconbridge merger arrangements

[9] The merger arrangements between Falconbridge and Diamond Fields contemplated the Fees that are at issue in this appeal. There were two fees, which were called a Commitment Fee and a Non-Completion Fee.

[10] A Commitment Fee in the amount of $28,206,106 was payable by Diamond Fields to Falconbridge upon entering into the merger arrangements. This occurred on February 9, 1996.

[11] A Non-Completion Fee in the amount of $73,335,881 was payable by Diamond Fields to Falconbridge upon certain conditions being satisfied. One of these was that a competing offer was completed. This fee is described in greater detail below.

[12] The Fees were both paid in 1996.

[13] The merger arrangements included an Arrangement Agreement. It set out the terms and conditions on which the merger would be carried out.

[14] The Arrangement Agreement provided that Falconbridge and Diamond Fields were each required to use reasonable efforts to obtain the necessary approvals to complete the merger. This included approvals from the corporations' respective shareholders. In addition, Diamond Fields agreed that it would not facilitate discussions with others concerning a competing bid. This obligation only took effect after Diamond Fields had an opportunity to discuss Falconbridge's offer with Inco.

[15] The Arrangement Agreement also specified that the terms and conditions were subject to the fiduciary duties of Diamond Fields' board of directors. This meant that throughout the bidding process another bidder (including Inco) could make an offer that the board of directors might decide to support instead. This is in fact what occurred.

C. Tax Court decision

[16] The Tax Court stated that the appeal raised two issues: (1) whether the Fees were properly included in Glencore's income; and (2) in the alternative, whether the Fees gave rise to a capital gain.

[17] With respect to the first issue, the Tax Court divided this into two sub-issues: (1) whether the Fees were income from a source pursuant to s. 3 of the Act; and (2) whether the Fees were taxable under s. 12(1)(x) of the Act.

[18] The Tax Court concluded that the first sub-issue was dispositive of the appeal. It determined that the Fees were income from a source since they were income from a business pursuant to s. 9(1) of the Act. The Tax Court declined to discuss the other issues.

[19] The Tax Court's analysis of s. 9(1) of the Act is discussed below.

D. Issues and Standard of Review

[20] This appeal gives rise to three issues:

(i) Did the Tax Court err in concluding that the Fees were business income pursuant to s. 9(1) of the Act?

(ii) Did the Non-Completion Fee give rise to a capital gain?

(iii) Should the Fees be included in computing income from a business or property pursuant to s. 12(1)(x) of the Act?

[21] The Tax Court judgment is subject to appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Determinations of fact and mixed fact and law are entitled to deference and attract the palpable and overriding error standard of review. Determinations of law (including extricable legal questions) are subject to correctness review.

[22] Recently, the Supreme Court of Canada commented on the application of these standards of review in circumstances where the overall conclusion is based on an extricable error of law (*Deans Knight Income Corp. v. Canada*, 2023 SCC 16 at para. 121). The reasons of the majority state that no deference is owed to the overall conclusion, but that deference continues to apply to factual findings. However, it cautions that "facts which were decisive when answering the wrong legal question are not necessarily as salient when answering the right one."

E. Issue 1 – Did the Tax Court err in concluding that the Fees were business income pursuant to s. 9(1)?

[23] The Tax Court applied the Supreme Court's decision in *Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196, 155 D.L.R. (4th) 295 [*Ikea*]. As I explain below, the principles from *Ikea* were misinterpreted by the Tax Court and this resulted in an extricable error of law.

[24] Ikea, the well-known furniture retailer, received a tenant inducement payment (TIP) from the West Edmonton Mall in connection with entering into a long-term lease. The issue was whether the TIP was received on income or capital account. The Supreme Court noted that s. 12(1)(x) of the Act could not apply because the provision was not in force at the relevant time (*Ikea* at para. 20).

[25] In the Supreme Court, Iacobucci J. concluded that the TIP was received on income account based on the factual finding that the TIP was made to reimburse rent or other obligations on revenue account. The Court stated that since "the TIP was made to reimburse an expense on income account [it] was clearly itself income" (*Ikea* at para. 29).

[26] The conclusion was summarized at paragraph 33 of *Ikea*. This is reproduced below, with emphasis on the passage that was relied on by the Tax Court.

> [33] In my view, Bowman J. was entirely correct in finding that the TIP received by Ikea was on revenue account and should have been included in income for tax purposes. The payment was clearly received as part of ordinary business operations and was, in fact, inextricably linked to such operations. On the evidence, no question of linkage to a capital purpose can seriously be entertained. Had Ikea wished, it could have requested that the TIP be advanced expressly for the specific purpose of fixturing, or to defray some other capital cost. It did not do so, however, and the payment was in fact made free of any conditions for or stipulations as to its use. Therefore, whether the TIP represented a reduction in rent or a payment in consideration of Ikea's assumption of its various obligations under the lease, it clearly cannot be treated as a capital receipt and should have been included in Ikea's income. . . .
>
> [Emphasis added]

[27] The passage that was relied on by the Tax Court is broadly worded. It needs to be read in context. The Tax Court failed to do this, as demonstrated in the following excerpt from its reasons, and in particular the underlined passage:

> [74] The potential acquisition of DFR was a means to acquiring the Voisey's Bay deposit and the evidence clearly establishes that the Falconbridge's business included the acquisition of mineral deposits.
>
> [75] <u>The Break Fees received by Falconbridge were inextricably linked to Falconbridge's ordinary business operations as a nickel mining company.</u> Falconbridge pursued the Voisey's Bay deposit for the purpose of making a profit. As a public company, all of Falconbridge's activities were directed to that end i.e. to increase shareholder value. The potential acquisition of the Voisey's Bay deposit was part of Falconbridge's strategy for earning income from its business.
>
> [76] Falconbridge was carrying on its business when it negotiated the Merger Offer Delivery Agreement and the Arrangement Agreement, both of which provided for the fees in dispute. Falconbridge's strategy in attempting to acquire the Voisey's Bay deposit was to maximize shareholder value by maintaining and bolstering its ore reserves and by containing its production costs. These goals were inextricable [sic] interwoven with Falconbridge's business. The Break Fees were ancillary business income received by Falconbridge in the course of earning income from business.
>
> [Emphasis added]

[28] The Court's interpretation of *Ikea*, and its application to the facts, essentially ignores the distinction between capital and revenue receipts. This was the very issue in *Ikea*.

[29] When *Ikea* is read as a whole, it is evident that Iacobucci J.'s reference to ordinary business operations in paragraph 33 is referring to something on revenue account. The very next sentence in *Ikea* states that there is no link to a capital purpose.

[30] The necessary linkage to something on revenue account is also made clear at paragraph 30 of *Ikea*:

> [30] As for the second contention, Ikea argued that if the payment were to be characterized as consideration for its continued obligation to carry on business in the premises during the term of the lease, it should be considered a capital receipt because such a payment goes to the "structure of the business". With respect, however, I believe this submission misses the mark. An accurate characterization of the receipt requires an assessment of the nature of the specific obligations in question. In this case, as Bowman J. correctly found, Ikea's obligations under the lease essentially consisted of the payment of rent and the operation of its business in the leased premises. These were clearly expenses incurred in the day-to-day operation of the business and were therefore on revenue account.

[31] The Tax Court's misinterpretation of *Ikea* is an extricable error of law. It should have considered whether the Fees were linked to something on revenue account. Accordingly, the outcome in the Tax Court is not entitled to deference.

[32] As explained below, in my view the Fees have no linkage to revenue.

[33] The Tax Court made factual findings that the Fees were linked to "pursuing the Voisey's Bay deposit for the purpose of making a profit. As a public company, all of Falconbridge's activities were directed to that end" (TC Reasons at para. 75). However, the Fees were actually linked to pursuing shares, not the Deposit itself. Either way, the linkage is to a capital purpose. The fact that the goal was to make a profit does not transform the linkage to a revenue item. The clear linkage was to capital.

[34] In this Court, the Crown submitted that the application of *Ikea* in this case is supported by the decision of this Court in *Morguard Corporation v. Canada*, 2012 FCA 306 [*Morguard*]. In *Morguard*, this Court upheld a decision of the Tax Court which applied *Ikea* to a break fee received as part of a failed takeover bid.

[35] However, the facts in *Morguard* are materially different from the facts in this case. For example, in *Morguard* the Tax Court determined that Morguard Corporation was in the business of acquiring companies. In this case, the Tax Court found that Falconbridge was not in the business of acquiring or selling companies (TC Reasons at para. 73). It is not surprising that the Tax Court did not rely on *Morguard*.

[36] The Crown urged us to apply *Morguard* despite this difference. Essentially, it seeks to extend *Morguard* beyond its particular facts. In my view, an extension to the facts of this case is not warranted because it would erode the well-entrenched principles as to the distinction between items on capital and revenue account. I am not aware of any facts in this case which would provide a sufficient link between the Fees and something on revenue account. I conclude that the Fees were received on capital account because the linkage was to a proposed acquisition of a capital asset.

F. Issue 2 – Did the Non-Completion Fee give rise to a capital gain?

[37] Glencore submits that the $73 million Non-Completion Fee is compensation to Falconbridge for disposing of its right to merge with Diamond Fields. As such, the receipt of the

Non-Completion Fee gave rise to a capital gain. This argument was not discussed by the Tax Court.

[38] For clarity, this submission does not apply to the Commitment Fee.

[39] A capital gain is generally a gain from the disposition of property, unless the gain is otherwise included in computing income. The capital gain is calculated as the compensation received for the disposition, less the cost of the property disposed of and expenses incurred in the disposition.

[40] Whether the Non-Completion Fee gave rise to a capital gain depends in large part on the bid terms set out in the Arrangement Agreement. It required that Falconbridge and Diamond Fields each facilitate the completion of the merger. This required approvals from the shareholders of both companies. The Arrangement Agreement also provided that nothing in that agreement restricted Diamond Fields' board of directors from supporting or facilitating a competing bid in fulfilment of its fiduciary duties.

[41] The Arrangement Agreement also set out the different circumstances in which the Non-Completion Fee would be payable. In all cases, the Non-Completion Fee was not payable unless a competing offer was made and completed. The circumstances which triggered Diamond Fields' obligation to pay the Non-Completion Fee were: (1) a competing offer was made before August 31, 1996; (2) the Arrangement Agreement was terminated in accordance with its terms when

Falconbridge dropped out of the bidding; and (3) the transaction contemplated by the competing offer was completed.

[42] To qualify as a capital gain, the Non-Completion Fee must be received as compensation for the disposition of property. Glencore submits that the Non-Completion Fee was received as compensation for the disposition of Falconbridge's right to merge.

[43] I reject this submission. Neither the Arrangement Agreement nor any other agreement provided Falconbridge with a right to merge. Diamond Fields did not promise that the merger with Falconbridge would be completed. It could not make that promise for two reasons. First, Falconbridge's offer was directed to Diamond Fields shareholders. Diamond Fields could not promise their acceptance of the offer. Second, Diamond Fields' board of directors was not obligated to support Falconbridge's bid if there was a competing bid that, by virtue of their fiduciary duties, the directors were required to support.

[44] I conclude that the Non-Completion Fee was not paid as compensation for the disposition of the right to merge. The receipt of this fee did not give rise to a capital gain.

G. Issue 3 – Should the Fees be included in computing income pursuant to s. 12(1)(x)?

[45] The main position of the Crown in this appeal is that the Fees are income from a business pursuant to *Ikea*. In the alternative, the Crown submits that the Fees are income pursuant to s.

12(1)(x) of the Act either as an inducement or a reimbursement. This alternative argument was not discussed by the Tax Court.

[46] Paragraph 12(1)(x) was enacted pursuant to a proposal in the federal budget of May 22, 1985. The proposal is described in the budgetary supplementary information:

> It is a generally accepted commercial principle that the cost of an asset or the amount of an expense should be reduced by any reimbursement or similar payment received that relates to the acquisition of the asset or the incurring of the expense. For example, a commercial tenant who was reimbursed by a landlord for part or all of the cost of making leasehold improvements would subtract the payment in computing the cost of such property. A similar result would arise with respect to manufacturers' rebates.
>
> Recent court decisions have indicated that this principle may not apply for income tax purposes.
>
> The budget proposes to require that all payments in the nature of reimbursements or inducements in respect of the acquisition of an asset or the incurring of a deductible expense be included in income for tax purposes unless the recipient elects to reduce the cost basis of the related property or the amount of related expense. This would apply to payments received after May 22, 1985 other than payments received under an agreement in writing made on or before that date. The law already specifically requires similar treatment for certain payments received as government assistance for the acquisition of property.

[47] The current version of s. 12(1)(x) is reproduced below in relevant part. There are no material changes from the version applicable to this appeal.

12(1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable	**12(1)** Sont à inclure dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien, au cours d'une année d'imposition, celles des sommes suivantes qui sont applicables:

[…]

(x) any particular amount (other than a prescribed amount) received by the taxpayer in the year, in the course of earning income from a business or property, from

(i) a person or partnership (in this paragraph referred to as the "payer") who pays the particular amount

(A) in the course of earning income from a business or property,

(B) in order to achieve a benefit or advantage for the payer or for persons with whom the payer does not deal at arm's length, or

(C) in circumstances where it is reasonable to conclude that the payer would not have paid the amount but for the receipt by the payer of amounts from a payer, government, municipality or public authority described in this subparagraph or in subparagraph (ii), or

(ii) a government, municipality or other public authority,

where the particular amount can reasonably be considered to have been received

[…]

x) un montant (à l'exclusion d'un montant prescrit) reçu par le contribuable au cours de l'année pendant qu'il tirait un revenu d'une entreprise ou d'un bien :

(i) soit d'une personne ou d'une société de personnes (appelée « débiteur » au présent alinéa) qui paie le montant, selon le cas :

(A) en vue de tirer un revenu d'une entreprise ou d'un bien,

(B) en vue d'obtenir un avantage pour elle-même ou pour des personnes avec qui elle a un lien de dépendance,

(C) dans des circonstances où il est raisonnable de conclure qu'elle n'aurait pas payé le montant si elle n'avait pas reçu des montants d'un débiteur, d'un gouvernement, d'une municipalité ou d'une autre administration visés au présent sous-alinéa ou au sous-alinéa (ii),

(ii) soit d'un gouvernement, d'une municipalité ou d'une autre administration,

s'il est raisonnable de considérer le montant comme reçu :

(iii) as an inducement, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of inducement, or

(iii) soit à titre de paiement incitatif, sous forme de prime, de subvention, de prêt à remboursement conditionnel, de déduction de l'impôt ou d'indemnité, ou sous toute autre forme,

(iv) as a refund, reimbursement, contribution or allowance or as assistance, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of assistance, in respect of

(iv) soit à titre de remboursement, de contribution ou d'indemnité ou à titre d'aide, sous forme de prime, de subvention, de prêt à remboursement conditionnel, de déduction de l'impôt ou d'indemnité, ou sous toute autre forme, à l'égard, selon le cas :

(A) an amount included in, or deducted as, the cost of property, or

(A) d'une somme incluse dans le coût d'un bien ou déduite au titre de ce coût,

(B) an outlay or expense,

(B) d'une dépense engagée ou effectuée,

to the extent that the particular amount

dans la mesure où le montant, selon le cas :

(v) was not otherwise included in computing the taxpayer's income, or deducted in computing, for the purposes of this Act, any balance of undeducted outlays, expenses or other amounts, for the year or a preceding taxation year,

(v) n'a pas déjà été inclus dans le calcul du revenu du contribuable ou déduit dans le calcul, pour l'application de la présente loi, d'un solde de dépenses ou autres montants non déduits, pour l'année ou pour une année d'imposition antérieure,

[…]

[…]

(vii) does not reduce, under subsection 12(2.2) or 13(7.4) or paragraph 53(2)(s), the cost or capital cost of the property or the amount of the outlay or

(vii) ne réduit pas, en application du paragraphe (2.2) ou 13(7.4) ou de l'alinéa 53(2)s), le coût ou coût en

expense, as the case may be, and	capital du bien ou le montant de la dépense,

[48] The discussion below addresses the following issues:

(i) Do the exclusions in s. 12(1)(x)(v) or (vii) apply to the Fees?

(ii) Is the payer requirement in s. 12(1)(x)(i) or (ii) satisfied?

(iii) Is it reasonable to consider that the Fees were received as an inducement or reimbursement for the purposes of s. 12(1)(x)(iii) or (iv)?

(iv) Were the Fees received in the course of earning income from a business or property?

Subparagraphs 12(1)(x)(v) and (vii) - Exclusions

[49] Paragraph 12(1)(x) contains several exclusions. The potentially relevant ones in this case are ss. 12(1)(x)(v) and (vii).

[50] Subparagraph 12(1)(x)(v) excludes, among other things, an amount that would otherwise be included in computing income. The parties provided no submissions which would give the Court a basis to apply this exclusion.

[51] As for s. 12(1)(x)(vii), this provision (in combination with related provisions), permits a taxpayer to reduce a s. 12(1)(x) income inclusion to the extent that the receipt relates to an outlay or expense that is not deducted in computing income. The parties agree that this provision applies in respect of Falconbridge's expenses related to the bid. Accordingly, the amount of the Fees that are potentially subject to s. 12(1)(x) is reduced by the amount of the bid expenses.

Subparagraph 12(1)(x)(i) or (ii) – The payer requirement

[52] Paragraph 12(1)(x) requires that the payer satisfy one of the criteria set out in s. 12(1)(x)(i) and (ii). This is not at issue because Glencore concedes that the requirement is satisfied.

Subparagraph 12(1)(x)(iii) or (iv) – Type of receipts

[53] Subparagraphs 12(1)(x)(iii) and (iv) set out the type of receipts that s. 12(1)(x) applies to. They include amounts that "can reasonably be considered to have been received" (1) as a reimbursement in respect of the cost of property or an outlay or expense, or (2) as an inducement. As explained below, I conclude that the Fees were received as an inducement.

[54] The inducement provision in s. 12(1)(x)(iii) is broad. First, the dictionary definition of the word "inducement" suggests that it applies in a variety of circumstances. In the Oxford English Dictionary (Online: https://www.oed.com), the meaning includes "that which induces; something attractive by which a person is led on or persuaded to action."

[55] Second, the text of s. 12(1)(x)(iii) suggests that the term “inducement” is intended to be all encompassing. Indeed, the provision in both English and French versions specifies certain types of receipts and then adds “any other form of inducement” in English and “ou sous toute autre forme” in French.

[56] I also note that s. 12(1)(x)(iii) applies to inducements generally. This contrasts with the reimbursement provision in s. 12(1)(x)(iv) which requires that the receipt is in respect of the cost of property or an outlay or expense. The difference in wording appears to be a change from the supplementary budget information reproduced above.

[57] In this case, the Fees satisfy the inducement requirement in s. 12(1)(x)(iii). It is reasonable to consider that the Commitment Fee and the Non-Completion Fee were received by Falconbridge as an inducement to entice Falconbridge to commit to make an offer for the shares of Diamond Fields in accordance with the merger arrangements.

[58] The nature of the Commitment Fee is clear from its name, and also from the fact that it is payable simply by Falconbridge committing to make the offer. Accordingly, the Commitment Fee induces Falconbridge to make the commitment.

[59] The Non-Completion Fee is a type of fee commonly referred to as a break fee. The general nature of a break fee was recently discussed by the Alberta Securities Commission in *Re Bison Acquisition Corp.*, 2021 ABASC 188 at paras. 231-232, which refers to *CW Shareholdings*

Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755 (Ontario Court (General Division)):

> [231] Break fees are intended to entice bidders to participate in an auction. As alluded to in the previous section of this decision, they compensate a party for its wasted time, resources, and lost opportunity costs should a proposed transaction fail (*CW Shareholdings (Ont. Gen. Div.)* at para. 50). They can offset various potential risks, including disclosure risk and reputational risk. From the target's perspective, agreeing to a break fee may assist it in its goal of generating the best bid to maximize shareholder value. From the bidder's perspective, a break fee protects against "the price being shopped and the transaction being abandoned in favour of a marginally better deal" (*Pacifica* at para. 49).
>
> [232] *CW Shareholdings (Ont. Gen. Div.)* is a leading case on the subject of break fees in Canada. In its reasons, the Ontario Court accepted that a break fee is appropriate where (at para. 51):
>
> (i) it is needed to induce a competing bid;
>
> (ii) the bid represents better value for shareholders; and
>
> (iii) the fee reflects "a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator" (the *CW Shareholdings Test*).
>
> [Emphasis added]

[60] The first sentence in the passage above clearly describes the nature of the Non-Completion Fee in this case. It was an inducement. This is amply supported by the record:

(i) The Management Information Circular dated March 8, 1996 provided by Diamond Fields to shareholders states that "Diamond Fields believes that

Falconbridge would not have entered into the Arrangement Agreement without Diamond Fields' agreement to pay [the Fees]."

(ii) At a Falconbridge board meeting held the day before Falconbridge committed to make the offer, Don Lindsay, the lead negotiator on behalf of Falconbridge, reported that Inco would not table an offer unless Diamond Fields first obtained an offer from Falconbridge.

(iii) Jack Cockwell, the Chairman of the Board of Directors of Falconbridge, was asked on cross-examination whether Mr. Friedland, the CEO of Diamond Fields, was trying to get an auction going. Mr. Cockwell's answer was "No question."

(iv) Don Lindsay testified that "we were firm that it had to be at least a $100 million break fee."

[61] I conclude that Diamond Fields paid the Fees in order to entice Falconbridge to make an offer pursuant to the merger arrangements. Accordingly, it is reasonable to consider that the Fees were received by Falconbridge as an inducement for the purposes of s. 12(1)(x).

[62] It does not make any difference that the payment of the Non-Completion Fee was conditional on the bid failing. Subparagraph 12(1)(x)(iii) focusses on the reason for the payment. Diamond Fields agreed to make the payment in order to entice Falconbridge to make the offer.

[63] In addition, the evidence as to Falconbridge's motivation to negotiate a fee (i.e., to deter another bidder and to earn a profit if the bid failed) is not relevant to this issue. Subparagraph 12(1)(x)(iii) asks the question whether Diamond Fields made the payment as an inducement. Whether Falconbridge had different motivations is not relevant.

[64] Finally, an inducement for the purpose of s. 12(1)(x) can include a payment made to entice a party to enter into a commercial arrangement. The wording is certainly broad enough, and the Tax Court decision of Bowman J. in *Everett's Truck Stop Ltd. v. Canada*, 93 D.T.C. 965 is an example of this application.

[65] I conclude that it is reasonable to consider that the Fees were received as an inducement for the purposes of s. 12(1)(x)(iii).

General requirement – Received in the course of earning income from a business or property

[66] The opening language of paragraph 12(1)(x) provides that it only applies to an amount that is: "received in the course of earning income from a business or property."

[67] Since s. 12(1)(x) does not apply to amounts that would otherwise be included in computing income, this requirement only applies to amounts that are not business or property income in accordance with s. 9(1) of the Act. Accordingly, this test is broader than the test for ordinary business and property income under s. 9(1).

[68] The meaning of the phrase “in the course of” is central to understanding this requirement. It is a phrase that is commonly used in the Act and has generally been given the meaning ascribed to it by Thurlow J. in *M.N.R. v. Yonge Eglinton Building Ltd.*, [1974] 1 F.C. 637; 74 D.T.C. 6180 (FC-AD): “in connection with”; “incidental to”; or “arising from”. The French version, “pendant qu’il tirait un revenue d’une enterprise ou d’un bien,” is similarly broad and supports, reinforces and strengthens this interpretation. The question is whether this describes the relationship between the Fees and Falconbridge’s business or property income-earning activity.

[69] Falconbridge is an integrated nickel mining company that is involved in exploring, developing, mining, processing, marketing and selling metals and minerals. Its operations are carried out directly and through subsidiaries. (TC Reasons at paras. 4, 9).

[70] The Fees were linked to Falconbridge’s operations as a nickel mining company. These operations required access to ore deposits. (TC Reasons at paras. 74-75). Accordingly, the Fees were received “in connection with”, or “in the course of”, these activities. It is sufficient for the purpose of this test that Falconbridge carries on these operations directly. It is not relevant that Falconbridge also has mining subsidiaries.

[71] In addition, the Fees were linked to an acquisition of shares that had the capacity to produce property income. Accordingly, the Fees were also received in the course of earning income from property.

[72] I conclude that the Fees were received by Falconbridge in the course of earning income from a business and property.

Paragraph 12(1)(x) applies

[73] I conclude that the necessary conditions for the application of s. 12(1)(x) are satisfied in this case. The Fees, less the bid-related expenses, are required to be included in computing income from a business or property.

H. Disposition

[74] The judgment of the Tax Court dismissed Glencore's appeal from a reassessment for the 1996 taxation year. The conclusion that I have reached does not disturb this result.

[75] Therefore, I would dismiss this appeal with costs fixed in the amount of $3,000 in accordance with the agreement of the parties.

"Judith Woods"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BOIVIN J.A. LASKIN J.A.
DATED:	JANUARY 5, 2024

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