Federal Court of Appeal | Cour d'appel fédérale

Date: 20151008

Dockets: A-388-14
A-389-14
A-390-14
A-391-14

Citation: 2015 FCA 214

CORAM: TRUDEL J.A.
WEBB J.A.
RENNIE J.A.

Dockets: A-388-14
A-389-14

BETWEEN:

DEVON CANADA CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dockets: A-390-14
A-391-14

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DEVON CANADA CORPORATION

Respondent

Heard at Ottawa, Ontario, on June 9, 2015.

Judgment delivered at Ottawa, Ontario, on October 8, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: TRUDEL J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] These appeals relate to the restrictions imposed on large corporations in filing appeals to the Tax Court of Canada. Graham J. of the Tax Court of Canada partially allowed the Crown's motions to strike parts of the notices of appeal filed by Devon Canada Corporation (Devon) (2014 TCC 255, Dockets 2013-1066(IT)G and 2013-1327(IT)G). Devon is appealing the order to strike parts of its notices of appeal. The Crown is appealing the decision to not strike the other parts that the Crown was seeking to have struck.

[2] Although the appeals to this Court were not consolidated, they were heard at the same time. These reasons apply to all of the appeals. The original of these reasons shall be filed in A-388-14 and a copy thereof shall be filed in each of the other appeal files.

[3] For the reasons that follow, I would allow the appeals of Devon and dismiss the appeals of the Crown.

Background

[4] Devon is a large corporation within the meaning assigned by subsection 225.1(8) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) (a large corporation). It was formed as a result of a number of amalgamations. Two of the companies that were part of the amalgamations (Anderson Exploration Limited (AXL) and Numac Energy Inc. (Numac)) made

significant payments (Surrender Payments) to their employees as consideration for the surrender of their stock options. In determining their profit (in the case of Numac) or loss (in the case of AXL) for the relevant taxation years for the purposes of section 9 of the Act, these companies deducted the Surrender Payments.

[5] The Minister of National Revenue (the Minister) determined that the Surrender Payments were not deductible by either Numac or AXL in computing their profit or loss because, in the Minister's view, these payments were made on account of capital and therefore, were not deductible as a result of the provisions of paragraph 18(1)(*b*) of the Act. Notices of reassessment to reflect this were issued and Devon filed notices of objection, which for AXL was an objection to the determination of a loss, since AXL still had a loss for the taxation year after the adjustment. The arguments raised in the notices of objection as originally filed only related to whether the Surrender Payments were deductible as a current expense in computing the profit or loss of the two companies for the purposes of section 9 of the Act.

[6] Devon and the Appeals Division of the Canada Revenue Agency (CRA) agreed to hold the notices of objection in abeyance until the final disposition of *Imperial Tobacco Canada Limited v. The Queen*, 2011 FCA 308 (leave to appeal to the Supreme Court of Canada refused on May 24, 2012 ([2012] S.C.C.A. No. 11)) (*Imperial Tobacco*). The issue in *Imperial Tobacco* was described by Sharlow J.A. as follows:

> 1. The issue in this case is whether Imasco Limited ("Imasco"), in computing its income for income tax purposes, is entitled to deduct payments made to its own employees and employees of its subsidiaries for surrendering options to acquire Imasco shares. Imasco made such payments in its 1999 and 2000 taxation years, and claimed deductions for the payments on the basis that they were employee compensation. The Minister, relying on paragraph 18(1)(*b*) of the

> *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), reassessed Imasco to disallow the deductions on the basis that the payments were on account of capital.

[7] This Court, in *Imperial Tobacco*, concluded that Bowie J. of the Tax Court of Canada did not err in concluding that the payments made by Imasco were on account of capital and therefore not deductible in computing its income as a result of the provisions of paragraph 18(1)(*b*) of the Act.

[8] Following the decision of the Supreme Court of Canada on May 24, 2012 to not grant leave to appeal the decision of this Court in *Imperial Tobacco*, Devon submitted a memorandum to the Appeals Division of the CRA in which Devon raised, for the first time, the arguments that, in the alternative, it should be allowed a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act in relation to the Surrender Payments. These paragraphs are set out in the Appendix to these reasons. The amount that would be deductible under either of these paragraphs in the years in question is less than the amount that AXL and Numac had claimed in their tax returns. As well, both of these paragraphs provide a deduction in relation to amounts that would be paid on account of capital. The references herein to the deduction under paragraph 20(1)(*b*) of the Act include the enhanced deduction under this paragraph as set out in subsection 111(5.2) of the Act and are limited to the additional deduction that would be available under paragraph 20(1)(*b*) of the Act if the Surrender Payments qualify as eligible capital expenditures.

[9] In a letter dated December 7, 2012, the CRA addressed the issue of whether, in its view, Devon would be entitled to a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act.

The CRA concluded that Devon would not be entitled to any deduction under either of these paragraphs. By a letter dated January 17, 2013 Devon requested further details from the CRA in relation to the position of the CRA on these two paragraphs. The CRA responded on January 29, 2013 with further explanations for its position.

[10] The Minister issued a notice of confirmation dated February 4, 2013 in which it confirmed the notice of loss determination related to AXL and a notice of confirmation dated March 14, 2013 in which it confirmed the reassessment related to Numac. The notice of confirmation related to the Surrender Payments made by Numac included the following statement:

> The basis of your objection is that
>
> - The taxable income determined for the year should be decreased by the stock option payout disallowed in the amount of $20,884,041 less related resource allowance of 5,221,010 resulting in $15,663,031 net effect to income.
>
> - You subsequently supplement your position in that the stock option payout, net of resource allowance, is an eligible capital expenditure and cumulative eligible capital should be deductible at the time of the acquisition of control pursuant to subsection 111(5.2) and paragraph 20(1)(*b*).

[11] The same statement is included in the notice of confirmation related to the Surrender Payment made by AXL, except that the reference to taxable income is changed to a non-capital loss and the amounts are different to reflect the different amounts for that company.

[12] In its notices of appeal, Devon included the arguments that the Surrender Payments are deductible under section 9 in computing the income of its predecessors and also included the

arguments related to whether its predecessors should be entitled to a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act. The Crown brought a motion to strike the paragraphs of the notices of appeal related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act

Decision of the Tax Court

[13] The Tax Court Judge concluded that the issue that had been raised by Devon in its original notice of objection was the issue of whether the Surrender Payments were deductible in computing the income or loss of Numac and AXL. On that basis the Tax Court Judge concluded that the paragraphs related to whether AXL and Numac were entitled to a deduction under paragraph 20(1)(*e*) of the Act should not be struck from the notices of appeal. However, since the arguments related to cumulative eligible capital relate to a deduction for a pool of expenditures (which may include other eligible capital expenditures) the Tax Court Judge concluded that those paragraphs should be struck from the notices of appeal.

[14] As noted above, each party has submitted appeals to this court.

Standards of review

[15] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada confirmed that the standard of review for appeals from decisions of the lower courts for questions of law is correctness. Findings of fact (including inferences of fact) will stand unless it is established that the Tax Court Judge made a palpable and overriding error. For questions of

mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

Issues

[16] The issues arising as a result of the two appeals are:

(a) Was the issue as set out in the original notice of objection the deductibility of the Surrender Payments such that Devon should be allowed to include the arguments related to either or both paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act in its notices of appeal; and

(b) In the alternative, does the notice of objection, for the purposes of subsection 169(2.1) of the Act, include the supplemental memorandum related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act?

Procedural Requirements of the Act for Objections and Appeals

[17] Since Devon is a large corporation there are restrictions imposed on its right to appeal matters to the Tax Court of Canada. Subsection 169(2.1) of the Act provides as follows:

169(2.1) Notwithstanding subsections 169(1) and 169(2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) served a notice of objection to an assessment under this Part for	**169**(2.1) Malgré les paragraphes (1) et (2), la société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe 225.1(8) et qui signifie un avis d'opposition à une cotisation établie en vertu de la présente partie pour

the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to	l'année ne peut interjeter appel devant la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation qu'à l'égard des questions suivantes :
(*a*) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or	*a*) une question relativement à laquelle elle s'est conformée au paragraphe 165(1.11) dans l'avis, mais seulement à l'égard du redressement, tel qu'il est exposé dans l'avis, qu'elle demande relativement à cette question;
(*b*) an issue described in subsection 165(1.14) where the corporation did not, because of subsection 165(7), serve a notice of objection to the assessment that gave rise to the issue and, in the case of an issue described in paragraph (a), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.	*b*) une question visée au paragraphe 165(1.14), dans le cas où elle n'a pas, à cause du paragraphe 165(7), signifier d'avis d'opposition à la cotisation qui a donné lieu à la question.

[18] A large corporation can only appeal to the Tax Court of Canada with respect to an issue in respect of which it has complied with subsection 165(1.11) of the Act in its notice of objection. This subsection provides as follows:

165(1.11) Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) objects to an assessment under this Part for the year, the notice of objection shall	**165**(1.11) Dans le cas où une société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe 225.1(8), s'oppose à une cotisation établie en vertu de la présente partie pour l'année, l'avis d'opposition doit, à la fois :
(*a*) reasonably describe each issue to be decided;	*a*) donner une description suffisante de chaque question à trancher ;
(*b*) specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection	*b*) préciser, pour chaque question, le redressement demandé, sous la forme du montant qui représente la modification d'un solde, au sens du

152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation; and	paragraphe 152(4.4), ou d'un solde de dépenses ou autres montants non déduits applicable à la société ;
(*c*) provide facts and reasons relied on by the corporation in respect of each issue.	*c*) fournir, pour chaque question, les motifs et les faits sur lesquels se fonde la société.

Analysis

[19] In *The Queen v. Potash Corporation of Saskatchewan Inc.*, 2003 FCA 471, the general purpose of subsections 165(1.11) and 169(2.1) of the Act (which were defined as the Large Corporation Rules) was described as follows:

> 4 The Large Corporation Rules were enacted in 1995 to discourage large corporations from engaging in a full reconstruction of their income tax returns for a particular year, after the objection or appeal process had started, based on developing interpretations and the outcome of court decisions in litigation involving other taxpayers...
>
> Simply put, Parliament wants the Minister of National Revenue (the Minister) to be able to assess at the earliest possible date both the nature and quantum of pending tax litigation and its potential fiscal impact.

[20] As noted in *Bakorp Management Limited v. The Queen,* 2014 FCA 104, [2014] F.C.J. No. 411 (*Bakorp*), a large corporation must reasonably describe the issue in its notice of objection:

> **28.** A general statement or question related to an amount that is to be determined for the purposes of the Act that would not allow the Minister to determine what is actually in dispute will not be a sufficient description of the issue. The examples cited as inadequate descriptions of an issue are a description of the issue as the computation of resource allowance or resource profits. In a similar vein, Justice Jorré of the Tax Court of Canada in *Canadian Imperial Bank of Commerce v. The Queen*, 2013 TCC 170 in dealing with the corresponding provisions in the *Excise Tax Act*, R.S.C. 1985, c. E-15, stated that a general

> description of the issue as the correct amount of tax owing would not be sufficient.
>
> **29.** Paragraph 165(1.11)(*b*) of the Act provides that, in relation to each issue, the relief sought must be specified as a change in the balance of the items listed. This means that the issue must be reasonably described in a manner that would result in such quantification as a specified amount. For example, describing an issue as the computation of resource profits would not be sufficient as it would not be possible to ascertain from this description the specific change in any balance that is being requested. If however, the particular element of the computation that is in dispute is reasonably described, then the effect that the resolution of the dispute would have on the income of the corporation is capable of being quantified.

[21] The purpose of the Large Corporation Rules is to allow the Crown to know at the objection stage the nature and quantum of tax litigation. In this case the nature of the tax litigation related to a particular deduction that was claimed by the predecessors of Devon. The Act is a statutory scheme. In order to claim a deduction in computing income or taxable income there must be a provision of the Act which would allow for such deduction. Therefore, it would seem to me that the nature of the litigation in this context would relate to the particular deduction that the taxpayer is seeking to claim. It is clear from the original notice of objection that was filed that Devon was seeking to claim a deduction under section 9 in computing the income or loss of its predecessors.

[22] Subsections 9(1) and 9(2) of the Act provide as follows:

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.	**9.** (1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.
(2) Subject to section 31, a taxpayer's loss for a taxation year from a	(2) Sous réserve de l'article 31, la perte subie par un contribuable au

business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.	cours d'une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte subie au cours de l'année relativement à cette entreprise ou à ce bien, calculée par l'application, avec les adaptations nécessaires, des dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

[23] Subsection 9(2) of the Act provides that the amount of a loss from a business is to be determined by applying the same provisions that would be applicable in determining income, with any necessary modifications. Therefore, for both Numac and AXL, the starting point for determining their income or loss under the Act would be subsection 9(1) of the Act.

[24] Since subsection 9(1) is subject to the provisions of Part I of the Act, the argument that the Surrender Payments were deductible under section 9 is an argument that the Surrender Payments would be deductible in determining the profit or loss of the predecessor corporations and that such deduction would not be denied by any provision of Part I. Therefore, this argument would include arguments that such deduction would not be prohibited by the general limitations contained in paragraphs 18(1)(*a*) and 18(1)(*b*) of the Act. Specifically, the position of Devon in its original notice of objection was that the Surrender Payments were not on account of capital and therefore the deduction of such payments would not have been denied as a result of the provisions of paragraph 18(1)(*b*) of the Act.

[25] Devon could have included alternative arguments in its notice of objection that would be inconsistent with its original position. Devon could have included arguments based on the

assumption that the Surrender Payments were on account of capital and that AXL and Numac would have been entitled to deductions under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act. However, having failed to do so, in my view, the issue raised by Devon in its original notice of objection that the Surrender Payments were deductible under section 9 of the Act (and therefore not on account of capital) cannot be considered to include the alternative and inconsistent arguments related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act. When Devon was seeking, on behalf of AXL and Numac, to claim a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act it was raising new issues. Each of these paragraphs applies to amounts that would be on account of capital and contain conditions that must be satisfied in order for these provisions to be applicable. Therefore, the nature of the claims is different because the new deductions claimed are based on a different premise (payments on account of capital versus a current expense) and on different statutory provisions each with its own set of conditions.

[26] In my view, the issue that Devon had raised in its original notice of objection was whether the Surrender Payments were deductible by Numac and AXL in determining their profit or loss for the purposes of section 9 of the Act and, accordingly, whether there was any provision of Part I of the Act that would deny such a deduction. As a result, I do not accept that the issue in the original notice of objection was the "deductibility of the Surrender Payments" such that it would include the later arguments related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act. If applicable, these paragraphs would not allow a deduction in computing profit or loss for the purposes of section 9 but rather a deduction in computing income or loss for the purposes of the Act.

[27] Devon, in this Court, focused on its argument that the Minister had accepted the additional submissions on paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act and that it should, therefore, be allowed to appeal to the Tax Court of Canada in relation to its argument that the predecessor corporations should be allowed a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act. The Crown argued that, for the purposes of subsection 169(2.1) of the Act, only the issues raised in the original notice of objection could be considered to be issues "in respect of which the corporation has complied with subsection 165(1.11) in the notice". In the Crown's view, even if Devon would have submitted the additional memorandum related to paragraph 20(1)(*b*) or 20(1)(*e*) of the Act the day after it served the notice of objection, whether a deduction would be permitted under either of these paragraphs would not be an issue in respect of which Devon had complied with subsection 165(1.11) in its notice of objection.

[28] Subsection 169(2.1) of the Act limits the issue on an appeal to the Tax Court of Canada to those issues in respect of which the large corporation has complied with subsection 165(1.11) in its notice of objection. The question in this case is whether the notice of objection, for the purposes of subsection 169(2.1) of the Act, is only the original notice of objection served by Devon or whether the supplementary memorandum related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act should be considered to be part of the notice of objection that was served.

[29] The Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54 stated that:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and

> ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[30] The interpretation of the reference to "notice of objection" in subsection 169(2.1) of the Act that would be harmonious with the Act, is that this "notice of objection" would include any amendments or additional submissions that are accepted by the Minister. As noted above, the Large Corporation Rules were introduced to allow the Crown to know at the objection stage the nature and quantum of tax litigation. The Minister can end the objection stage at any time by issuing a notice of confirmation or notice of reassessment.

[31] As the Tax Court Judge noted, there is no provision in the Act that specifically allows a large corporation to amend its notice of objection. However, if the Minister allows a large corporation to raise additional issues before the objection stage is completed, it is difficult to accept that the Minister would be prejudiced if the large corporation is allowed to continue to pursue those issues before the Tax Court of Canada. In this case the CRA, acting on behalf of the Minister, responded to Devon in relation to the merits of its submissions with respect to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act and the Minister, in the notices of confirmation, stated that the basis of the objection included the argument that the predecessors of Devon should be entitled to a deduction under paragraph 20(1)(*b*) of the Act. Therefore, the Minister

explicitly accepted that the issue related to paragraph 20(1)(*b*) of the Act was part of the objection.

[32] Although there is no reference to paragraph 20(1)(*e*) of the Act in the notices of confirmation, the arguments raised by Devon in relation to paragraph 20(1)(*e*) of the Act were included in the same memorandum in which it raised the arguments with respect to paragraph 20(1)(*b*) of the Act. Therefore, if paragraph 20(1)(*b*) of the Act was part of objection then so also was paragraph 20(1)(*e*) of the Act.

[33] Since the Minister, while this matter was still at the objection stage, accepted the additional submissions and treated these as part of the objection, these submissions should be considered to be part of the notice of objection for the purposes of subsection 169(2.1) of the Act. Devon should be allowed to appeal to the Tax Court of Canada in relation to these issues. As well, since the Minister accepted these submissions, it is a moot point whether the Minister could have refused to accept them on the basis that they were made well after the time permitted for filing a notice of objection or for seeking an extension of time to file a notice of objection, had expired.

[34] As a result, I would:

(a) allow the appeal of Devon in A-388-14, with costs, and I would set aside the Order of the Tax Court of Canada dated August 29, 2014 (Court File No. 2013-1327(IT)G) and I would dismiss the motion of the Crown to strike parts of the notice of appeal of Devon, with costs in the Tax Court of Canada;

(b) allow the appeal of Devon in A-389-14, without costs, and I would set aside the Order of the Tax Court of Canada dated August 29, 2014 (Court File No. 2013-1066(IT)G) and I would dismiss the motion of the Crown to strike parts of the notice of appeal of Devon, without costs in the Tax Court of Canada; and

(c) and dismiss the appeals of the Crown in A-390-14 and A-391-14, without costs.

"Wyman W. Webb"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Donald J. Rennie J.A."

Appendix

A-388-14

Section 20, subsection (1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) reads as follows:

20. (1) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	**20**. (1) Malgré les alinéas 18(1)*a*), *b*) et *h*), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
…	[…]
(*b*) such amount as the taxpayer claims in respect of a business, not exceeding 7% of the taxpayer's cumulative eligible capital in respect of the business at the end of the year except that, where the year is less than 12 months, the amount allowed as a deduction under this paragraph shall not exceed that proportion of the maximum amount otherwise allowable that the number of days in the taxation year is of 365;	*b*) la somme qu'un contribuable déduit au titre d'une entreprise, ne dépassant pas 7 % du montant cumulatif des immobilisations admissibles relatives à l'entreprise à la fin de l'année; toutefois, lorsque l'année compte moins de douze mois, la somme déductible en application du présent alinéa ne peut dépasser la proportion de la somme maximale déductible par ailleurs que représente le nombre de jours de l'année d'imposition par rapport à 365;
…	[…]
(*e*) such part of an amount (other than an excluded amount) that is not otherwise deductible in computing the income of the taxpayer and that is an expense incurred in the year or a preceding taxation year	*e*) la partie d'un montant (sauf un montant exclu) qui n'est pas déductible par ailleurs dans le calcul du revenu du contribuable et qui est une dépense engagée au cours de l'année ou d'une année d'imposition antérieure :
(i) in the course of an issuance or sale	(i) soit dans le cadre d'une émission

of units of the taxpayer where the taxpayer is a unit trust, of interests in a partnership or syndicate by the partnership or syndicate, as the case may be, or of shares of the capital stock of the taxpayer,

ou vente d'unités du contribuable, si celui-ci est une fiducie d'investissement à participation unitaire, ou de participations dans une société de personnes ou un syndicat par cette société de personnes ou ce syndicat, ou encore d'actions du capital-actions du contribuable,

(ii) in the course of a borrowing of money used by the taxpayer for the purpose of earning income from a business or property (other than money used by the taxpayer for the purpose of acquiring property the income from which would be exempt),

(ii) soit dans le cadre d'un emprunt d'argent que le contribuable utilise en vue de tirer un revenu d'une entreprise ou d'un bien, sauf s'il s'agit d'argent utilisé par le contribuable en vue d'acquérir un bien dont le revenu serait exonéré,

(ii.1) in the course of incurring indebtedness that is an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt or property that is an interest in a life insurance policy), or

(ii.1) soit dans le cadre de la constitution d'une dette qui représente un montant payable pour un bien acquis en vue de tirer un revenu d'une entreprise ou d'un bien (sauf un bien dont le revenu serait exonéré ou un bien qui est un intérêt dans une police d'assurance-vie),

(ii.2) in the course of a rescheduling or restructuring of a debt obligation of the taxpayer or an assumption of a debt obligation by the taxpayer, where the debt obligation is
(A) in respect of a borrowing described in subparagraph 20(1)(e)(ii), or (B) in respect of an amount payable described in subparagraph 20(1)(e)(ii.1),and in the case of a rescheduling or restructuring, the rescheduling or restructuring, as the case may be, provides for the modification of the terms or conditions of the debt obligation or the conversion or substitution of the debt obligation to or with a share or another debt obligation,(including a commission, fee, or other amount paid

(ii.2) soit dans le cadre de la révision du calendrier des paiements sur une créance du contribuable, de la restructuration de la créance ou de sa prise en charge par le contribuable, à condition que la créance se rapporte à un emprunt visé au sous-alinéa (ii) ou à un montant payable visé au sous-alinéa (ii.1) et que, s'il s'agit de la révision du calendrier des paiements ou de la restructuration de la créance, la révision ou la restructuration prévoie la modification des conditions de la créance, sa conversion en une action ou en une autre créance ou son remplacement par une action ou par une autre créance, (y compris les commissions, honoraires et autres montants payés ou payables au titre de

or payable for or on account of services rendered by a person as a salesperson, agent or dealer in securities in the course of the issuance, sale or borrowing) that is the lesser of

services rendus par une personne en tant que vendeur, mandataire ou courtier en valeurs dans le cadre de l'émission, de la vente ou de l'emprunt) égale au moins élevé des montants suivants :

(iii) that proportion of 20% of the expense that the number of days in the year is of 365 and

(iii) le produit de 20 % de la dépense et du rapport entre le nombre de jours de l'année et 365,

(iv) the amount, if any, by which the expense exceeds the total of all amounts deductible by the taxpayer in respect of the expense in computing the taxpayer's income for a preceding taxation year, and for the purposes of this paragraph,

(iv) l'excédent éventuel de la dépense sur le total des montants déductibles par le contribuable au titre de la dépense dans le calcul de son revenu pour les années d'imposition antérieures; toutefois :

(iv.1) "excluded amount" means

(iv.1) « montant exclu » s'entend des montants suivants :

(A) an amount paid or payable as or on account of the principal amount of a debt obligation or interest in respect of a debt obligation,

(A) un montant payé ou payable au titre du principal d'une créance ou des intérêts afférents à une créance,

(B) an amount that is contingent or dependent on the use of, or production from, property, or

(B) un montant qui est conditionnel à l'utilisation de biens ou qui dépend de la production en provenant,

(C) an amount that is computed by reference to revenue, profit, cash flow, commodity price or any other similar criterion or by reference to dividends paid or payable to shareholders of any class of shares of the capital stock of a corporation,

(C) un montant calculé en fonction des recettes, des bénéfices, du flux de trésorerie, du prix des marchandises ou d'un critère semblable ou en fonction des dividendes versés ou payables aux actionnaires d'une catégorie d'actions du capital-actions d'une société,

(v) where in a taxation year all debt obligations in respect of a borrowing described in subparagraph 20(1)(e)(ii) or in respect of indebtedness described in subparagraph 20(1)(e)(ii.1) are

(v) dans le cas où toutes les obligations découlant d'un emprunt visé au sous-alinéa (ii) ou d'une dette visée au sous-alinéa (ii.1) sont réglées ou éteintes au cours d'une année

settled or extinguished (otherwise than in a transaction made as part of a series of borrowings or other transactions and repayments), by the taxpayer for consideration that does not include any unit, interest, share or debt obligation of the taxpayer or any person with whom the taxpayer does not deal at arm's length or any partnership or trust of which the taxpayer or any person with whom the taxpayer does not deal at arm's length is a member or beneficiary, this paragraph shall be read without reference to the words "the lesser of" and to subparagraph 20(1)(e)(iii), and

d'imposition — autrement que dans le cadre d'une opération faisant partie d'une série d'emprunts ou d'autres opérations et remboursements — par le contribuable pour une contrepartie qui ne comprend pas d'unités, de participations, d'actions ou de créances du contribuable ou d'une personne ayant un lien de dépendance avec celui-ci ou d'une société de personnes ou fiducie dont le contribuable ou une telle personne est un associé ou un bénéficiaire, la partie de la dépense visée au présent alinéa est égale à l'excédent éventuel de la dépense sur le total des montants déductibles par le contribuable au titre de la dépense dans le calcul de son revenu pour les années d'imposition antérieures,

(vi) where a partnership has ceased to exist at any particular time in a fiscal period of the partnership,

(vi) dans le cas où une société de personnes cesse d'exister à un moment quelconque d'un de ses exercices :

(A) no amount may be deducted by the partnership under this paragraph in computing its income for the period, and

(A) aucun montant n'est déductible par la société de personnes en application du présent alinéa dans le calcul de son revenu pour l'exercice,

(B) there may be deducted for a taxation year ending at or after that time by any person or partnership that was a member of the partnership immediately before that time, that proportion of the amount that would, but for this subparagraph, have been deductible under this paragraph by the partnership in the fiscal period ending in the year had it continued to exist and had the partnership interest not been redeemed, acquired or cancelled, that the fair market value of the member's interest in the partnership immediately before that time is of the fair market value of all the interests in the partnership immediately before

(B) la personne ou société de personnes qui était un associé de la société de personnes immédiatement avant ce moment peut déduire, pour une année d'imposition se terminant à ce moment ou après, le produit de la multiplication du montant qui serait déductible par la société de personnes au cours de l'exercice se terminant dans l'année en application du présent alinéa si elle n'avait pas cessé d'exister et si la participation dans la société de personnes n'avait pas été rachetée, acquise ou annulée par le rapport entre la juste valeur marchande de la participation de cet associé dans la société de personnes

that time;	immédiatement avant ce moment et la juste valeur marchande de toutes les participations dans la société de personnes immédiatement avant ce moment;

Paragraph 20(1)(*b*) was amended to read as outlined above for taxation years that commence after December 21, 2000. For both AXL and Numac, the reassessments in question were for taxation years ending in 2001 as a result of an acquisition of control. It is not clear when those taxation years began. However, the change in wording in paragraph 20(1)(*b*) of the Act is not material for the purposes of this appeal.

The related definitions of cumulative eligible capital and eligible capital expenditures have not been included because these definitions are lengthy and are not necessary for the disposition of this appeal.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-388-14 A-389-14
STYLE OF CAUSE:	DEVON CANADA CORPORATION v. HER MAJESTY THE QUEEN
AND DOCKETS:	A-390-14 A-391-14
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. DEVON CANADA CORPORATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 9, 2015
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	TRUDEL J.A. RENNIE J.A.
DATED:	OCTOBER 8, 2015

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